

IN THE SEYCHELLES COURT OF APPEAL

[Coram: F. MacGregor (President), S. B. Domah (JA),
A. Fernando (J.A) J. Msoffe (J.A), F. Robinson (J.A)]

Civil Appeal SCA CP1/2016

(Appeal from Constitutional Court Decisions of CP1/2016)

**WAVEL JOHN CHARLES
RAMKALAWAN**

APPELLANT

VERSUS

**ELECTORAL
COMMISSIONER**

JAMES ALIX MICHEL

ATTORNEY-GENERAL

RESPONDENTS

Heard: 2 August 2016

Counsel: Mr. B. Georges for Appellant

Mrs S. Aglae for Respondent no. 1

Mr. B. Hoareau for Respondent no. 2

Mr. R. Govinden for Respondent no 3 with Mr Anath

Delivered: 12 August 2016

JUDGMENT

S. Domah (J.A)

- (1) On 3, 4 and 5 December 2015, Seychelles held its first round in its latest quinquennial election for the choice of its ensuing President. As per the Constitution, if any from the number of the candidates secured more than 50% of the votes, he is declared elected, failing which the process goes through a second ballot between the best two. As it happened at the end of the 3-day process, no candidate reached that ceiling. The country was then set for a second round on 16, 17 and 18 December 2015. It was the first time it had happened in the history of Seychelles. The two contestants were Respondent No. 2, Mr James Alix Michel, the President in post; and the Appellant, Mr Wavel John Charles Ramkalawon, the Opposition Leader. It was a notoriously close contest and the whole country waited with bated breaths for the announcement of the results which came out late in the night of 18 December. The Appellant, the Opposition leader had missed it by a narrow margin of 193 votes.
- (2) Unhappy with the outcome, Appellant filed a petition against the Electoral Commission, the elected President and the Attorney-General before the Constitutional Court. In his view, rightly or wrongly, he would have carried the day but for the electoral malpractices.
- (3) He averred eleven (11) acts of illegal practice. The Respondents denied all the allegations and Respondent no. 2 went an extra mile. He averred in his defence that it was the appellant, then petitioner, who has been guilty of illegal practice within the meaning of section 51(3)(b) of the Election Act. At the end of a long hearing spanning over a couple of weeks and comprising a host of witnesses, a heap of documents and over 1,500 pages of transcript, the Court comprising Chief Justice M. Twomey, C. McKee J. and D. Akiiki-Kiiza J. delivered a judgment of 131 pages.
- (4) They found:

 1. the acts of illegal practice not proved against the elected President;

2. a number of others mentioned in the case needed to be summoned and were summoned to answer allegations of illegal practice;
 3. the allegation made by Respondent No. 2 proved against the Appellant on the facts and his own statement.
- (5) Section 47(1) of the Elections Act provides that, at the conclusion of the trial of an election petition, the Constitutional Court shall report in writing to the Electoral Commissioner its finding under section 51(3)(b), the end result of which is that he is disqualified from voting for a period of 5 years. The Court stayed the order of reporting the Appellant on his application pending the determination of the appellate Court.
- (6) This Appeal against the decision of the Constitutional Court canvasses the following grounds:

GROUND 1

The Constitutional Court erred in finding that the Appellant had committed an illegal practice contrary to section 51(3)(b) of the Elections Act without:

- (a) Any party to the petition having prayed for any relief in respect of the alleged illegal practice;
- (b) Warning the Petitioner that he risked being penalised for having committed an illegal practice and giving him an opportunity of being heard thereon otherwise than to counter a mere allegation raised;
- (c) Considering the evidence supporting the alleged illegal practice in detail and assessing that evidence in the light of the requirements of section 51(3) (b).

GROUND 2

The Constitutional Court erred in finding that the Appellant had committed an illegal practice contrary to section 51(3)(b) of the Elections Act in that it failed to appreciate that the Newsletter had not contained any stipulation as to vote, had

not made any definite promise to any voter, had not been specific as to a voter, and had not offered to procure any office in exchange for a vote.

GROUND 3

The Constitutional Court erred in deciding to report that the Appellant had committed an illegal practice without first:

(a) Considering, and giving the Appellant an opportunity of explaining, whether the act or omission constituting the alleged illegal practice had been done or made in good faith or through inadvertence or other reasonable cause, or

(b) Considering whether, taking into account all the relevant circumstances, and after having heard the Appellant in that regards, it would be just that the alleged illegal practice should be an exception under the Elections Act and that the Appellant should not be subject to the consequences arising from the commission of the alleged illegal practice.

- (7) In this appeal, we are concerned only with the above grounds. The case has other ramifications with which we are not at present concerned. Miscellaneous Proceedings are on-going.

Evidence and Proceedings

- (8) The finding of illegal practice against the appellant was based on a leaflet and Appellant's response to the questions on its content. It has not been challenged that the leaflet emanated from him. Drawn up by him in the English language, it was translated in Tamil language and circulated to the Tamil community. Dated 9th of December 2015, its proximity of the date to the second round carries some significance. In that open letter issued to the Tamil community, he had spoken about his identical origin and his close ties with the community before making certain promises: inter alia, making Deepavali a national holiday and appointing "those who are eligible from Tamil and Indian origins (in) suitably placed positions in (his) cabinet" and the public service.

- (9) Evidence had been adduced by Mr. Rajasundaram, himself a Tamil and knowledgeable with the Tamil language and the Tamil Community. His reading of the letter was at first that it was like a manifesto. However, under cross examination by the Attorney General who read section 51 (3)(b) of the Act to him, Mr. Rajasundaram agreed that there was an apparent breach of the section in the inducement offered to the Tamil Community to vote for him and in return for favours. We have to straightaway state that a witness's opinion as to whether an activity falls foul of the law is neither here nor there. This was a matter of law for the trial Court at the time and for this Court on the present appeal.
- (10) Mr. Georges – evidently focusing on his defence that section 51(3)(b) referred to “a voter” and not a community of electors as such - questioned the witness on the Tamil community. The witness answered that the targeted readership was not a particular voter but a particular community. Further, he agreed that this was not a case where any specific person had been promised a post as a Minister in Cabinet or Principal Secretary in the public service. The letter was not personalized. It was agreed that there was no signature on the letter. Mr. Rajasundaram stated that he himself had received the letter between the first and second round of elections despite the letter being dated 9th December 2015.

