1966 *Present :* **H. N. G. Fernando, C.J., T. S. Fernando, J., and Sri Skanda Rajah, J.**

D. M. WIMALASARA BANDA, Appellant, *and* M. M. S. B. YALEGAMA, Respondent

Election Petition Appeal No. 10 of 1966—Electoral District No. 36 (Rattota)

Election petition—Meaning of term "agent"—Corrupt practice—False statements made at an election meeting regarding a candidate—Police reports in proof of such statements—Admissibility in evidence—Evidence Ordinance, ss. 35, 145, 155 (c), *159, 160—"Public book, register or record"—Police Ordinance (Cap. 53), s. 56—Ceylon (Parliamentary Elections) Order in Council, 1946, ss. 58 (1) (d), 77* (c).

(i) The Chairman who presides at an election meeting as agent or with the knowledge and consent of a candidate has implied authority to supervise and control the meeting and to permit speeches to be made at his discretion. The candidate can, therefore, be held responsible for a false statement made by any speaker at the meeting concerning the personal character or conduct of an opposing candidate. In such a case, the speaker in question is also an "agent" within the meaning of the term in Election Law.

Samaranayake v. Kariawasan (69 N. L. R. 1) followed.

(ii) One ground on which the petitioner-appellant sought to have the election of the respondent as a Member of Parliament declared void was that an agent of the respondent had committed the corrupt practice of making a false statement of fact concerning the personal character or conduct of an opposing candidate. The statement in question was alleged to have been made by the agent at an election meeting held on 9th March 1965. The only evidence as to the fact that this statement was made at the meeting consisted of a report P 56 which was produced at the trial by an Inspector of the C. I. D., Colombo, who had received it at his office on 3rd April 1965. A Police Sergeant testified that he sent that report and that it was compiled from notes taken down by him of a speech made by a person at the election meeting. He had made the notes at the meeting in an exercise book and afterwards dictated a report to his brother (not a Police Officer) : P 56 was the original or a carbon copy of what the brother had written at dictation. The exercise book in which the witness claimed to have entered his original notes was not produced at the trial. In regard to other Police reports produced at the trial, the evidence was that the original notes made at meetings by Police Officers had been destroyed after reports compiled from them had been completed.

Held, by H. N. G. FERNANDO, C.J., and T. S. FERNANDO, J. (SRI SKANDA RAJAH, J. dissenting), that the police officer's report P56 was not admissible under section 35 of the Evidence Ordinance in proof of any statement mentioned in the report. P56 was not an official book, register or record contemplated in section 35 of the Evidence Ordinance. "Record" in that section must be given a generic meaning as "book" and "register", and a report like P56, or even the original notes, did not bear such a character.

Illangaratne v. de Silva (49 N. L. R. 169) overruled.

Don Phillip v. Illangaratne (51 N. L. R. 561) considered.

Held further, that evidence of the matters stated in P56 was not duly given under section 159 or section 160 of the Evidence Ordinance. If section 159 or section 160 is intended to be utilized in a case, both Judge and witness must be made aware that evidence is being given as permitted by one or other of these sections.

ELECTION Petition Appeal No. 10 of 1966—Electoral District No. 36 (Rattota).

Nimal Senanayake, with *U. A. S. Perera* and *N. S. A. Goonetilleke*, for Petitioner-Appellant.

Colvin R. de Silva, with *Malcolm Perera*, *K. Shanmugalingam*, *Prins Gunasekera*, and *Jayatissa Herath*, for Respondent-Respondent.

Cur. adv. vult.

December 20, 1966. H. N. G. FERNANDO, C.J.—

This was an appeal against the determination of an Election Judge holding that the Respondent was duly elected at the March 1965 General Election as Member of Parliament for Electoral District No. 36, Rattota. The grounds of evidence relied on at the trial of the Election Petition were that the Agents of the Respondent or persons acting with his knowledge and consent had committed the corrupt practice of making or publishing false statements of fact concerning the personal character or conduct of Chandrasena Munaweera who had been one of the other two candidates at the Rattota election.

Evidence was led at the trial in regard to—

(*a*) one instance where a false statement was alleged to have been made in a pamphlet marked P54;

(*b*) five instances of false statements alleged to have been made in speeches delivered at meetings held in support of the candidature of the Respondent;

(*c*) several instances of false statements alleged to have been made by one person at different places in the electorate from a motor car carrying a loudspeaker.

I will deal first with the case of the pamphlet P54. The learned Judge has held that two statements concerning Mr. Munaweera which were made in this pamphlet were not statements which referred to the personal conduct or character of Mr. Munaweera. The finding of the learned Judge was strongly challenged in appeal, on the ground particularly that one of the statements contained in the pamphlet was clearly and beyond

doubt an allegation that Mr. Munaweera, who had been a Member of Parliament in December 1964, had at the time " crossed over " and voted against the Government in Parliament, having accepted a bribe for doing so. It was argued I think with much justification that the finding with respect to this statement was perverse and ought to be set aside. For reasons which will presently appear, however, it is not now necessary to consider the validity of this argument.

We understand that although the trial of this petition occupied 13 days and concluded on 8th June 1966, the learned trial Judge reserved his judgment for 11th June, and on that day dictated his judgment from the Bench. This course which the Judge followed perhaps accounts for the fact that in relation to nearly every one of the eight charges which he had to consider, the judgment contains no findings of fact except the particular finding relied on by the learned Judge for holding that the charge had not been established. For instance in the case of the pamphlet P54 there is only a finding that the statements made in the pamphlets did not affect the personal character or conduct of Mr. Munaweera : there is no finding that the statements were false, nor a finding that they were made by an agent of the Respondent. In regard to some of the other charges also the sole finding relates to the " innocence " of the statements, and there are no findings on other relevant points. In regard to one charge there is a finding that an alleged statement was made by a person not proved to be an agent of the Respondent, but no finding as to whether the statement was false or affected the personal character or conduct of Mr. Munaweera. In the result, if the appellant had satisfied us that a particular finding must be set aside, we would have been left without the benefit of other findings of fact necessary to enable us properly to dispose of this appeal.

