IN THE COURT OF APPEAL

ST. VINCENT

Civil Appeal No. 1 of 1972

Between: HUDSON KEMUEL TANNIS Appellant

and

EMERY WINSTON ROBERTSON Respondent

Before: The Honourable the Acting Chief Justice
The Honourable Mr. Justice St.Bernard
The Honourable Mr. Justice Louisy (Acting)

H.B. St.John, Q.C.(Barbados) and J. Adams for appellant
C.O. Phillips, Q.C. and F. Adams for respondent

Jan. 30, 31, Feb. 1, Mar. 14, 1973

JUDGMENT

CECIL LEWIS, C.J.(Ag.)

At a general election held in St. Vincent on April 7, 1972, the parties to this appeal were rival candidates for election to a seat in the House of Assembly to represent the West Kingstown constituency. Hudson Kemuel Tannis (hereinafter referred to as the appellant) was declared by the Returning Officer to be duly elected. The unsuccessful candidate Emery Winston Robertson (hereinafter referred to as the respondent) filed an election petition dated April 27, 1972 in which he sought a declaration that the appellant "was not duly elected and that his election and return are wholly null and void."

The legislation regulating elections in St. Vincent is an ordinance originally intituled the Legislative Council (Elections) Ordinance No. 13/1951 but by virtue of s. 9(5) of the Existing Laws (Adaptation) Act No. 3/1969 the title of this Ordinance was changed to The House of Assembly (Elections) Ordinance; and for the purposes of this appeal it will be referred to as "the Ordinance".

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It was alleged in paragraph 3 of the petition that the appellant "was by himself and by his agents guilty of the corrupt practices of bribery, treating, undue influence and of aiding, abetting and counselling the commission of election offences." These allegations failed.

It was also alleged in paragraph 4 of the petition that "many irregularities were committed in the course of the said election in the said /West Kingstown_7 Constituency". The irregularities were specified but the only one relevant to this appeal is that contained in sub-paragraph (iii) of paragraph 4 which reads:

> "4(iii) That contrary to section 70 of the Ordinance Alfred Mandeville of New Montrose, the authorised agent of the said Hudson Kemuel Tannis, left the Polling Division No. 6A several times and communicated with Gale De Shong of Villa and H.B. Crichton of Frenches and others and disclosed the names and number of persons who voted in Polling Division No. 6A."

This allegation was the only one which the trial judge found to be established and on the basis of his finding (the terms of which will be later mentioned) he declared the appellant's election void and issued a certificate to that effect to the Governor pursuant to s. 75 of the Ordinance.

The questions which fall to be decided in this appeal are: (a) was there sufficient evidence to justify the judge's finding? and (b) if so, what is the effect in law of his finding.

The section of the Ordinance which requires the secrecy of the voting at a polling station to be maintained in section 70 which reads as follows:

> "70. (1) Every officer, clerk and agent, in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate except for some purpose authorised by law before the poll is closed, to any person any information as to the name or number on the list of electors of any elector who has or has not

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applied for a ballot paper or voted at that station, and no person shall interfere with or attempt to interfere with an elector when marking his vote or otherwise attempt to obtain in the polling station any information as to the candidate for whom any elector in such station is about to vote or has voted.

(2) Every officer, clerk and agent in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting and shall not attempt to communicate any information obtained at such counting as to the candidate or candidates for whom any vote is given in any particular ballot paper.

(3) No person shall, directly or indirectly, induce any voter to display his ballot paper after he has marked it so as to make known to any person the name of the candidate or candidates for whom or against whose name he has so marked his vote.

(4) Any person who acts in contravention of any of the provisions of this section shall be liable, on summary conviction, to imprisonment for six months or to a fine of two hundred and forty dollars."

The pertinent material relating to the allegation contained in paragraph 4(iii) of the petition on which the judge based his finding is to be found in the evidence of the witness hereinafter mentioned.

The respondent said in examination-in-chief:

"After lunch I saw Tannis's Agent, Alfred Mandeville at No. 6A Polling Station. He was leaving the Polling Station and speaking to Gale DeShong, one DeSouza and to H.B. Creighton.

Gale De Shong used to go around with Tannis on his campaigns.

DeSouza campaigned in the Stoney Ground area for Tannis.

When Mandeville left this Station he had an electoral roll on which certain names were ticked as they voted.

DeShong would drive away so would Creighton and DeSouza after Mandeville spoke to them:

The 3 men would come singly.