Mr Ramkalawan's Answers

- (11) The Appellant admitted to having drafted the letter in English for the purpose of its translation and circulation to the Tamil community. It contained statements such as: *“Those who are eligible from Tamil and Indian origins will be suitably placed positions in my cabinet, Principal Secretaries.... The above are not just words or just decorations, I request all of you to support me and other parties to join me and I humbly request you to do so. You should also be instrumental for this country to have a good room flourishing like a flower. Support Ramkalawan and make him victorious.”* These were amongst other benefits to the Tamil community if they were to support him and the parties representing him in the election.

(12) Mr. Ramkalawan's answer to the content of the leaflet has been that it was simply politicking and that all elections are about promises. His position may be gauged by the following answers he gave: *"Well I was not offering anything in particular to the Tamil or people of Indian origin, what I was basically saying is if there are people of Tamil and Indian origin who are eligible and who are suitable qualified they could very well just like anybody else be part of government."* He added: *"it was also very important for me to write to the Tamil community because there had been this notion that Ramkalawan and the SNP were xenophobes and that they hated foreigners, and given that the Tamil community is a big community that votes I thought it was my duty as a Politician campaigning to also seek their vote."* When asked whether this letter was intended to induce voters to vote for him, his answer was: *"My Lords, election is about promises, so if I make a promise to the Tamil community is it not the same as making a promise to the elderly? Is it not the same as making a promise to young people? Is it not the same as making other promises? This is what elections are all about. And when politicians stand up and say I promise that I will do this that and the other, I do not see the difference between that and what is in the letter."*

(13) That made Mr. Hoareau appearing for Respondent No. 2 probe Mr. Ramkalawan further:

"Q: So you agree with me that you were inducing these people to vote for you on the promise of offering ministerial posts and principal secretarial post in your government to members of their community?"

A: So what? I mean this is my answer my Lords. "

Our task in this appeal is to see whether he is correct in holding that view and giving that answer.

THE LAW

(14) Before we move to the heart of the matter, it behoves us to clear some air with respect to the law itself. This is the first time a petition of such magnitude has been brought under the Election Act 1996.

Nature of the Proceedings Before the Constitutional Court

- (15) The questioned areas touch some basic principles applicable. They related to the nature of the proceedings, the onus and the standard of proof, the categorization of the various sections, whether under the criminal law or the civil law etc. Some of the words used in the text of the law throw some doubts as to whether the hearing was a civil action or a criminal action or somewhere in between. Some phrases in the Elections Act are connotative of criminal action rather than civil action. For example, section 47(1)(b) uses the word: “*guilty of an illegal practice*” and other sections use the word “*trial.*” The terms used in civil actions are “*an illegal practice stands proved*” or “*hearing*” instead of “*trial.*” Not only practitioners want to be certain about it but also the citizens who are the users. The problem this duality creates becomes evident at the time of the applicability or otherwise of: (a) the right of silence; (b) the right against self-incrimination; (c) the quantum of proof which is proof beyond reasonable doubt in a criminal trial and proof on a balance of probabilities in a civil action.
- (16) The Constitutional Court heard the case as a civil case all through and applied the civil standard of proof. Section 45(1) makes it abundantly clear that the trial of an election petition shall be held in the same manner as a trial before the Supreme Court in its original civil jurisdiction.
- (17) These issues have vexed not only Seychelles. They have necessitated the authoritative pronouncement of the courts in other jurisdictions equally: Australia, Canada, India, United Kingdom, United States, Mauritius etc. Be that as it may, the law has to be certain especially one that touches each and every individual for the exercise of his or her right to vote. Candidates, voters, public authorities, practitioners need to know the scope and the limits of the various provisions and how they relate to one another in terms of application and interpretations.
- (18) Our analysis, however, shows that the confusion does not lie in the text of the Elections Act but in our own minds. The Act creates two possible actions in actual fact: one is the civil action by way of petition and the other is a criminal

action by way of a formal charge. There is no mystery in how a civil action may cohabit with a criminal action and how they relate to each other in a legislation – whether one after the other or independently of each other or in parallel. In the Canadian system, the Federal Court of Canada was called upon to clarify the position in a case as recent as 2013. In **McEwing v. Canada (Attorney General) 2013 FC 525 (CanLII)**, the Court examined the Canadian Election Act 2000 and stated as follows:

“Prior to the enactment of the 2000 Act, procedures to overturn election results were governed by ... the Dominion Controverted Elections Act, a 19th century Statute. (The) legislative regime ... were considered to be cumbersome, costly and time-consuming and were for those reasons, rarely employed. The two jurisdictions, civil and criminal, were therefore treated separately in the 2000 Act.”

Co-existence of civil and criminal actions

(19) A careful reading of the Seychelles Elections Act 1996 shows a comparable history and outcome. In the Canadian system, the criminal régime in section 19 is more easily demarcated from the civil régime in section 20 of the Elections Act 2000. In our Elections Act, the civil is found in sections 44-45 and the criminal in sections 51-53. However, the same acts and doings generate both a criminal and a civil action. Where the acts and doings are proved on a balance of probabilities, they lead to non-criminal sanctions such as rights suspension, de-registration etc. In Seychelles, it is removal of name from the Electoral Register for a period of 5 years, which in effect in a quinquennial legislature is for one or two elections only. The same acts and doings, if proved beyond reasonable doubt, in criminal proceedings will lead to criminal sanctions: 3 years imprisonment and SR20,000 fine. In certain cases, the maximum penalty is SR1,000,000. This explains the rationale for not creating a new and third quantum of proof in this area.