As I have stated above, we have no finding of the trial Judge on the question whether P54 was published by an agent of the Respondent. According to the evidence it was published by one Mulan Dunuweera. The witness De Mel testified that P54 was brought to his house by Dunuweera who came in a party of people. As to the time when P54 was handed to De Mel, he testified " I believe it is about mid January 1965 three or four days after the nomination because I remember the date of the nomination as the 11th of January ". An important point in De Mel's testimony was that Dunuweera had on that occasion canvassed De Mel's vote for the Respondent. There was also evidence referred to in the judgment that Mulan Dunuweera had made a speech in support of the candidature of the respondent at a meeting held on 30th January 1965, and evidence that Mulan Dunuweera had caused to be printed another document P51, which although it mentioned no names, referred to the same matter as P54, viz. the betrayal of the Government on an occasion of a vote in Parliament. Had these been the only matters relevant to the question whether Mulan Dunuweera was an agent of the Respondent at the time when he is alleged to have delivered to De Mel the pamphlet P54, the conclusion that he was an agent may have been an obvious one.

On the other hand, there were several matters in evidence which are relevant to this question, but which unfortunately received no consideration in the judgment. Mr. T. B. Illangaratne, who had been a senior member of the Cabinet in the Government which was defeated in Parliament in December 1964, was a witness at this trial. He testified that he had been a member of the nomination board which selected candidates to represent the Sri Lanka Freedom Party at the General Election of 1965, and that Mulan Dunuweera had applied for nomination for the Rattota seat. He said also that some time after the Respondent had been selected as the party candidate and after the date of nomination, the Respondent had told him that a number of persons who had unsuccessfully made application for nomination were not giving support to the Respondent, and that one such person was Mulan Dunuweera. According to Mr. Illangaratne, he himself spoke to Dunuweera about this matter shortly after 21st January 1965 ; Dunuweera at first told him that he could not support the Respondent's candidature, but later agreed to do so on Mr. Illangaratne's advice. There is also the evidence of the Respondent himself that it was only late in January that Dunuweera agreed to support him, and that Dunuweera did actively support him from about the end of January 1965. The evidence to which I here refer was not challenged in cross-examination.

The pamphlet P54 was printed on 14th December 1964, nearly a full month before Nomination Day, and several weeks before the Respondent had even applied for the Party nomination, and it is perfectly clear that in having it printed Dunuweera had no intention of using the pamphlet to further the Respondent's candidature. On the contrary, the pamphlet P 51, also printed early in December, shows that Dunuweera at that stage was motivated partly by bitter personal acrimony towards Mr. Munaweera, and partly by his intention to contest and defeat the latter in the forthcoming General Election. P51 was clearly a challenge to such a contest. At the time when these pamphlets were printed, the Respondent was in Government service and it was not known that he had then any intention of standing for Parliament.

If the learned Judge had addressed his mind to the question whether Dunuweera acted as the Respondent's agent when he handed P54 to De Mel a few days after 11th January 1965, he would have found considerable evidence indicating that Dunuweera had not so acted. There was nothing incredible in Mr. Illangaratne's evidence which in substance disclosed that Dunuweera, who had long been a Party stalwart but had nevertheless been refused the Party nomination, had been unwilling to support the Respondent who was a complete new-comer in the Party. The dates when P51 and P54 were printed, and the content of P51, show that Dunuweera's motive was purely personal. The fact that only one publication (to De Mel) of P54 was proved also tends to negative the allegation that Dunuweera was in mid-January seriously supporting the respondent's candidature. Had these matters received consideration by the Election Judge, he would have found in them confirmation of the Respondent's evidence that Dunuweera had not been his agent prior to the

end of January, and little or nothing to controvert that evidence. The judgment indicates that the trial Judge acted on what I consider is the correct principle, namely, that a Member chosen by the vote of the people must not be unseated upon an election petition unless a statutory ground of avoidance is established by proof of the same standard as is required in a criminal case. For me now to hold that proof of Dunuweera's agency was not established by the evidence is not to reverse an express finding of the trial Judge. But even if there had been such a finding, I would have been compelled to hold in appeal that the evidence fell far short of establishing agency beyond reasonable doubt. Thus, although for reasons different from those relied on by the trial Judge, I affirm his finding that the charge based on P54 was not proved.

I pass now to consider a different charge. There was evidence that at a meeting held on 9th March 1965 at Udatenne in support of the Respondent, some person had in the course of a speech made an allegation that Mr. Munaweera had taken a bribe of Rs. 75,000 and acted treacherously against the former Prime Minister. According to the judgment, the Respondent did not at the trial contest the fact that this was a false statement relating to the personal character or conduct of Mr. Munaweera, but the defence taken up was that the person who made the speech did so neither as agent nor with the knowledge or consent of the Respondent. The learned trial Judge accepted the position that the speaker had not been expressly appointed an agent of the Respondent, and held that there was not sufficient evidence from which to conclude that the speaker made the statement with the knowledge and/or consent of the Respondent. The Judge held that although the Chairman of the meeting was an agent of the Respondent, the Chairman had no authority to add to or delete from a list of speakers previously chosen by the Respondent, and that in permitting this particular speaker to make a speech the Chairman exceeded his authority. His finding was that the speaker was not an agent of the Respondent. For reasons which have been stated in the judgment in appeal in the *Bentara-Elpitiya case*[1], the learned Judge in the present case has misdirected himself on the law in reaching that finding. There was no evidence that the Chairman had been prohibited by the Respondent from permitting speeches to be made by persons other than those previously chosen by the Respondent; on the contrary, the evidence establishes that this particular meeting could not have commenced at the scheduled time unless persons not previously selected had been permitted to speak. Indeed out of several persons so previously selected only two or three ultimately turned up at the meeting. When the Chairman presided as agent or with the knowledge and consent of the Respondent, he had implied authority to supervise and control the meeting and to permit speeches to be made at his discretion. I hold therefore that the speaker in question was an " agent " within the meaning of the term in Election Law. Save for other reasons which will be presently discussed, the election of the Respondent should have been declared void in consequence of the making of false statements by a speaker at this meeting.