I spoke to Stevens the Presiding Officer objecting to the conduct of the people and

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drew his attention to what was going on.

He replied saying that the agent could leave any time he wanted provided he was there during the last hour.

Others were in DeShong's car and they went into the station to vote leaving after in DeShong's car.

DeSouza came with Cyril Roberts and others but after Mandeville spoke to him and pointed to the electoral list, Roberts the driver drove off with everyone."

George Maule a witness for the respondent said:

"We went to Sgt. Samuel's Polling Station. There I saw DeSouza in the road standing. Mandeville came from the Station with an electoral list and came and spoke to DeSouza. He was pointing to the list. Cyril Roberts drove up in a car also.

DeSouza left by car with Roberts after Mandeville spoke to him.

Mr. Robertson spoke to the Presiding Officer who called Mandeville back to the Station and told him he can't do such things."

Beulah Stapleton the respondent's agent at Polling Station No. 6A said:

"On polling day I was agent for Mr. Robertson at Station 6A Sgt. Samuel's Residence.

Mr. Tannis had an agent there. I had an electoral list so did the other agent, Mandeville.

As the people came up to vote the agent for Mr. Tannis ticked off the names on the list.

He left the Polling Station many times to communicate with cars and the people in them. I did not recognise the people to whom he spoke. He communicated with the drivers of the cars.

Mr. Robertson came to the Station and I reported to him.

Robertson spoke to the Presiding Officer and said he objected to Mr. Mandeville leaving the Station and communicating with the drivers."

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The appellant's evidence on this issue was as follows:

> "DeShong was active in taking people to the polls. I dont know Charles Roberts. He is a supporter of mine. DeSouza came to my table and left on several occasions. DeShong never said that certain people had not voted nor had De Souza. DeShong was my assistant. DeSouza was also helping at the table at Fordes."

The appellant's agent Mandeville said in examination-in-chief:

> "On Election day I was agent for Tannis at Station No. 6A at Samuel's home.
>
> I know Gale or Bertram DeShong who came to the Polling Station. I spoke to him. I came out into the road to do so. I know Mr. Creighton He did not come to the Station on that day.
>
> As far as DeShong is concerned I did not disclose the names of the persons who had voted at 6A Station. I gave someone the poll list."

In cross examination he said:

> "I saw Mr. Robertson there several times. I did not hear his agent report to him that I left Station and showed lists to others. Nor did I hear Robertson do so. I had given my list to one of the workers and he took it away. I did not show any to DeShong. I was not pointing to a list when I spoke to DeShong. DeSouza came there once, DeShong twice. I spoke to DeSouza but did not show him my list - the second list - I did not tell him of who voted."

When re-examined he said:

> "I saw Mr. Tannis at Polling Station, I had a list there when he came the second time I still had the first list.
>
> The second list came after mid-day. Mr. Tannis came into the Station.
>
> Someone took the first list from me and gave me a second list at the Polling Station.
>
> DeSouza came in front the Polling Station."

Bertram DeShong who is also known as Gale DeShong said in examination-in-chief:

> "On 7.4.72 I was in Walker Piece and then I went to the Polling Station where I spoke to Mr. Mandeville. I left but did not find

/Mr. Edwards..

> Mr. Edwards whom I was looking for. Later I went back to the Polling Station with 3 persons, came out and I left.
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> At the Station no one came to me."

In cross examination he said:

> "At Station No. 6A I saw Mandeville inside. I called him and asked for someone. He did not come to me with any paper in his hand. I never discussed people who had voted or yet to vote.
>
> I did not see Hubert DeSouza on 7.4.72.

Grenville Stevens who was the Presiding Officer at Polling Station No. 6A was called as a witness for the appellant. He said:

> "Tannis agent left the Station before closing hour. Robertson drew my attention to the fact that Mandeville had left his position. He did so twice. He took his Electoral list with him and I saw him talk to persons whom I dont know.
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> On two occasions I saw Mandeville speaking to persons in a car."

After a very careful review of this evidence the trial judge came to the following conclusion:

> "I am satisfied that the agent, on more than one occasion, went to a car in which Gale DeShong, among others, was present, took with him his lists on which was indicated those who had already voted and those who had not done so at Polling Station No. 6A and that he communicated the information thereon to those persons.
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> I agree that no one actually heard what the agent said to those persons but the circumstantial evidence is strong and compelling and it convinces me that there was an infringement of the secrecy of the poll.
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> In addition, the agent failed to identify the person who relieved him of the first list or to state with any degree of precision the circumstances under which it was surrendered but the significant fact that the first list was taken away and replaced by a second sometime around mid-day, that is to say about mid-way between the 10 hour period allotted for voting, is per se another means whereby the information contained in that first list was communicated to others."