The mental element in civil and criminal electoral actions

(20) This takes us to the issue of mental element applicable in the two actions. This issue becomes relevant to us in relation to the application of section 45. The state of mind in a civil action is *in abstracto*: the standard of a reasonable man

(English law) or “la conduite d’un bon père de famille” (French Law). Criminal liability is assessed *in concreto*: whether this particular defendant had the *mens rea* required for the offence charged. Thus, while the standard in the mental element of fraud in criminal election action would be subjective, in a civil election action that would be objective, mitigated to a mere level of recklessness or carelessness, even if in either case “*the intention is doing that thing which the Statute intended to forbid.*” See **Norfolk, Northern Division, Case [1869] 1 O’M & H 236**; **Wrzesnewskyj v Canada (Attorney-General) 2012 ONSC 2873 (CANLII)**.

- (21) In **Bielli v Canada (Attorney-General) 2012 FC 916 (CANLII)**, the mental element in a criminal case is compared to that in a civil case where “*it is not a determination based on the subjective or individual perception or experience, but what is reasonable to conclude regarding what a person ought to have known in the circumstances.*” It is a question of fact whether the person knew or should have known: **McEwing v. Canada (supra)**.
- (22) Further, in the case of **Andrew Erlam & Ors v Lutfar Raman and Anor [2015] EWHC 1215 (Comm)**, at para. 56, the High Court decided that “*knowledge of what they (the respondents) are doing does not need to be proved against a candidate for him to be fixed with their actions.*” That admittedly is a hard fact but objective liability is part and parcel of civil law which is concerned with a community rights and obligations: see **Great Yarmouth Borough Case, White v Fell (1906) 5 O’M & H 176**. The reason thereof may lie in the fact that it is rare that members of the public engage in DIY corrupt practice in election time. Their activity invariably revolves round the candidate they support. It is always open to the candidate to come up and rebut his involvement in the conduct of the undesirable elements in his entourage.
- (23) We are concerned in the present case with a civil application of the law of illegal practice but not the criminal application of the law of illegal practice.
- (24) In the case of **Pellerin v Thérien [1997] RJQ 816 CA**, the appellant challenged the constitutionality of section 465 on the ground that the sanction was suspension of his political right to vote, which was as good as a penal

sanction. Yet the quantum of proof the law provided for was on a balance of probabilities. The Court of Appeal dismissed the argument holding that the two aspects of control over elections are distinct and require different substantive principles and rules of evidence. In the case of **FH v MacDougall 2008 SCC 53 (CANLII)**, at para. 40, the Court stated that: “Absent a statutory direction to the contrary, the burden of proof never shifts to the respondent party and the quantum of remains that of the balance of probabilities.” The same view has been taken in the case of **Andrew Erlam & Ors v Lutfar Raman and Anor [supra]** which puts it curtly: “In general terms, an election court is a civil court not a criminal court.”

- (25) It would be otherwise where the case was conducted on the basis of a criminal charge for election offences of corrupt or illegal practice at which time the criminal standard of proof will apply. This was definitely decided by the Court of Appeal in England, which we make our own, in the case of **R v Rowe ex parte Mainwaring [1992] 1WLR 1059**. The civil standard of proof which is balance of probabilities for the hearing of an election petition has been confirmed in the case of **A.K. Jugnauth v Ringadoo [2007 SCJ 80] [supra]** by the Judicial Committee of the Privy Council in **Ringadoo v Jugnauth [2008 UKPC 50]** insofar as it concerns the trial of an election petition as opposed to the trial of a defendant who stands charged criminally with election offences.

Adversarial Action with Inquisitorial dimension

- (26) Accordingly, there should be no confusion in our minds about the nature of the action, the onus of proof and the standard of proof. We are in the area of civil proceedings, if with a statutorily added inquisitorial dimension. But not for its inquisitorial character do the nature of the action and proceedings and the onus and the quantum of proof change. Where the action starts by a citizen against another citizen by way of petition, the action is a civil action and will be governed by all the rules of the civil procedure. Where the action starts by the State against a citizen based on the offence, the action is a criminal action and will be governed by all the rules obtaining under the criminal procedure. As for the word “guilty” used in penal proceedings, it is not a monopoly of criminal law.

It is of usage in civil law equally, more often seen in disciplinary proceedings:
(see **West's Encyclopedia of American Law, 2nd ed. 2008.**)

ELECTION AND DEMOCRACY

- (27) At the same time, the high seriousness of this civil process should be in the forefront in the mind of everyone involved. An election for the choice of our legislature or the Head of State goes to the very root of our democratic system of government. In **Indira Nehru Gandhi v. Raj Narain [1976] (2) SCR 347** (AIR 1975 SC 2299), the Court held:

“Democracy is a basic feature of the Constitution. Election conducted at regular, prescribed intervals is essential to the democratic system envisaged in the Constitution. So is the need to protect and sustain the purity of the electoral process.”

THE CONSTITUTIONAL COURT SITTING AS AN ELECTION COURT

- (28) Our laws have entrusted the task of protecting and sustaining the purity of the electoral process upon the Judiciary through a Constitutional Court sitting as the Election Court with at least two judges. The paramount role of this Court in the context of Seychelles calls for profound reflection on the high responsibility reposed upon it.

- (29) In to-day's political world, evidence abounds that the strength of a democracy is only as good as the credibility of its elections. Elections make or break democracies. They make them where they are free, fair and credible. They break them where they are just a façade. In the **IDCR: Briefing Paper Electoral Corruption**. Sarah Birch, this is what has been stated:

“In the modern world, electoral corruption is one of the major obstacles to democratisation; it is also a significant problem in many established democracies.”

- (30) We are going through a period of time in world history where even the established democracies seem not safe enough in the many ways elections may be rigged. Mischief makers have adopted new ways of corrupting the electoral process. In a recent election in Canada, a misleading message was

sent over the internet in the name of the authorities to the voters of a particular area with a known allegiance to one of the parties. The message directed them to a place where it was not possible for them to vote. Electoral corrupt practice has taken other subtle and sophisticated forms as is evident in the case of **Andrew Erlam & Ors v Lutfar Raman and Anor [supra]** better known as the Tower Hamlets case. This has emphasized the role of the election courts to exercise greater vigilance over the manner in which democracies are being corrupted.