[1] *Samaranayake v. Kariawasan (1966) 69 N. L. R. I.*

The only evidence as to the fact that this statement was made at the Udatenne meeting consisted of a report P56 which was produced at the trial, and I must refer to the circumstances pertaining to this report. One Siribaddana, an Inspector of the C. I. D., Colombo, produced at the trial a document in Sinhala which was marked P56, which had apparently been received at the C. I. D. office on 3rd April 1965. Subsequently this document was shown to one Sergeant Ratnayake of the Matale Station. When asked in examination in chief " Is that a report made by you ? ", his answer was " I recorded this at the meeting and got them written up and checked them up ". Subsequently, however, Ratnayake admitted that P56 had not been in fact recorded at the meeting. His later position was that he had made notes at the meeting in an exercise book, and afterwards dictated a report to his brother (not a Police Officer) and that P56 was the original or a carbon copy of what the brother had written at dictation. I must note here that although P56 bears a stamp evidencing its receipt at the C. I. D. office in April 1965, this document bears neither the signature of Ratnayake nor any indication as to the date on which it was written. According to Ratnayake the original notes which he made at several meetings were written into an exercise book during the meetings, and his evidence on this point is interesting (the under-lining is mine) :—

" Q. You have with you all the notes of the meetings that you covered ?

A. Yes, I have.

Q. You have written down all these in an exercise book ?

A. Yes.

(*To Court :* Q. Have you got that exercise book ?

A. I cannot say whether it is there.

Q. You would keep it ?

A. After the Election the book was kept in the office. I do not know whether it is still there.

Q. Did you keep it in the office ?

A. Yes.

Q. After you kept it in the office you have up to today not seen it ?

A. I have no recollection of having seen it. "

The exercise book in which the witness claimed to have entered his original notes was not produced at the trial. In regard to other Police reports produced at this trial, the evidence was that original notes made at meetings by Police Officers had been destroyed after reports compiled from them had been completed.

His Lordship Chief Justice Sansoni in the *Dedigama* Petition refused to allow the production of similar Police reports on the ground that the original notes from which the reports were claimed to have been compiled had been destroyed or were not made available to Court. I am in entire agreement with the principles underlying this ruling. The best evidence of what a Police Officer notes at a meeting will be the notes themselves, and if the notes have been destroyed or deliberately suppressed, it is unsafe (to say the least) to admit in evidence a report alleged to have been compiled from the notes. In the case of the document P56 unusual suspicion must attach to it, because it bears no date or signature and it is actually in the handwriting of a civilian, and more particularly because, for reasons unexplained in the trial, it reached the C. I. D. office nearly a fortnight after the date of the General Election, and long after the meeting in question.

Several of these Police reports were produced at the trial, and it is perfectly clear from the judgment that the learned trial judge acted on these reports as being themselves evidence of the fact that statements attributed in the reports to speakers at Election meetings had actually been made by those speakers. Section 35 of the Evidence Ordinance reads as follows :—

> " An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty especially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

Now any entry referred to in Section 35 is itself a relevant fact. Thus a birth registration entry, for example, is itself evidence of the facts stated in the entry, that is to say that X was born on a particular day, that his mother was Y and his father was Z. Those facts are thus established by proof of the entry itself without the need for any oral testimony in proof of the facts.

Learned Counsel who appeared for the Appellant in this case has properly conceded that reports like P56 do not come within the scope of Section 35. It is clear that P56 is not an official book, register or record contemplated in the Section. A public " book " or " register " is something regularly maintained, with the object that entries be made therein in the course of official business ; s. 35 refers to such books or registers being " kept ", the verb " to keep " in this context having the meaning that the book or register is maintained for the making of particular entries as a matter of regular routine. " Record " in that section must be given a generic meaning as " book " and " register ", and a report like P56, or even the original Police note, certainly does not bear such a character. Section 35 occurs in the group of sections 34–37, the others in the group dealing with books of account regularly kept, maps and charts, statements in Acts, notifications and Gazettes, and statements in official legal publications. It is because the authenticity of entries or statements in such documents would ordinarily be beyond

question that the Evidence Ordinance renders the entries or statements relevant evidence of the facts therein stated—One cannot for a moment concede that the same authenticity attaches to reports like P56.

I have no doubt therefore that the report was not admissible under Section 35 in proof of any statement mentioned in the report.

Counsel for the appellant argued that evidence of the matters stated in P56 was duly given under Section 160 of the Evidence Ordinance. Section 159 permits a witness to refresh his memory as to a transaction by reference to a document made at the time of the transaction or soon thereafter. Section 160 permits a witness to testify to facts mentioned in such a document even if he has no specific recollection of the facts themselves.