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The judge in effect found that there were two separate communications made by the appellant's agent. The first was when he went to a car in which Gale DeShong and others were seated and took his list with him. He held that on the evidence and in the circumstances there was a communication to DeShong and the other persons in the car. The other communication which the trial judge found established was when the agent gave his first list to an unidentified workman. He held that this was "another means whereby the information contained in that first list was communicated to others."

It was submitted by counsel for the appellant that having regard to the following factors, viz: (a) the judge's statement that his finding was based on circumstantial evidence (b) his finding also that no one heard what the agent said to the persons in the car (c) the evidence pointed as much to the possibility that a disclosure may or may not have been made (d) the ordinance imposed a criminal penalty for a contravention of s. 70 thereof (e) the requirement as laid down in Walcott v. Hinds 10 W.I.R. 521 at 522 that proof must be on a balance of probability, and that the degree of probability must be high having regard to the gravity of the issue involved, the judge ought not to have found the allegation in paragraph 4(iii) of the petition proven, as, on the evidence, all that could reasonably be said to have been established was that someone did in fact have an opportunity of reading the list but this was not in itself sufficient to satisfy the court that the person did in fact read the list. I am unable to accept this submission. I am clearly of the opinion that despite the denial by the agent that he did not disclose to anyone the names and numbers of persons who had voted, and Gale DeShong's denial that he and the agent had discussed who had voted or were yet to vote, there was sufficient material contained in the evidence of the respondent, the witnesses

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George Maule and Beulah Stapleton and the appellant's own witness, Grenville Stevens, the Presiding Officer, on which the trial judge, bearing in mind the standard of proof required in the case of this nature, could reasonably come to the conclusion that there had been an unauthorized communication to Gale DeShong resulting in a contravention of s. 70(1) of the Ordinance.

I am also of the opinion that the admission by the appellant's agent as to the manner in which he dealt with the first voters list conclusively established that he had infringed the secrecy of the voting at Polling Station No. 6A. The fact that he had given his voting list to one of the workers, and that someone had taken his first list from him and given him another shows that he had parted with possession of the list. Since it is regarded as being one of the functions of an agent at a Polling Station to take a note of the names and numbers of persons voting at that station, it is reasonable to assume that the appellant's agent had ticked off on his list the names and numbers of persons who had voted at Polling Station No. 6A. The respondent said in his evidence that "when Mandeville left this station he had an electoral roll on which certain names were ticked as they voted". Accordingly, when the worker received the list, he, and any other person to whom he may have shown it would be able to ascertain the names and numbers of the persons who had voted at this Polling Station. This constituted a communication to the worker in question. S. 70(1) of the Ordinance says that an agent "shall not communicate except for some purpose authorised by law before the poll is closed, to any person any information as to the name or number on the list of electors of any elector who has .... voted at that station".

Here there is no evidence that the communication was for

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some purpose authorized by law. There is also no evidence to show that the poll was closed when the communication was made. Section 33 of the ordinance fixes the hours for taking the poll between 7 a.m. and 5 p.m. As the appellant's agent said he received the second list "after mid-day", it is reasonable to infer that this list was intended to replace the first list he had given to the worker, so that his act of giving away his first list must have preceded his receipt of the second which took place "after mid-day".

I am therefore of the opinion that there was sufficient evidence before the trial judge to justify his finding that there had been a communication of information by the appellant's agent in breach of s. 70(1) of the Ordinance. The crucial question however is whether under the provisions of the ordinance this finding can be used for the purpose of declaring the appellant's election null and void. The answer to this question is to be found by examining certain provisions of the St. Vincent Constitution Order, 1969 No. 1500 (Imp.) (hereinafter referred to as "The Constitution") and of the Ordinance.

S. 26 of the Constitution deals with disqualification for membership of the House of Assembly. Sub-section (3) of this section authorises Parliament to make provisions prescribing offences for which an elected member may be disqualified for membership of the House of Assembly if he is convicted thereof, or if on an election petition he is reported by the court hearing the petition be guilty of such offences. So this means in effect that if a person is elected to the House of Assembly when he is disqualified by any law made by Parliament pursuant to this sub-section his election will of course be void.

/Section....