Election Court is a Unique Court

(31) It is sometimes not so obvious that an Election Court has special characteristics. As was stated in the Tower Hamlets case:

“An election court is, in some ways, a unique tribunal. Election petitions are presented and pursued in very similar manner to claims made in the civil courts and, procedurally, the basic rules to be applied are those of the Civil Procedure Rules (“CPR”). Accordingly, election proceedings have an adversarial character. Nevertheless, election petitions differ in a number of ways from civil actions.”

(32) One of the special characteristics is that it is vested with at once an adversarial character as well as an inquisitorial character: see para. 40 of **Andrew Erlam & Ors v Lutfar Raman and Anor [supra]**. A like competence is vested with the Constitutional Court sitting as an Election Court. The Elections Act vests it with powers under section 45(2) whereby the court may not stay content with only the dispute between the parties but need to go further. It may order *proprio motu* and compel any person concerned with the election to attend as a witness to depose. The trial is not only the trial of the persons directly before court but it is one of the election itself. That is apparent by the wording of section 45(2).

Section 45 (2): Election Court's Inquisitorial Role

(33) Section 45 (2) reads:

"45(2) The Constitutional Court may—

(a) by an order, compel any person who appears to the Court to be concerned in the election to attend as a witness at the trial; and

(b) examine a witness referred to in paragraph (a) or any person in Court, although the person has not been called as a witness.

(3) A witness or a person referred to in (3) subsection (2) may be examined or cross examined, as the case may be, by the petitioner, respondent and Attorney-General or his representative, if present at the trial."

(34) All this simply highlights the role the Judiciary plays and should play in ensuring that the integrity of the electoral process is not corroded in any way whatsoever. Its primordial responsibility is to jealously guard the legacy of a democratic system of government and ensuring its continuous consolidation under the rule of law.

Mindfulness of nation's fragility

(35) The Judiciary, however, has its institutional limits. It may only enter the scene *ex post facto*, for diagnosis and cure. By that time, it may well be too late. Our fragile democracies would be better served if everyone played by the rules. On and off, it would help each citizen to refer to our Constitution along with our prayer books. It is a place where we have reposed our own fate as an individual and as a nation. We have to be:

"EVER MINDFUL of the uniqueness and fragility of Seychelles;

CONSCIOUS of our colonial history before becoming an Independent Republic;

AWARE and PROUD that as descendants of different races we have learnt to live together as one Nation under God and can serve as an example for a harmonious multi-racial society

It shall be the duty of every citizen of Seychelles-

(a) to uphold and defend this Constitution and the law; ... and

(f) generally, to strive towards the fulfillment of the aspirations contained in the Preamble of this Constitution.”

(36) With the above essential preliminaries, we come to the Grounds of Appeal.

GROUND 1

(37) Ground 1, challenges the decision of the Constitutional Court in its finding that the Appellant had committed an illegal practice contrary to section 51(3)(b) of the Elections Act without:

- (a) Any party to the petition having prayed for any relief in respect to the alleged illegal practice;
- (b) Warning the Petitioner that he risked being penalized for having committed an illegal practice and giving him an opportunity of being heard thereon otherwise than to counter a mere allegation raised;
- (c) Considering the evidence supporting the alleged illegal practice in details and assessing that evidence in the light of the requirements of section 51(3) (b).

(38) We shall take the Grounds in the order in which they have been raised.

GROUND 1(a)

(39) On Ground 1 (a), the question is whether the mere fact that the 2nd respondent had only stated that there was corrupt practice by the Appellant, without praying the Court for a relief, the Court should have at all made an order which was to all intent and purposes outside the four corners of the pleadings. Mr Bernard Georges for the Appellant submitted that Respondent No. 2 had never intended the ultimate consequence of de-registration of the Appellant when he had put in his defence. His complaint was a shield and not a sword.

Limits and Scope of Pleadings in an Election Case

(40) We would have happily granted learned counsel that argument had we been in an ordinary civil case between private parties before any other Court: see **Gill v Gill SCA 4/2004**. But here the parties were neither in an ordinary case nor before an ordinary court. A court entrusted to hear an election petition is a

unique court in many respects as has been outlined above, both adversarial and inquisitorial. We have dwelled on that aspect sufficiently above to rehash it here.

- (41) What is more, section 45(1) does not stay content with stating that the trial of an election petition shall be held in the same manner as a trial before the Supreme Court in its original jurisdiction. It subjects the civil proceedings to the imperatives of the Act. Section 45(1) is stated to be subject to this Act (underlining ours.) Now, when we read section 45(2), we note that once a petition is lodged, the Court is seized with a wider jurisdiction than just an examination of the issues before the two parties. The trial by that very fact becomes the trial of an election. Section 45(2) enables the Court to go beyond the parameters of the adversarial hearing and don an inquisitorial role. It may order and compel the attendance and the examination of witnesses who are not originally in the case but are concerned. We are not basically limited by the pleadings as would be the case in an ordinary civil action between private parties.
- (42) In a 19th century case dealing with a like issue as the present one whether a petitioner could be questioned on his own wrong-doing in his own petition, the court held: *“Except where there are recriminatory charges against the unsuccessful candidate, or for the purpose of declaring petitioner’s vote void on scrutiny, the conduct of the petitioner at an election cannot be inquired into, and in this case there is no distinction between a candidate-petitioner and a voter-petitioner”*: **Re Dufferin Case (1879) HEC 529. 4 AR 420 (CAN) cited in The Digest of Annotated British Commonwealth and European Cases Vo. 20, Elections, para. 1727.**
- (43) However, that decision did not survive for long. In the early 20th century, the overriding need to maintain the pure stream of an election process uncorrupted came to the fore and the Courts moved away from that jurisprudence as from the case of **Maidstone Case, Cornalis v Barker (1901) 5 O’M&H 149, cited in The Digest (ibid.), para. 1727.**

(44) In the Seychelles' Elections Act, like in many other up-dated elections laws, this long arm of the law is evident. Section 45(2) reads:

“45(2) The Constitutional Court may—

(a) by an order, compel any person who appears to the Court to be concerned in the election to attend as a witness at the trial; and

(b) examine a witness referred to in paragraph (a) or any person in Court, although the person has not been called as a witness.

(3) A witness or a person referred to in (3) subsection (2) may be examined or cross examined, as the case may be, by the petitioner, respondent and Attorney-General or his representative, if present at the trial.”