The record of the evidence of Sgt. Ratnayake does not show that either the trial Judge or counsel intended that P56 was to be used or admitted under s. 159 or s. 160. Ratnayake was not asked whether he could remember what had been said at the meeting, whether before or after perusing P56. If a writing is used only to refresh memory, then the matters which require consideration by the Judge are the credibility of the witness's testimony and the reliability of his memory. If the writing does not serve to refresh memory, then the matter for consideration is the honesty of the person making the record and the reliability both of his sense of hearing and of his capacity to make an accurate record. Despite decisions in India to the contrary, I much prefer the view that, if s. 159 or s. 160 is intended to be utilized, both Judge and witness must be made aware that evidence is being given as permitted by one or other of those sections.

In *Illangaratne v. de Silva* [1] Windham J. held that a police officer's report, purporting to have been made in circumstances substantially similar to those affecting the reports in the instant case, was admissible under s. 35 of the Evidence Ordinance as being an " official record ". A decision of a Bench of 3 Judges in *King v. Silva* [2] was there relied on as a case in which " the exact point is covered ".

In the latter case, which involved a charge of murder, one Mohammadu had been taken before a Superintendent of Police and made to him a statement which was recorded by the Superintendent. At the trial, Mohammadu gave evidence inconsistent with his former statement. Thereupon the Superintendent was called and, having produced the statement, he explained that the statement had been freely made by Mohammadu, who had placed his mark to it after it had been read and explained to him. The accused in the case was convicted of grievous hurt, and the witness Mohammadu was dealt with for having given false evidence at the trial. A Bench of 3 Judges held that the statement was properly used in evidence—

(*a*) under s. 145 of the Evidence Ordinance, to cross-examine Mohammadu as to a previous statement made by him in writing or reduced to writing ; and

[1] *(1948) 49 N. L. R. 169.* [2] *(1928) 30 N. L. R. 193.*

(*b*) under s. 155 (*c*) of the Evidence Ordinance, to impeach the credit of the witness Mohammadu, by proof of a former statement inconsistent with his evidence.

There is literally not a word in the judgment in *King v. Silva* which refers to s. 35 of the Evidence Ordinance, or to the character of the " entries " declared by that section to be relevant evidence of any fact. The statement there proved was the previous statement of a *witness*, and it was proved only for the strictly limited purposes specified in s. 145 and s. 155. The production of the statement as reduced to writing was necessary under the best evidence rule, and was not in any way related to s. 35. I must say, with the utmost respect, that Windham J. completely misunderstood the judgment if he thought it to be authority for the admission, in proof of the fact that a person made a certain statement at a meeting, of a police officer's report of matters said to have been uttered at the meeting. Such a report is certainly not a " statement made by such person or reduced into writing " (s. 145) ; that section relates only to statements written by the witness himself, or statements made by him and accepted by him at the time to be correctly reduced to writing. Nor was there any witness, in the case heard by Windham J., " whose credit was impeached by proof of former statements inconsistent with his evidence " (s. 155). Nor did Windham J. examine in any way the purpose and scope of s. 35 in deciding that the police report was admissible. For these reasons, I emphatically decline to follow the decision in *Ilangaratne v. de Silva*, and I trust that the judgments in this and other appeals will finally overrule that decision. I must disapprove also the decision in *Don Philip v. Ilangaratne* [1], in so far as it placed reliance on police reports in proof of statements alleged to have been made at election meetings. Apart from the strictly legal issue to which I have given consideration above, I must express my agreement with the observations which my brother Fernando proposes to make with regard to the use hitherto made of police reports of election meetings.

For the sake of completeness, I propose to add an expression of opinion which is *obiter*. I consider that a police report of the nature admitted in this case would be available under s. 155 (*c*) of the Evidence Ordinance to impeach the credit of the officer making the report, if anything stated in the report is inconsistent with evidence given in a Court by the officer. The report may also be utilised under s. 145, to cross-examine the officer himself. But such a report does not constitute proof, as against any person, that he made any statement attributed to him in the report.

Abeyesundere J. who was the trial Judge in the instant case, has authorised me to state that if the grounds of objection which I have now considered had been argued before him he would have held P56 to be not admissible under section 35.

I hold for these reasons that there was misdirection in law in the admission of P56 in evidence ; there was accordingly no proof that the alleged

[1] *(1949) 51 N. L. R. 551.*

false statements to which it refers were in fact made at the Udatenne meeting. The finding of the trial Judge that the charge based on P56 had not been established as against the Respondent has therefore to be affirmed, though again for different reasons.

In relation to the third of the charges mentioned at the commencement of this judgment, I was not impressed by the arguments that there was either misdirection in law or else gross misdirection on the facts.

The remaining charges depended solely on police reports alleged to have been compiled from notes which had subsequently been destroyed, or which were not available at the trial. On the same grounds which apply in the case of P56, I hold that these reports were not legal proof that alleged false statements had been made by agents of the Respondent.

The determination of the Election Judge is affirmed, and the appeal is dismissed with costs.

T. S. FERNANDO, J.—

I agree with the judgment of my Lord dismissing this appeal for the reasons stated by him. The abhorrence with which I view this new phenomenon of copies of police reports where the originals have been destroyed that has obtruded itself upon our courts is so great that I am impelled to add the following observation :—

What is declared a corrupt practice by section 58 of the Ceylon (Parliamentary Elections) Order in Council, 1946 is the making or publishing of any *false* statement of fact in relation to the personal character or conduct of a candidate. I cannot appreciate why instructions have to be given by superior officers of the Police to their subordinates that notes be taken of the contents of speeches made at election meetings that are likely to contain false statements such as those sought to be penalised by section 58. While it is true it is the duty of all police officers to detect and bring offenders to justice, surely at the time a police officer is recording a note of a speech that is being made he is not aware that a statement made in the course of that speech is false. Such a record has then to be attributed to an excess of zeal displayed by the officer unaware as he is of the falsity of the statement. I do not wish to believe that police officers consciously waste their time in the hope that statements in election speeches would ultimately turn out to be false.