Section 26(3) of the Constitution reads:

> "(3) Parliament may provide that a person who is convicted by any court of any offence that is prescribed by Parliament and that is connected with the election of elected members of the House of Assembly or is reported guilty of such an offence by the court trying an election petition shall not be qualified, for such period (not exceeding five years) following his conviction or, as the case may be, following the report of the court as may be so prescribed, to be elected as an elected member of the House or to be appointed as a nominated member."

The next section of the Constitution to which reference must be made is s. 104. This section which is to be found in Chapter IX (Transitional Provisions) deals with "existing laws" and the relevant sub-sections are, (1), (2) and (5). Each sub-section respectively makes provision with regard to the construction manner of taking effect and definition of these laws. The sub-sections read:

> "104.-(1) The existing laws shall, as from the commencement of this Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the West Indies Act 1967 and this Constitution.
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> (2) Where any matter that falls to be prescribed or otherwise provided for under this Constitution by Parliament or by any other authority or person is prescribed or prOvided for by or under an existing law (including any amendment to any such law made under this section), that prescription or provision shall, as from the commencement of this Constitution, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the West Indies Act 1967 and this Constitution) as if it had been made under this Constitution by Parliament or, as the case may require, by the other authority or person.
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> ... ... ...
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> (5) For the purposes of this section, the expression "existing law" means any Ordinance, law, rule, regulation, order or other instrument made in pursuance of (or continuing in operation under) the existing Orders or the West Indies (Dissolution and Interim Commissioner) Order in Council 1962(a) and having effect as part of the law of Saint Vincent or of any part thereof immediately before the commencement of this Constitution."

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The effect of subsection (2) of s. 104 of the Constitution is that if there is any matter which "falls to be prescribed or otherwise provided for" under the Constitution by Parliament or any other authority or person and this matter is already provided for under an existing law then that provision shall as from the commencement of the Constitution have effect as if it were made under the Constitution by Parliament or such other authority or person.

Section 67 of the Ordinance makes provision for the disqualification of elected members of the House of Assembly convicted of certain offences (and ipso facto for the avoidance of their election) and in so far as it is material reads as follows:

> "67. Every person who is convicted of bribery treating undue influence, or personation or of aiding, counselling or procuring the commission of the offence of personation shall (in addition to any other punishment) be incapable during a period of seven years from the date of conviction -
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> ... ... ...
>
> (b) of being elected a member of the Legislative Council or if elected before his conviction, of retaining his seat as such member."

Is this section therefore a provision which falls within the ambit of s. 104(2) of the Constitution as an "existing law" providing for a matter which falls to be provided for under s. 29(3) of the Constitution? In my opinion it is. It provides the penalty of disqualification for membership of the House of Assembly of any person <u>convicted</u> of the offences mentioned therein, and these are the only offences in the Ordinance which carry such a penalty. A conviction of an offence under this section will have the effect of avoiding an election. These offences also carry the additional punishments of a fine or imprisonment prescribed under sections 65 and 66 of the Ordinance.

/Secondly, ....

Secondly, is s. 67 also an "existing law" within the meaning of the definition of this expression in s. 104(5) of the Constitution? Here too answer must be in the affirmative. By article 15(1) of the West Indies (Dissolution and Interim Commissioner) Order in Council 1962 No. 1084, made under the West Indies Act 1962 it is provided that "all laws, not being laws to which the next following article applies, (i.e. Federal Laws) that are in force immediately before the appointed day shall remain valid after the beginning of that day as respects each Territory notwithstanding the dissolution of the Federation. The Federal laws were continued in force by article 16 of this Order in Council. The appointed day of course means the day on which the West Indies Federation was dissolved. St. Vincent was one of the Territories in the Federation, and the Ordinance having been in force since May 5, 1951 had effect as part of the law of St. Vincent immediately before the commencement of the Constitution which event took place on October 27, 1969.