(45) The Attorney-General has referred to the case of **Moses Masika Wetangula v Musikari Nazi Kombo and William Kinyani Onyango IEBC [2013] eKLR** in support. The Court did refer to these cases in its judgment at paragraph 111. That should provide the answer to this part of the Appeal. There is no merit in Ground 1(a).

GROUND 1(b)

(46) On Ground 1 (b), the question is whether it was the duty of the Court to warn the appellant that he risked being penalized for having committed an illegal practice. That would have given him an opportunity to answer or not to answer the allegation or to give a proper explanation.

(47) It is the argument of the Respondents that the appellant was represented by counsel of some standing so that the need was not felt. To our mind, the right against self-incrimination exists no matter whether it is a civil case, a criminal case or an enquiry. That right is attached to the person and goes with the person. It does not matter where he is: whether at the police station, in his home, in a public place, in the witness box, in a criminal case or a civil case.

Was there a duty to warn appellant?

(48) The wording of Article 19 (1) (g) should be borne in mind, however: *“A person shall not be compelled to testify at the trial or confess guilt.”* On the facts, it is

patently clear that the Appellant was not compelled to say whatever he had to say in his defence, in the particular circumstances of this case. There arose no duty either on his counsel or the Court to enter into the arena. On the facts, the averment against him was not a matter that had occurred out of the blue. It had been on the cards since the beginning of the case. He had all the time available to consider his position. There is no indication that he was taken by surprise in any way as learned counsel for the Respondents put it. If with the opportunity given to him, he did not apprise himself of the law, he is deemed to know the law. Eventually, he preferred to meet the allegation with his explanation.

- (49) On the other aspect of this ground as to whether the explanation was acceptable and should have been accepted by the Court, we shall address it along with Ground 1 (c).

GROUND 1(c)

- (50) The grievance of Mr Bernard Georges under Ground 1 (c) is that the Constitutional Court did not properly examine whether the facts constituted illegal practice. The examination is extremely cursory in the judgment, according to him, in its finding that the Appellant had committed an illegal practice by publishing and distributing leaflets in the Tamil language to voters from the Tamil Community in Seychelles promising them senior posts in his government, thereby inducing them to vote for him or refrain from voting for the elected President contrary to section 51(3)(b) of the Election Act.

- (51) The operative part of the judgment of the Constitutional Court on the question *in quo* reads:

“While it is not averred that the acts of the Petitioner affected the results of the elections in any way, it is clear that his acts satisfy the provisions of section 51(3)(b) to constitute illegal practices. Even if he was not intending to contravene the law, we view such acts especially by the leader of a political party to be reprehensible and irresponsible. We were particularly dismayed by his non chalance and levity when challenged with the evidence which he admitted. We are obliged to make a report on

this matter to the Electoral Commission in terms of striking his name off the register of electors.”

Court’s examination of the evidence

- (52) The judgment does not give ample details of the examination of the content of the leaflet in what way it constituted an illegal practice. But the language used by the court and the record of the proceedings do show that the court had properly ascertained that the acts constituted an illegal practice within the definition of section 51(3)(b). The leaflet even if in Tamil was translated in English and cross-examined upon. The content was admitted by the Appellant. The only criticism that can be made of the judgment is that it could have been more elaborate.
- (53) This is an exercise we shall carry out deriving our powers under rule 31(3) of the Rules of the Court of Appeal. At the same time, we shall see whether the Court reached the right decision on the facts available on record since it is all a matter of examining a leaflet in the light of the answers given by the Appellant. This will also help us to help users of this law to demarcate the line between the lawful and the unlawful. When are promises made in an electoral campaign lawful? And when are they unlawful?
- (54) We shall look at three cases from three jurisdictions. The first is **Ringadoo v Jugnauth [2007 SCJ 80]** which was confirmed on appeal by the Judicial Committee of the Privy Council in **Jugnauth v Ringadoo [2008 UKPC 50]**. One of the allegations was the offer made by an elected member to the Muslim Community for the extension of their cemetery. The second is the case of **Erlam & Ors v Rahman & Ors [supra]**, the Tower Hamlets case, in England. This had to do with the issue of an elected Mayor, a Bangla Deshi, canvassing for support from the Bangla Deshi community. We shall then compare them with the Indian case of **Subramaniam Balaji v Government of Tamil Nadu & Others Civil Appeal No. 5130 of 2013** where two competing parties made competing promises of gifts in cash and kind, including household items to certain classes of people. This will enable us to consider the present case

where the Appellant issued a leaflet comprising promises to the Tamil Community for positions and posts in his proposed government.

The impugned leaflet

(55) The leaflet reads:

“Beloved Tamil hearts you are more than my life and I, Ramkalawan who likes you all write this note to you.

There is a strong rumour that I will send all Tamil people out of this country and it is a wrong message and I completely deny as rumour.

My grandfather hailed from the State of Uttara Pradesh in India who migrated and settled in Seychelles.

While I was a religious preacher and as an Opposition Leader I have participated in all wedding ceremonies, birthday functions and funerals of all Tamil origin and I participated with my full heart; I prayed God with my full hearty and Blessed all.

I merge myself and live together with Indians and Tamils.

If all of you join together and make me as President, I shall declare Deepavali as Government holiday.

Those who are eligible from Tamil and Indian origins will be suitably placed positions in my cabinet; principal secretaries.

To flourish all trades of the trading community, my government shall do the necessary and I rule accordingly.

All suitable consultations shall be made and resolve those stumbling blocks amongst small traders.

My Government shall find a solution to VAT very soon.

Those of you brothers who are afraid of this party in power since last 38 years need to join together now and support my arm; I will be one amongst you when I rule this country.

If I come to power, suitable tax concession arrangements shall be made for those people whose income remain less than Rupees 10,000.00.

Laws of GOP and Immigration will be simplified.

My government shall ensure that Seychelles Rupees is not devalued.

My Government shall take suitable and necessary steps to develop the religions, language and race of all Indians and Tamils.

A time slot will be allocated to Tamils in Television and Radio (video and audio).