What happens after such a recording by a police officer ? An election petition is occasionally presented by or on behalf of a defeated candidate. Quite often, as indeed in the case which has given rise to the present appeal, no evidence of any person except the police officer is even attempted to be led to prove that the alleged false statement was made. The police officer himself says he has no independent recollection of the contents of the speech, and the petitioner relies on section 160 of the Evidence Ordinance. As the witness has no specific recollection

of the facts he renders himself immune from effective cross-examination. He could say that the speech was correctly recorded in the notes he made at the time. The law allows to the adverse party a right to see the note or writing made by the witness so that, after perusal thereof, the latter may be cross-examined upon it. This right, which has proved itself to be a very important one, is effectively baulked by the eruption of a new practice, a practice that is unfortunately growing and must be unhesitatingly discouraged, of destroying the contemporaneous note or writing. Uneasiness of the mind of the public at such destruction is not allayed when, as sometimes happens, the witness says that the writing was destroyed " on instructions received ". What is therefore made available to the cross-examiner is a copy, often a " fair " copy, made sometime after the event. Where, as is often the case, the dispute at the trial relates to an offending word or words and not to the bulk of the rest of the note of the speech, a reference to the original note would be of vital necessity to the adverse party. It would be important, for instance, to examine the original note for any corrections, interpolations or erasures. Imperfections of that nature are swept away in advance if all that is made available at the trial is what goes under the sobriquet of a " copy ", sometimes described as a precis alleged to have been made from the contemporaneous note. This procedure whereby the original note or writing is destroyed renders the police officer liable to be accused by the adverse party of distorting the truth or, what may be as objectionable, of undue partiality towards a particular candidate.

At a stage of the development of our Country when parliamentary elections are yet conducted in an atmosphere not devoid of tension and excitement, I venture to suggest that police officers will be well advised to confine themselves to their regular and more conventional duties. The matter of taking notes of speeches which might contain a statement which on verification turns out to be false could well be left to the resources of the candidates themselves or of their agents and supporters.

SRI SKANDA RAJAH, J.—

This is an appeal from the determination of an Election Judge dismissing the petition with costs and declaring the respondent duly elected and returned as a Member of Parliament.

The hearing commenced on 16th May, 1966, and concluded on 8th June, 1966, which was the end of the week. The order itself was dictated from the Bench after the week-end. Counsel for the Appellant complains, not without justification, that there has been a denial of justice.

An appeal to this Court lies only on any question of law : vide section 82A of the Ceylon (Parliamentary Elections) Order in Council, 1946. The jurisdiction conferred on this Court is, therefore, limited. It would

be the same as in a case stated by the Board of Review for the opinion of this Court on questions of law under the Income Tax Ordinance. The scope and nature of the power which this Court has to reject conclusions reached by the Board of Review on questions of law, of fact and of mixed law and fact was set down by Gajendragadkar, J., in *Naidu and Co. v. The Commissioner of Income Tax* [1]. This passage was adopted by this Court in *Mahavithana v. Commissioner of Inland Revenue* [2] and *Ram Iswara v. Commissioner of Inland Revenue* [3]. It runs thus :—

" There is no doubt that the jurisdiction conferred on the High Court by section 66 (1) is limited to entertaining references involving questions of law. If the point raised on reference relates to the construction of a document of title or to the interpretation of the relevant provisions of the statute, it is a pure question of law ; and in dealing with it, though the High Court may have due regard for the view taken by the tribunal, its decision would not be fettered by the said view. It is free to adopt such construction of the document or the statute as appears to it reasonable. *In some cases the points sought to be raised on reference may turn out to be a pure question of fact ; and if that be so, the finding of fact recorded by the tribunal must be regarded as conclusive in proceedings under section 66 (1). If, however, such a finding of fact is based on an inference drawn from primary evidentiary facts proved in the case, its correctness or validity is open to challenge in reference proceedings within narrow limits. The assessee or revenuee can contend that the inference has been drawn on considering inadmissible evidence or after excluding admissible and relevant evidence ; and, if the High Court is satisfied that the inference is the result of improper admission or exclusion of evidence, it would be justified in examining the correctness of the conclusion. It may also be open to the party to challenge a conclusion of fact drawn by the tribunal on the ground that it is not supported by any legal evidence ; or that the impugned conclusion drawn from the relevant facts is not rationally possible : and if such a plea is established, the Court may consider whether the conclusion in question is not perverse and should not, therefore, be set aside. It is within these narrow limits that the conclusions of fact recorded by the tribunal can be challenged under section 66 (1). Such conclusions can never be challenged on the ground that they are based on misuppreciation of evidence.* There is yet a third class of cases in which the assessee or the revenuee may seek to challenge the correctness of the conclusion reached by the tribunal on the ground that it is a conclusion on a question of mixed law and fact. Such a conclusion is no doubt based upon the primary evidentiary facts, but its ultimate form is determined by the application of relevant legal principles. The need to apply the relevant legal principles tends to confer upon the final conclusion its character of a legal conclusion and that is why it is regarded as a conclusion on a question of mixed law and fact. In dealing with findings on questions of mixed law and

[1] *(1959) A. I. R. 359 (S. C.) at 362 and 363.* [2] *(1962) 64 N. L. R. 217.*
[3] *(1962) 65 N. L. R. 393.*

fact the High Court would no doubt have to accept the findings of the tribunal on the primary questions of fact; but it is open to the High Court to examine whether the tribunal has applied the relevant legal principles correctly or not; and in that sense the scope of inquiry and the extent of the jurisdiction of the High Court in dealing with such points is the same as in dealing with pure points of law."