It will be observed that section 29(3) of the Constitution refers to two situations in which persons may be subject to disqualification for membership of the House of Assembly by legislation made pursuant to the said sub-section, and these are (a) the situation where a person is convicted by any court of an offence prescribed by Parliament which is connected with the election of elected members of the House of Assembly and (b) the situation where a person is reported guilty of such an offence by the court trying an election petition. S. 67 of the Ordinance specifically provides for the first situation. It does not in terms provide for the second but this does not affect its status as an "existing law" falling within the ambit of s. 104(2) of the Constitution and providing for a matter which falls to be provided for under s. 29(3) of

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the Constitution. Since s. 67 of the Ordinance is an "existing law" then the provisions of sub-sections (1) & (2) of s. 104 apply, and this existing law as it had effect at the commencement of the Constitution must be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution. This means that this section will have to be construed as though the second situation envisaged by s. 29(3) of the Constitution were therein provided for and accordingly the section would read something like this:

> "Every person who is convicted of bribery, treating undue influence or personation or of aiding, counselling or procuring the commission of the offence of personation, or who is reported guilty of any of these offences by a court trying an election petition shall (in addition to any other punishment) be incapable during a period of five years from the date of conviction, or of the report as aforesaid -
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> (a).....
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> (b) of being elected a member of the House of Assembly or if elected before his conviction, or before the making of the said report, of retaining his seat as such member."

The offence created by s. 70 of the Ordinance prohibiting disclosure of information which might infringe the secrecy of the poll, is not an offence included among those in s. 67 of the Ordinance carrying a penalty of disqualification for membership of the House of Assembly either on conviction thereof or as a result of a report by a court trying an election petition of a finding of guilt of such an offence against any person. Since disqualification for membership of the house of Assembly under the Ordinance (and ipso facto, avoidance of an election thereto) attaches only to the offences mentioned in s. 67 it was not competent for the judge to hold that the contravention of s. 70(1) of the Ordinance which he had found to have been committed had the effect of disqualifying the appellant and so rendering his election void as he declared.

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The only sanction provided by the Legislature in respect of the commission of an offence under s. 70 of the Ordinance is that prescribed in sub-section (4) thereof. This is imprisonment for 6 months or a fine of $240 on summary conviction of the person found guilty of the offence.

It may be of interest to note that s. 53 of the U.K. Representation of the People Act 1949 which deals with the requirement of secrecy at polling stations contains provisions corresponding to those in s. 70 of the Ordinance and the penalty provided in this Act for a breach of those provisions is a term of imprisonment not exceeding 6 months on summary conviction of the person committing the offence.

I have reached the conclusion that the judge was not authorized by the Ordinance to declare the appellant's election void by reason of the construction which I have placed on the Ordinance, and it is gratifying to find support for this conclusion in the Bolton Case (Omerod v. Cross) (1874) 31 L.T. 194, reported in 2 O'Malley and Hardcastle's Reports 138 at pp. 141 and 142. This was a decision under section 4 of the Ballot Act 1872 of England the material part of which reads as follows:

> "Infringement of secrecy
>
> 4. Every officer, clerk, and agent in attendance at a Polling Station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate except for some purpose authorized by law before the poll is closed to any person any information as to the name or number on the register of voters of any elector who has or has not applied for a ballot paper or voted at that station. ....."

This section is identical with the corresponding part of s. 70 (1) of the Ordinance save that for the words "register of voters" in the English Act the words "list of electors" are used in the local legislation.

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The facts in the Bolton Case as stated at pp. 141 and 142 of the O'Malley and Hardcastle report are as follows:

> "It was proved that on the polling-day the returning officer visited the various polling stations in company with the Town Clerk. At each of the polling stations he remarked that the personation agents for the Respondent Cross were furnished with a register of the voters to which tickets were attached opposite the name of each voter. As soon as a voter had voted the agent stealthily tore off the ticket and put it in his pocket, and subsequently conveyed it to some person outside the polling station, and by this means persons outside knew, while the poll was going on, who had voted and who had not voted. After calling the attention of the Town Clerk to what he had observed, the returning officer communicated with Mr. Winder, the Respondent's agent, who on the night before the election, upon hearing that something of the kind was contemplated, had expressly forbidden it to be done. Mr. Winder immediately wrote to each of the personation agents to request them to desist from what they were doing, and the returning officer observed, on again visiting the various polling stations, that some of the agents had desisted, but some had not. The returning officer subsequently communicated what he had observed to the Home Secretary.
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> It was submitted by the Petitioners that this proceeding was a deliberate and wilful violation of the provisions of the Ballot Act, and that in consequence the election ought to be declared void."