While recognizing those long serving Indians and Tamils in Government service, I shall streamline the Ministry of Health and Ministry of Education;

If we come to power, our government shall not disturb those private employers in employment sector and never disturb at any time;

To improve the economy of Seychelles (country) we shall do all the necessary infrastructure.

The above are not just words with decorations I request all of you to support me and other parties who join me and I humbly request you to do so.

You should also be instrumental for this country to have a good rule flourishing like a flower.

SUPPORT RAMAKALAWAN AND MAKE HIM VICTORIOUS TO HAVE THE STATE OF LORD RAM IN THE SEYCHELLES.”

The Explanation of the Appellant

- (56) It is the explanation of the Appellant that the leaflet is no more than an election manifesto and an election promise like so many electoral promises. We would tend to agree with him and others who would hold that view. Except that at the same time, at some places, the leaflet loses the character of an electoral manifesto and becomes a document of bargain.

Court's consideration of the content of the impugned leaflet

- (57) The major part of it does look like an 'election manifesto' directed to the Tamil Community. It assumes that this community should be afforded a greater participation in his government. Whether it really qualifies to be considered as an election manifesto, we shall analyze in due course.
- (58) A nice pun is made on the era of Ram and the first syllable of his own name, written to win their hearts. He adds "I merge myself and live together with Indians and Tamils." There is nothing in it. No promise is made. The concluding tour de force: "SUPPORT RAMKALAWAN AND MAKE HIM VICTORIOUS TO HAVE THE STATE OF RAM IN THE SEYCHELLES," is political jargon. Account needs to be taken of the fact that the Opposition, in its electoral campaign, is condemned to launch its campaign based on errors of the past to sell a new vision for the future while Government has the advantage of focusing on its achievements in office.

Where does the leaflet hurt section 51(3)(b)?

(59) At a few places, however, the leaflet begins to hurt the law. It is where it says:

“If all of you join together and make me as President, I shall declare Deepavali as a Government holiday. Those who are eligible from the Tamil and Indian origins will be suitably placed positions in my cabinet; principal secretaries.”

“If we come to power, our Government shall not disturb those private employers in employment sector and never disturb at any time.”

“The above are not just words and decorations ...”

(60) The leaflet has just used a few words too many. The promises are not just words. That it was all meant to attract their electoral support to make him President with a reciprocal commitment is patent. Targeting a particular community like the Tamils within the larger community of Seychellois, in a language written to them, not accessible to the rest of the community is a risk that a candidate takes just like the Bangla Deshis in the Tower Hamlets case and the Muslim Community on the **Jugnauth v Ringadoo [supra]** case.

As rightly decided in the Tower Hamlets case:

“There is world of difference ... between what might, if unkindly, be termed a general ecclesiastical bleat, and (am) especially targeted letter aimed at one particular body of the faithful telling them their religious duty is to vote for candidate A and not candidate B.

(61) What is the law which was violated by those words? Section 51(3)(b) reads:

51 (3) For the purposes of this section and sections 44, 45 and 47, a person commits an illegal practice where the person—

(a)

(b) directly or indirectly, by that person or by any other person on that person’s behalf, gives or procures or agrees to give or procure or to endeavour to procure, any office, place or employment to or for a voter, or to or for any person, in order to induce the voter to vote or refrain from voting.”

(62) Had the same things been stated differently, it would not have fallen foul of the law. It would have passed the test of legitimacy if he had stated in the leaflet:

for example, that the Tamil Community needs to have a proper recognition in the public affairs of Seychelles; that Deepavali needed to have a proper recognition; that the community needed to be properly represented in the Executive and the Civil Service etc.

- (63) The reason is that in this case it is the offer to cater for perceived past omissions. But in the way it is written, it is striking a bargain. "Support me for Presidency in return for a Ministerial post in Cabinet and senior post in the public service. This is not an empty word but an undertaking." The proximity to the election dated is to be noted. The leaflet is dated 9th December 2015 and the elections were due on the 16th December so that it must have been circulated in between at the time of the electoral sprint. How near to the polling day an impugned activity takes place is an important factor: see **Barrow-in-Furness [4 O'M & H. 77]; Ringadoo v A.K. Jugnauth [infra]**.

The mischief lies in the element of private bargain

- (64) The mischief lies in the element of bargaining. As the reasoning in **Ringadoo v A.K. Jugnauth [2007 SCJ 80]** confirmed on appeal by the Judicial Committee of the Privy Council in **Jugnauth A.K v Ringadoo [2008 UKPC]**:

"The campaign was conducted not so much along the line of government performance or but on the basis of "donnant donnant" where votes, individually and collectively, were exchanged for jobs in the civil service."

- (65) In **Ringadoo v Jugnauth [supra]**, the averment was that on the 29th of December 2005 at a Centre the respondent had officially announced the acquisition of land of 2 arpents to be given to the Islamic Community as a cemetery with the sole design of inducing, influencing and bribing the voters of Muslim faith. The Court decided:

"A candidate does not fall foul of our electoral law against bribery where he is selling so to speak government performance or electoral programme or party manifesto to attract votes. That is normal electoral campaigning. ... He will fall foul of the law when he is involved in buying votes: i.e. exchange vote for money or any other valuable considerations instead of using cogent arguments to influence the voters. There must be an

element of bargaining and the corrupt motive will stand out so obviously from the facts.”

(66) Redressing grievances of people of a particular community or locality is part of the “*politique de proximité*.” But this “*politique de proximité*” will not shield the politician where the offer of redress is exchanged for votes: see also **Harjit Sing v Umrao Singh [AIR 1980 SC 701]**.

(67) The Supreme Court took the view that “to announce certain decisions a few days before polling whether by Cabinet or the Prime Minister may constitute an act of corrupt practice of bribery if done for a purpose which was obviously to induce the voters and which has nothing to do with the political manifesto.”