The passage relevant for the consideration of the submissions made by Counsel for the Appellant is italicized above.

The ground relied on by the petitioner was corrupt practice as defined by section 58 (1) (*d*) and read with section 77 (*c*).

In order to succeed the petitioner had to prove that the statement in question

(1) is a statement of fact;

(2) relates to the personal character or conduct of another candidate, viz., Munaweera;

(3) is false

(4) was made or published

(*a*) by an agent of the respondent, or

(*b*) with the knowledge or consent of the respondent; and,

(5) was made or published for the purpose of affecting the return of Munaweera.

It will be seen that what meaning the speaker intended by the words he uttered is not an element of this charge. Therefore, no burden rested on the petitioner to prove either beyond reasonable doubt or even on the balance of probability that the utterance was made intending a sinister meaning. The real test is, "What would be the impression created by the words in question on the mind of a reasonable man or the ordinary voter?". When the Election Judge placed the burden of proving the meaning intended by the speaker on the petitioner he seriously misdirected himself on the law. For this reason alone this appeal should be allowed and a trial *de novo* by another Election Judge ordered.

An Election Judge owes a duty not only to the parties but also to this Court, to which an appeal lies, and even to the electorate, to specify the point or points for determination, the decision thereon and the reasons for the decision. An Election Judge trying the above charge (of false statement) should consider and decide whether each one of the five elements specified above has been proved. It is not sufficient for him to say that one of the elements has not been proved and to refrain from deciding the other elements.

If the Court of Appeal sets aside his finding in respect of the only element he had chosen to decide, then it will have to order a retrial. Such a course will involve the parties in unnecessary expense and at the same time defeat the object of the legislature, viz., the constitution of

the Legislative Assembly should be distinctly and speedily known (v. *Senanayake v. Navaratne* [1] and the Balangoda Election Petition Appeal No. 3 of 1966 : S. C. Minutes of 11.8.1966[2]).

I am unable to subscribe to the view that the judgment is not vitiated by the failure to determine all the questions involved, (" though the ideal would be to determine all of them ") ; nor to the view that the Election Judge must be assumed to have considered all the elements for the astonishing, and, to my mind, even amusing, reason that " he is one of us ". This proposition will not, obviously, be applicable in the case of an Election Judge who is only a District Judge. This assumption does not appear to have been made ever before. Such an assumption is not warranted by law and is pregnant with danger. Besides, even if such an assumption is permissible, can it be invoked in the case of a Judge who does not ordinarily do trial work—not even Assize trials ?

Another view to which I cannot subscribe is that we should strain to uphold the validity of an election. What this Court has to do is to ascertain whether

(*a*) on a pure question of law the finding is correct ;

(*b*) on a pure question of fact whether the finding impugned is " not rationally possible ; if such a plea is established, ... the conclusion in question is not perverse and should not, therefore, be set aside" ; or

(*c*) on mixed questions of fact and law the relevant legal principles have been correctly applied, regardless of consequences.

There was much argument regarding the admissibility of document P 56—the report made by Police Sergeant Ratnayake of a meeting held on 9th March, 1965, at Udatenne, at which one of the alleged false statements was made. Counsel for the Appellant first argued that it was admissible under Section 35 of the Evidence Ordinance, but later abandoned that submission, when the majority of the Court indicated that P 56 would not be admissible under that section. He, however, submitted that it was evidence under sections 159 and 160 of the Evidence Ordinance. Before considering these provisions I would express my respectful dissent from the very general proposition that a Member of Parliament should not lose his seat on the report or even on the evidence of a Police Officer.

Section 35 of the Evidence Ordinance : An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact, made by a public servant in the discharge of his official duty or by any other person in performance of a duty especially enjoined by the law of the country in which such book, register, or record is kept is itself a relevant fact.

[1] *(1954) 56 N. L. R. 5 (P. C.)* [2] *(1966) 69 N. L. R. 49. (Ratwatte v. Piyasena)*

Section 159 (1) of the Evidence Ordinance : A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

Section 159 (2) : The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Section 159 (3) : Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document :

Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

Section 160 of the Evidence Ordinance : A witness may also testify to facts mentioned in any such document as is mentioned in Section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration : A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

In *Illangaratne : v. G. E. de Silva* [1] Windham, J., held that a Police Officer's official report of a speech at an election meeting is admissible under section 35 of the Evidence Ordinance and is not any the less admissible from the fact that his original rough note made during the actual course of the speech, and a rough draft of the report made immediately afterwards, have since been lost or destroyed. It is the report itself which is admissible, and nothing in the law requires the production of the rough note or draft of such a report.

This decision was arrived at after a Lahore case was considered (v.p. 173). Our attention was drawn to the order made by Sansoni, C.J., in the trial of the Dedigama Election Petition wherein he had stated that he prefers to follow the Lahore case and said that the police report is not admissible under section 35. With respect, I find it difficult to dissent from the considered view expressed by Windham, J.

Commenting on section 35 in his Law of Evidence Monir says :—

" *Reports made by public servants*—Every isolated document is not a book, register or record, but in certain cases a single document, e.g., a report by a public servant made within the discharge of his duty, may be considered an official book, register or record. Where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of this section and entitled to great weight " (4th Edition pp. 299 and 300)

[1] *(1948) 49 N. L. R. 169.*

Under the Police Ordinance it is the duty of Police officers to detect and bring offenders to justice (v. Police Ordinance, Chap. 53, section 56). Making a false statement before or during an Election is an offence. Therefore it was P. S. Ratnayake's official duty to detect it and bring the offender to justice. Besides P 56 was a report made in pursuance of official directions issued by his superiors. It was sent to the Assistant Superintendent of Police? Criminal Investigation Department, in charge of the elections. It was filed in his office. P. S. Ratnayake said that P 56 and P 56A are true and correct copies of what he heard at that meeting.—He got the report written out by his brother Seelaratne and checked it and found it to be correct.—According to P 56 Sunil Karunadasa alleged that Munaweera had received a bribe of Rs. 75,000. This is not an allegation which can be misunderstood or easily forgotten. This report (P 56) is also receivable in evidence under section 160 of the Evidence Ordinance because P. S. Ratnayake said that P 56 is a true and correct record of what he heard at that meeting.