Mellor, J. in his judgment said:

> "There is no doubt that the Legislature, when it passed the Ballot Act, did intend that that should be a perfectly secret mode of voting, as far as any instrumentality or machinery which it could provide could make it so. It was new in the English law, it was new in the law of elections, nothing of the kind had occurred before; and therefore when the Legislature for the first time enacted that voting should take place by ballot, and prescribed in very careful language and terms, so far as they could, the precise machinery by which it should be carried into effect, they did intend that secrecy should be preserved as far as itwas possible. But when the Legislature was for the first time creating the machinery of voting by ballot, (and there was no then-existing machinery which this could supplement, it was entirely new in its principle and entirely new in its machinery) it was for the legislature to provide the safeguards by which that secrecy should be protected and maintained, and if the Legislature have failed in doing that, the misfortune may be the misfortune of the public, but the fault at all events lies at the door of the Legislature. Now I am satisfied upon the construction of the

/Ballot....

Ballot Act that a deliberate violation of the provision with regard to secrecy was attempted to be effected in this borough. I am certain that those persons who placed these tickets upon the register which were seen by the Mayor to be stealthily put into the pocket of the personation agent and conveyed by him manifestly to some persons outside, committed a violation of the statutory declaration which they had made, and committed an offence within the meaning of the provisions of the Ballot Act, thereby rendering themselves liable to serious punishment. But that is the only protection which the Legislature has provided. They undoubtedly thought that that would be abundantly sufficient to secure the secrecy of the election. If it has failed to do so, it is because it is not possible for any machinery to be invented which shall secure perfectly the object which the Legislature had in view. There is almost always a door left open to persons who are willing (as Mr. Leresche has very pertinently said) to run the risk of undergoing any amount of punishment, provided they can only benefit their party in an election. As a rule, however, I do not think that will often happen, and I do not think it would have happened here if the parties themselves had thoroughly understood the serious consequences which were likely to follow from it. However, it is clear that it was deliberately done, because when Mr. Winder found that it was proposed to be done he remonstrated and protested against it, warning them that it was contrary to the provisions of the Ballot Act, and therefore placing them in the condition of transgressing the law intentionally. But, as it seems to me, no foundation for attacking the seat can arise from the act of the personation agent, or any other officer connected with the election. The punishment is specified by the Legislature; it must be found within the four corners of the Act of Parliament, and I have no power, neither has the common law any power, to supplement any additional penalty upon either the persons who transgressed the law or the persons for whose sake or in whose favour such an act may have been done. Upon that part of the case I entirely concur with what was said by my brother Martin in his evidence before the Select Committee upon Elections. When he was describing what the result would be of a breach of the law, he was asked by Sir George Grey, 'Do you mean that if it was proved that a candidate had committed acts which were illegal and which subjected him to penalties (it is as 'a candidate' there, and I agree that we must read it in the same light in this case as if it had been a candidate, assuming it was one of those things which came within the general law of agency) the judge could take no notice of it, unless it was an

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> act which vacates the seat?'-and in answer my brother Martin said: 'I think certainly that the mere doing of an act which the Act means to be subject to a penalty, but does not declare to affect the seat, could not by possibility affect the seat.' Now that is the very distinct opinion of a most learned and able judge, whose disposition as the disposition of everybody who tries to look straight into things would be, is to give effect as far as possible to the provisions of an Act of Parliament; and I take it to be the duty of a judge to take care that he does not fritter away the meaning of Acts of Parliament by any subtle construction, but to give a bold (but at the same time a cautious) decision which shall further rather than defeat the object of any Act of this character. I am satisfied that there is nothing in this Act, however it may affect individuals, which can affect the seat. I grant that it is no great satisfaction to those whose interests may be in some degree affected by acts of this kind to be told that they can prosecute the offenders if they like. Anything more odious and objectionable than throwing it upon private prosecutors to proceed in these matters and prosecute the parties who are guilty I cannot conceive. However, that cannot affect the construction which I must put upon the Act of Parliament."

The point that where the Legislature has created an offence and provided a penalty therefore, that penalty is intended to be the only remedy available for a violation of the law creating the offence, is further emphasized at page 150 of the report where Mellor, J. was dealing with the effect of an illegal act deliberately done to influence an election. He said:

> "I agree with the opinion of the late Mr. Justice Willes; he was decidedly of opinion that a violation of an Act of Parliament which itself created the offence and provided the penalty could not avoid the election; all it did was to inflict penal consequences upon the persons who did the act".

These words exactly fit the circumstances of this case and I respectfully adopt them in support of my conclusion.

The trial judge held that the curative provisions of s. 75A of the Ordinance did not entitle him to disregard the violation of s. 70(1) of the Ordinance. S.75A reads as

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follows:

"Non-compliance with rules, etc., when not to invalidate election.