(68) In the case of Tower Hamlets, the candidate was playing two cards: the race card and the religious card. In our case, it is a community card. The focus as here was on a letter which contained the then Mayor’s message. The content may be ignored. But what is important is, as has been stated in the operative part of the decision: “*Although the document speaks of the ‘community’ throughout in a neutral fashion, it must be recalled that the letter was published solely in the Bengali language in a newspaper whose readership ... was restricted to Bengali speakers. It had not appeared in the English section of the newspaper.*”

(69) Its pernicious character was condemned as “a specially targeted letter aimed at a *particular body of the faithful, telling them their religious duty is to vote for candidate A and not for candidate B.*” The court sadly found that there was undue influence of the spiritual type and a breach of section 115(2) of the 1983 Act.

The concept of free and fair election is openness

(70) The role played by an open offer to needy people through a manifesto is highlighted in the case of **Subramaniam Balaji v Government of Tamil Nadu & Others [Civil Appeal no. 5130 of 2013.]**

- (71) While releasing its manifesto one party had offered free distribution of Colour Television sets to each household which did not possess same. The stated intention was to provide recreation and general knowledge to the household women, more particularly living in the rural areas. When the party was elected, forms were distributed for the purpose of screening the eligible recipients and implementing the scheme.
- (72) Another party offered in its manifesto grinders, mixers, electric fans, laptop computers, 4-gram gold thalis, Rs50,000-cash for women's marriage, green houses, 20 kg rice to ration-card holders, free cattle and sheep on certain basis to the needy but not necessarily those under the poverty line. When the respective parties were elected, forms were distributed for the purpose of screening the eligible recipients and implementing the scheme.
- (73) The Court held that to the extent that these were ventilated in the party public manifesto, the offers could not be taken to be bribes and illegal practices. They stemmed from their manifestos designed to achieving social and economic democracy in the pursuit of the political democracy enshrined in the Constitution. Thus, the freebies could not be regarded as a decision the court could enter into.
- (74) It goes without saying that even if one of the TV sets was offered for a vote which was not foreseen in the manifesto, it would have amounted to an act of corrupt practice.

Definition and role of a political manifesto

- (75) The acts and doings derive legitimacy from a public document disseminated to the wide electoral population for the purpose of ensuring a level playing field to every participant in the campaign. This is the role played by a political manifesto. What is a political manifesto? It is “a public declaration of intent, policy, aims etc, as issued by a political party, government, or movement,” as per Collins English Dictionary, ed. 2016. Merriam-Webster's Collegiate Dictionary, Eleventh Edition defines a

manifesto as “a written statement declaring publicly the intentions, motives, or views of its issuer.” It is the publicity aspect of it that makes it a manifesto in the sense that it is manifest and not restricted to a specific community. If any activity, including the freebies fall under it, it cannot be regarded as corrupt practice. But the same activity would fall foul of the law if it is not known to the rest of the nation, in a language that is understood by a small community as in this case. A bargain then is being struck privately with the rest of the electorate unaware.

(76) Openness is the key to a free and fair election. The people may only exercise their votes freely and fairly if they are “fully informed of the policies and qualities of all the political parties and candidates through appropriate electoral campaigns to enable voters to make an informed choice.” This extract is taken from the Shared Code of Conduct of the Political Parties and Stake Holders prior to the election in Seychelles of 2015.

(77) The Supreme Court in **Ringadoo v Jugnauth [supra]** also commented on the opprobrium of the conduct: a campaign conducted not along party policy line on an election manifesto but an offer made to a selected group against an offer for community support for election. The difference lies in whether it is a “*projet de société*” or a “*projet personnel*” that one is projecting.

(78) It is all a question of what you want to convey. It is all right to say to the people or any part of the people: “My party represents this vision for the future of the nation and its people. Your interests and your concerns fall within that vision.” But it is not right to say to them in private: “Your community has been marginalized. You vote for me. And I shall offer you a Ministerial position and a senior post in the public service.”

Cutting out the mischief in the leaflet

(79) Had the same message been conveyed differently it would have been regarded as permissible under the law:

1. that the Tamil Community forms an important section of the whole nation;

2. that the Constitution of the Republic speaks of a plural nation;
3. that they have a number of concerns which hitherto have passed unnoticed by successive governments;
4. that the community needs to be duly represented in the Civil Service and in the Cabinet;
5. that time should be allocated in the national TV for an exposure of their culture and festivals;
6. serious consideration should be given to their festival Deepavali as a public holiday.

(80) It may well be that this neutral language would have had greater impact on the community. What is the difference? The same activity stated in one way becomes the opposite of itself when stated in a different way. The difference is obvious when one says: "It is permissible to pray while smoking but it is not permissible to smoke while praying." The crux of the matter is what do you want to convey?

(81) The text as worded unhappily conveys the clear message of bargaining for votes, an undertaking to the community that they will obtain Deepavali as a public holiday and places in the Cabinet and senior posts in the civil service against their votes. Learned counsel has argued that there is nowhere the offer of vote mentioned. To us, that is clearly driven home by the design at the end of the document which shows a tick against his name in a simulated ballot paper. This is where it went wrong. We are not quite sure whether the Appellant had this leaflet vetted by his legal adviser/s before he released it. He should have had it so vetted.

(82) This is where what may have been an otherwise worthy political enterprise to pursue went wrong and in our view, therefore, the conclusion of the Constitutional Court that the Appellant had fallen foul of the law cannot be disturbed.

OUR DECISION ON BREACH OF SECTION 51(3)(b)

- (83) Our answer to paragraph (c) is that, while it is true the Court should have gone into more details to see whether the case against the Appellant was proved, the Constitutional Court did not err in substance in deciding as it did.

GROUND 2

The Constitutional Court erred in finding that the Appellant had committed an illegal practice contrary to section 51(3)(b) of the Elections Act in that it failed to appreciate that the Newsletter had not contained any stipulation as to vote, had not made any definite promise to any voter, had not been specific as to a voter, and had not offered to procure any office in exchange for a vote.

- (84) Before we consider this ground, we may set the record right. The leaflet circulated was not by any standard a Newsletter. It was a private correspondence to the Tamil Community in the Tamil language obviously for their private readership.