Monir comments on this section as follows:—"According to the section, if the witness, though having no recollection of the facts, is sure that the facts were correctly represented in the document at the time he wrote it or read it, the document may be evidence on the witness swearing to that fact."—p. 939.

In *Om Prakash v. Emperor* [1] it was held that section 159 does not render the notes of a speech inadmissible in evidence. At p. 869 Tapp. J, said, "It was then contended on behalf of the appellant that the notes of the speech were not admissible in evidence as Nazar Hussain should have testified orally as to the speech and under section 159, Evidence Act, refreshed his memory from those notes. I fail to see how section 159, relied upon by the learned Counsel and urged by him, renders the notes of the speech inadmissible in evidence. This provision of law merely provides for a witness, while under examination, refreshing his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. Instead of deposing orally as to the speech made by the appellant, Constable Nazar Hussain put in the notes made by him of that speech, and I confess I can see no difference between this procedure and Nazar Hussain deposing orally after reference to those notes. For all practical purposes this would be one and the same thing."

In my opinion, therefore, P 56 was rightly received in evidence. It contains the false statement of fact that "Munaweera had taken a bribe of Rs. 75,000 and acted treacherously against the Lady Prime Minister", as was held by the Election Judge, who further held that it related to the personal character of Munaweera, another candidate, and it was made with the purpose of affecting the return of Munaweera. He had

[1] *A. I. R. 1930 Lahore 867.*

also rightly held that this was made at an election meeting held in support of the respondent's candidature. But his conclusion that Sunil Karunadasa was not an agent of the respondent was not only "not rationally possible" but even "perverse", especially after he had rightly held that the chairman of the meeting was an agent of the respondent.

The document R 8 shows that the meeting was held in support of the respondent's candidature. It certainly did not include Sunil Karunaratne's name as one of the speakers. Nine speakers were determined by the respondent and named therein. But, it contained also the proclamation "and other accomplished speakers will address you". Of the nine speakers mentioned in R 8 only Anver turned up at the meeting and he was the first speaker. The only other of the nine speakers was Illangaratne, who arrived along with the respondent, who attended the meeting long after its commencement.

If the chairman of the meeting who was agent of the respondent had no authority to allow other speakers to address the meeting, the meeting would have had to be abandoned long before the respondent turned up in the company of Illangaratne. At that meeting seven persons who were not in the list contained in R 8. spoke. In answer to the Election Judge the respondent said, "I have empowered my workers in my office at Matale to do all the necessary work connected with meetings held in my support." The respondent admitted in the course of his evidence that he could not possibly be present all the time at every meeting held to further his candidature and in his absence his organisers looked after his meetings (i.e. when he is moving round the electorate and he remained at this meeting for only about half an hour or forty-five minutes). On 9.3.65, besides the meeting at Udatenne, the respondent had two other meetings and so he had to rely on somebody locally to keep the meeting going and he expected his supporters to put in other speakers in place of the speakers mentioned in R 8 who did not turn up. Also he admitted that his supporters at the spot had done their best to keep the meeting going till the respondent arrived.

Even without this evidence, it was clear that the chairman of that meeting was agent of the respondent—agent to promote the interests of the respondent. Therefore, he had authority to decide as to whom he should permit to speak. Sunil Karunadasa came within the category of "and other accomplished speakers".

The evidence in the case was sufficient to establish beyond any manner of doubt—not merely beyond reasonable doubt—Sunil Karunadasa's agency.

I would, therefore, hold that the charge in respect of the false statement attributed to Sunil Karunadasa has been proved beyond reasonable doubt and on that ground alone the respondent's election should be declared void.

Another charge is in respect of the pamphlet P 54 proved to have been published by one Mulan Dunuweera. The Election Judge has not rejected the evidence of one de Mel, a draughtsman in the Public Works Department, that this pamphlet was handed to him " four or five days after the Nomination Day in January 1965 by Mulan Dunuweera who came with some other persons to canvass his vote for the respondent ". He appears to have accepted this evidence and acted on it. But he did not decide the question of agency, though there was the evidence of Illangaratne and the respondent himself tending to show that Mulan Dunuweera was not the respondent's agent at the time in question.

Was it because that evidence was rejected that the Election Judge acted on the footing that de Mel was canvassed by Mulan Dunuweera as agent for the respondent ?

In the last paragraph of P 54 Munaweera is told that he had " filled the pockets of his trousers " when he did the despicable act " of voting against the Government—by raising that hand of yours unkempt and festered owing to the blood and pus of the ultimate corruption.....'

The Election Judge's interpretation of this passage with reference to an earlier passage in the pamphlet to the effect that the passage in question referred to meant that he had been hired to write to the Silumina is patently wrong and " not rationally possible ". The conclusion that it refers to a bribe taken before voting is irresistible. It is also noticed that Munaweera's evidence on this matter has been ignored altogether. His evidence was that (though the voting was on 3.12.1964) he wrote to the Silumina only after that explaining his conduct regarding the vote and it was published in the Silumina of 13.12.64. (P 65).

This charge should be tried afresh before another Election Judge, because not merely the validity of the respondent's election but also the question whether Sunil Karunadasa has been guilty of a corrupt practice making him liable to be reported, is involved. Besides, that is a duty owing to the electorate itself.