75A. Notwithstanding anything in the provisions of this Ordinance no election shall be declared invalid by reason of non-compliance with the provisions of this Ordinance or of the rules thereto or of the regulations made thereunder, or any mistake in the use of the forms prescribed under this Ordinance, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Ordinance, and that such non-compliance or mistake did not affect the result of the election."

However, in the light of the decision to which I have come no necessity arises for the application of this section and therefore, the argument addressed to the court on this section by counsel for the respondent had in my opinion no bearing on the question whether or not the trial judge had authority under the Ordinance to declare the appellant's election void by reason of his finding that there was a contravention of s. 70(1) thereof. The appellant in my opinion was duly elected.

I would therefore allow the appeal, set aside the order of the court below and the certificate of the judge and order that the case be remitted to the High Court with a direction to the judge to certify to the Governor in accordance with the decision of this court that the appellant was duly elected. The appellant should have his taxed costs here and in the court below.

P. Cecil Lewis
Acting Chief Justice

ST. BERNARD, J.A.

I will deal only with the question whether a breach of subsection (1) of section 70 of the House of Assembly (Elections) Ordinance, 1951 (No. 13), by a polling agent in communicating imformation as to the course of the poll will avoid an election.

Counsel for the appellant submitted that section 70 of the above Ordinance prescribed the punishment for an infringement of secrecy under that section and the intention of the legislature was clear. In the same Ordinance, he said, there were other electoral offences for which a punishment was prescribed and the penalty of disqualification also followed as a consequence. He referred to section 67 of the Ordinance which sets out a penalty of disqualification for membership of the House on conviction for certain officers. Counsel further submitted that the election of the appellant was held in accordance with the principles laid down in the Ordinance. There was an election by ballot and everyone who wanted to vote was allowed to vote; the ballot was a secret ballot and no person attempted to prevent any other person from exercising the franchise secretly. The results, he said, of that election showed a majority in favour of the appellant and a breach of section 70(1) did not affect the results of the election in any manner. In support of his argument counsel cited Bolton's case, Omerod v. Cross (1874) 2 O'M & H 138 at pages 141, 143.

In Bolton's case Mellor, J. was construing section 4 of the Ballot Act, 1872 (35 & 36 Vict C 33) which is substantially the same as section 70 of the House of Assembly (Elections) Ordinance, 1951. The penalty under the Ballot Act 1872, for communicating information during the poll as to the number of persons who voted was imprisonment for a term not existing six months, with or without hard labour. The penalty in this State for such

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a breach under section 70 is imprisonment for six months or a fine of two hundred and forty dollars. In Bolton's case Mellor, J. stated at pages 143 and 144 -

> "I am certain that those persons who placed tickets upon the register which were seen by the Mayor to be stealthily put into the pocket of the personation agent and conveyed by him manifestly to some persons outside, committed a violation of the statutory declaration which they had made, and committed an offence within the meaning of the provisions of the Ballot Act, thereby rendering themselves liable to serious punishment. But that is the only protection which the Legislature has provided
> .....
> But, as it seems to me, no foundation for attacking the seat can arise from the act of the personation agent, or any other officer connected with the election. The punishment is specified by the Legislature; it must be found within the four corners of the Act of Parliament, and I have no power, neither has the common law any power, to supplement any additional penalty upon either the person who transgressed the law or the persons for whose sake or in whose favour such an act may have been done."

Counsel for the respondent submitted that the Bolton case was a decision based on the Common Law, and as such its conclusions were not applicable to the question to be determined in this appeal. He stated that section 13 of the Ballot Act (1872) (Eng.) was similar to section 75A of the House of Assembly (Elections) Ordinance, 1951, save for the fact that section 13 of the Act applied only to rules and regulations made thereunder while section 75A applied to rules and regulations and also to the provisions of the Ordinance. In the Bolton Case, he stated, the judge did not consider section 13 of the Act for the reason that it did not apply to the case before him as he was dealing with a substantive provision. He found a

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contravention of the Act but he could not use section 13 to assist him in declaring the election void, and had therefore to fall back on the common law.

Section 75A reads as follows -

> "75A. Notwithstanding anything in the provisions of this Ordinance no election shall be declared invalid by reason of non-compliance with the provisions of this Ordinance or by the rules thereto or of the regulations made thereunder, or, any mistake in the use of the forms prescribed under this Ordinance, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in this Ordinance, and that such non-compliance or mistake did not affect the result of the election."