Single voter v Community Votes

- (85) Under this ground, if the argument of learned counsel is that section 51(3)(b) only applies where the acts and doings are directed to a single voter and not to a community of voters, the argument is hard to follow. The legislator cannot have intended that where the illegal practice involves a sole voter, section 51(3)(c) applies but where it concerns many voters forming a community or class, it does not. We are not prepared to go with him along this line. On the contrary, the higher the number of people targeted, the greater the gravity. And where it is generalized, there is a duty to render the election as a whole void.
- (86) However, there is a much shorter answer to this argument. Section 20 of the Interpretations and General Provisions Act reads:

“20. In an Act words in the singular include the plural and words in the plural include the singular.”

GROUND 3

The Constitutional Court erred in deciding to report that the Appellant had committed an illegal practice without first:

(a) Considering and giving the Appellant an opportunity of explaining whether the act or omission constituting the alleged illegal practice had been done or made in good faith or through inadvertence or other reasonable cause, or

(b) Considering whether, taking into account all the relevant circumstances, and after having heard the Appellant in that regards, it would be just that the alleged illegal practice should be an exception under the Elections Act and that the Appellant should not be subject to the consequences arising from the commission of the illegal practice. finding that the Appellant had committed an illegal practice contrary to section 51(3)(b) of the Elections Act.

(87) We shall take both limbs in the above ground together. What happened was that the moment the Court found that the case alleged against the Appellant was proved, it moved forthwith to the reporting procedure: section 47(1)-(4). These provisions read:

“(1) At the conclusion of the trial of an election petition, the Constitutional Court shall report in writing to the Electoral Commission—

- (a) whether an illegal practice has been proved to have been committed by a candidate or an agent of the candidate and the nature of the practice;*
- (b) the names and descriptions of all persons who have been proved at the trial to have been guilty of an illegal practice.*

(2) Before making any report under subsection (1)(b) in respect of a person who is not a party to an election petition the Constitutional Court shall give the person an opportunity to be heard and to call evidence to show why the person should not be reported.

(3) When the Constitutional Court reports that an illegal practice has been committed by a person, the person is disqualified for a period of five years from the date of the report from being registered as a voter and from voting at an election or a referendum under this Act.

(4) The Electoral Commission shall cause the name of the person reported under subsection (1) to be removed from the register of voters of

the electoral area where the person is registered as a voter.”

(88) In that exercise, the Constitutional Court did not apply the provision of section 45(4) which vests it with power to consider any circumstance which would have assuaged the harsh legal consequence of the act and omission of the Appellant. It felt bound by the wording of section 47(1) that at the conclusion of the trial of an election petition, the Court shall report the fact to the Electoral Commissioner which would lead to his disqualification.

(89) We take the view that the Court should have considered the provision of section 45(4) to ascertain whether there existed reasons in the case which would have distilled the grave consequences of the reporting and disqualification. In other words, a judicious application of section 47(1) should have been made in the light of the provisions under section 45(4). This subsection reads:

“(4) Where it appears to the Constitutional Court on an election petition—

(a) that an act or omission of a candidate or the agent of a candidate or any other person, which, but for this section, would be an illegal practice under this Act, has been done or made in good faith through inadvertence or accidental miscalculation or some other reasonable cause of a like nature; or

(b) that upon taking into account all the relevant circumstances it would be just that the candidate, agent of the candidate or the other person should not be subject to any of the consequences under this Act for such act or omission,

the Court may make an order allowing the act or omission, which would otherwise be an illegal practice under this Act, to be an exception to this Act and the candidate, agent or other person shall not be subject to the consequences under this Act in respect of the act or omission and the result obtained by the candidate shall not, by reason only of that act or omission, be declared to be void.”

Application of Natural Justice

(90) However, even if section 45(4) had not existed, natural justice demanded that before the report were to be made, the appellant was entitled to be heard before the coercive order could be made. As was stated in 1615 in **Baggs case [11 Co. Rep 93 b]**, bodies entrusted with decision making power could not validly exercise it without first hearing the person who was going to suffer. That proposition of law has been made our own in the case of **Jeremie v Minister CS 154/1994, 20 March 1995** whereby:

“It is the rule of natural justice that when one sits in judgment on others the decision must be supported by valid reasons.”

(91) In **Russell v Duke of Norfolk [1949] 1 All ER 109 at 119**, Tucker LJ stated as follows:

“The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth.”

In other words, once a Court has made a finding that carries with it sanctions of a coercive nature, particularly of this nature which affects a fundamental Charter right, consideration should be given as to whether the sanction fits the act or omission, is of a grave or light nature before the sanction is imposed proportionally. After a finding that the case was proved against the Appellant, it was open to the Court to give an opportunity to the Appellant to consider the applicability of section 45(4), account taken of the legal consequence that was to follow. This Ground succeeds.

FINAL CONCLUSION ON MERITS OF THE APPEAL

(92) The Appeal is dismissed on Grounds 1 and 2. But it succeeds on Ground 3.

(93) In the circumstances, in the exercise of our powers under Rule 31(1), we would invite learned counsel of the Appellant, if he so wishes, to address us now on the application of section 45(4) to the facts of this case. Otherwise, we assume that the facts are already apparent and the submissions, especially those under

paragraph 12 and 13 of his Heads of Argument dated 4th July 2016, have sufficiently canvassed the points, in which case we shall proceed under Rule 31(3) to consider whether it is just to report the matter to the Electoral Commissioner under section 47(1) of the Elections Act.

FINAL DECISION

APPLICATION OF SECTION 47(1) OF THE ELECTIONS ACT

- (94)** Further to our decision on the grounds of appeal, we have considered the facts of this appeal and the submissions of learned counsel for the appellant and the stand taken by the Respondents.

- (95)** We take the view that the acts and omissions arose in a one-off incident through inadvertence or misapprehension of the law.

- (96)** Taking that into account and all the relevant circumstances, we take the view that it would be just that the candidate should not be subject to the legal consequences under the Act.

- (97)** We, accordingly, spare the Appellant the application of section 47(1) of the Elections Act with respect to the Reporting requirement to the Electoral Commissioner. In the circumstances, we make no order as to costs.

S. Domah (J.A)

I concur:

F. MacGregor (PCA)

I concur:

J. Msoffe (JA)

Signed, dated and delivered at Palais de Justice, Ile du Port on 12 August 2016