P 57 is the report made by P. C. Kulapala of a meeting held at Kaikawala on 28.1.1965 in support of the respondent. The report states that N. K. Liyanage said, " Mr. Rajaratne, Mr. C. P. de Silva and his follower Munaweera subdued by the money of Mr. Hema Basnayake, Gunasena Book-stall and the Lake House paper people and performing the antagonistic act of raising the hand against the Sri Lanka Coalition Government has made it a matter of regret for him to come to battle with him. "

According to P. C. Kulapala the respondent was present when Liyanage made this speech—the respondent being there from the beginning till the end of the meeting. P 57 is evidence for the reasons I have given in regard to P 56. The Election Judge said, " The meaning assigned on behalf of the petitioner to the aforesaid utterance of Liyanage was that Munaweera was subdued by bribes given by the persons mentioned

in that utterance. It cannot be said that such utterance was made intending such meaning in view of the fact that such utterance can mean that Munaweera was subdued because the persons mentioned in such utterance were providing him with funds to defray his election expenses. I hold that the aforesaid utterance of Liyanage does not relate to the personal character or conduct of Munaweera ".

The passage in question relates to the money that had been paid before the voting. Before the voting there would have been no election expenses in contemplation. The meaning attributed by the Election Judge was not only " not rationally possible " but also " perverse ".

Besides, as already pointed out earlier in this order, what meaning the speaker intended by the words he uttered is not an element of this charge. Therefore, there was no burden on the petitioner to prove what Liyanage intended. How would an ordinary voter have understood this utterance ? There can be only one answer to it, viz., that Munaweera voted in this manner because he had been bribed with money to do so. This would, therefore, clearly relate to the personal character of Munaweera.

There was ample evidence of agency. In fact, the respondent was present when Liyanage made the speech. The evidence also establishes that it is a statement of fact and it is false. This charge too has been proved beyond reasonable doubt and the respondent's election is void on this ground also.

Another finding which is " not rationally possible ", is in regard to the statement embodied in the report P 58, viz., " 14 members becoming slaves for money left the Government ".

The Election Judge has stated that the word " money " " refers to money in general " and therefore the statement means " having become slaves to capitalism ". In addition he has held that the word " Government " means the Cabinet and because Munaweera was not a member of the Cabinet this statement could not refer to Munaweera. It is perfectly clear that the only meaning that can be given to the word is the party in power. No reasonable man would consider the word " Government " (Aandu) to mean the Cabinet. This charge too (in respect of the statement alleged to have been made by Podiappuhamy) should be retried.

The appeal should be allowed, the order appealed from should be set aside with costs both here and below. Action should be taken as indicated in this order.

After the above judgment was prepared I had the opportunity of reading the judgment prepared by my Lord the Chief Justice in which he says, "Abeyesundere, J., who was the trial Judge in the instant

case, has authorised me to state that if the grounds of objection which I have now considered had been argued before him he would have held P 56 to be not admissible under Section 35 ".

This course does not appear to be right. It would seem objectionable. The fact is that the Election Judge admitted it in evidence, without indicating under what provision he did so, and acted on it. I wonder if he can be heard to say now that he would not have admitted it under Section 35, especially when he had not himself heard the submissions. This may be construed as affording him an opportunity to deliver a supplementary judgment in respect of a point which had already been argued in appeal or consulting him in regard to the judgment of this Court.

Addendum

After the above order was prepared judgment was delivered in S.C. 496 (F) of 1964 : D.C. Jaffna No. TR/52 on 13.12.66 by my brother T. S. Fernando, with my concurrence, where the provisions of Section 35 of the Evidence Ordinance were the subject of decision. There the question was whether the contents of the document D1, a list of temples in the Islands division, were relevant and properly received in evidence. D1 was prepared in pursuance of an order issued by the Government Agent to the Maniagar, who gathered the information through the Village Headman, who reported the name of the founder of the temple and that of its then Manager, as required in the Government Agent's order, which was not based on duty especially enjoined by law. We have answered this question in the affirmative.

This decision supports the view I have expressed earlier in this order in respect of Section 35 of the Evidence Ordinance. The police reports in question were prepared in pursuance of orders received from superior officers who were competent to issue such orders.

I have this day (15.12.66) had the opportunity of reading the opinion of my brother T. S. Fernando agreeing with my Lord the Chief Justice that the appeal should be dismissed.

While conceding that " it is the duty of all Police officers to detect and bring offenders to justice "—to which duty I have referred earlier in my order—he " suggests that Police officers will be well advised to confine themselves to their regular and conventional duties. The matter of taking notes of speeches which might contain a statement which on verification turns out to be false could well be left to the resources of the candidates themselves or their agents and supporters ". I regret that I am unable to share this view.

This suggestion, if carried out, may well lead to serious breaches of the peace, whereas when a Police officer takes down notes of speeches he

can do so unmolested. Besides, the evidence of candidates, their agents and supporters is vulnerable on the score of interest or partiality, which may not ordinarily be imputed to Police officers.

I would rather not restrict the duties of Police officers, whose duties would include the duty to detect election offences as well and to bring such offenders to justice, especially in a country notorious for the making of false statements of fact in relation to the personal conduct or character of candidates. If their duties are restricted this offence may become far more prevalent and go unchecked.

Certainly the best course for Police officers would be to preserve the original notes. Had they been preserved the question of admissibility of P 56, etc., could not have arisen. The situation that arose from the failure to preserve them it was which was the subject of consideration by Windham, J., in *Illangaratne v. G. E. de Silva* (supra). Such reports appear to have been consistently admitted thereafter. They were admitted in the Bentara-Elpitiya and the Balangoda Election petitions, the appeals in which were dismissed.

Appeal dismissed.