Counsel cited Woodward v. Sarsons (1874 - 1880) All E.R. 262 and several Canadian cases in support of his proposition. All these cases show that an election will be declared void if there was no real election at all, or if the election was not conducted in accordance with the principles laid down under the election law. But if, in the opinion of the tribunal, the election was one conducted in accordance with the principles laid down in the election laws, even though there might have been irregularities or mistakes made in carrying out the election under those laws, the election must not be declared invalid unless such irregularities or mistakes affected the result of the election. The submission of counsel for the respondent must fail. Bolton's case, in my view, was a case decided under section 4 of the Ballot Act, which is substantially the same as section 70 of the House of Assembly (Elections) Ordinance, 1951. It was not a decision at common law. The judge clearly stated that the punishment must be found within the four corners of the Act, and he had no power, neither had the common law any power to supplement any additional penalty. I would adopt the view expressed by Justice Mellor. /section ...

Section 13 of the Ballot Act, 1872, is not a provision designed to assist a tribunal in declaring an election invalid but rather a provision to save an election when conducted under the principles of the election laws.

Section 70 of the House of Assembly Ordinance is wider in its scope than section 13 of the Ballot Act and non-compliance with the provisions of the Ordinance or the rules and regulations thereunder will not invalidate an election save in those circumstances stated herein.

In Woodward v. Sarsons at page 270, the Court said the following in respect of section 13 of the Ballot Act, 1872 -

> "It, therefore, is, as has been said, an enactment ex abundanti cautela, declaring that to be the law applicable to elections under the Ballot Act, 1872, which would have been the law to be applied if the section had not existed. It follows that, for the same reasons which prevent us from holding that this election was void at common law, we must hold that it is not void under the statute."

In the present case, in my opinion, the election was conducted in accordance with the principles laid down in the Ordinance. Although there was an infringement of secrecy by disclosing information as to the course of the poll at one polling station this disclosure did not affect the result of the election, and neither did it infringe the secrecy of the ballot as provided for in sections 42, 43 and 44 of the Ordinance. The election in every other respect was an election under the provisions of the Ordinance and every voter had a fair and free opportunity of electing the candidate of his choice. I would allow the appeal with costs here and in the court below and concur in the order proposed by the learned President.

E. L. St. Bernard
JUSTICE OF APPEAL

LOUISY, J.A. (Ag.)

In my view the sole point in this appeal is whether the trial judge had the power to declare the election of the appellant void having found that there was an infringement of secrecy under subsection (1) of section 70 of the House of Assembly (Elections), Ordinance, 1951 (No. 13).

I agree with the finding of the trial judge that there was an infringement of the secrecy of the voting. The penalty for this infringement is imprisonment for six months or a fine of two hundred and forty dollars. The section does not give any power to the trial judge to impose a fine or a period of imprisonment on the appellant or to declare his election and return void.

Where then is the authority of the trial judge to be found for declaring the appellant's election void for such an infringement? I have examined the Ordinance carefully and am unable to find his authority for so doing.

Counsel for the respondent submitted that the trial judge's authority is to be found in section 75, but I am unable to read in the section the trial judge's authority for voiding the appellant's election for the infringement of secrecy in subsection (1) section 70, despite the English and Canadian authorities referred to by counsel in support of this submission.

Under section 75 the mode of trial of an election petition is in the same manner as a suit commenced by a writ of summons. At the conclusion of the trial of an election petition, the trial judge's judgment shall be -

(a) whether the member of Council whose return and election is complained of or any and what other person was duly returned or elected, or

(b) whether the election was void.

In the instant case the trial judge's judgment is that the election of the appellant was void.

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In my view this section gives a judge power to void the election if it is shown that the election was so conducted that the court which is asked to void it is satisfied that there was no real electing at all or the election was not conducted under the provisions of the Ordinance. I am satisfied that the appellant's election on the evidence, was properly conducted.

If the trial judge had found the allegations in prargraph 3 of the petition, pertaining to bribery, treating, undue influence, aiding and abetting and counselling the commission of election officers proven or that the provisions of sections 42, 43 and 44 were contravened he would have the power, in my opinion, to declare the election void but before doing so he would have to consider section 75A.

In my opinion the only protection which the Ordinance provides for an infringement of secrecy under subsection 1 of section 70 is the penalty in subsection (4). Neither the Ordinance nor the common law clothed the trial judge with the authority to declare the election and return of the appellant void. I would allow the appeal with costs here and in the court below and concur in the order proposed by the learned President.

Allan Louisy
JUSTICE OF APPEAL (Ag.)