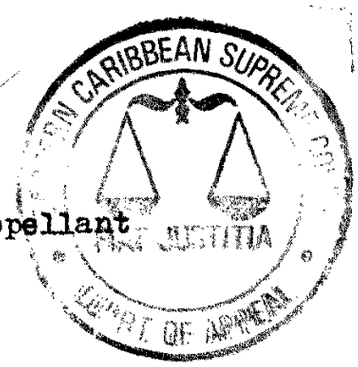
IN THE COURT OF APPEAL



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CIVIL APPEAL NO. 2 of 1976

BETWEEN: EDISON LEWIS - Appellant

Vs.

REUBEN HARRIS
THE SUPERVISER OF ELECTIONS
THE RETURNING OFFICER - Respondents

Before: The Honourable the Chief Justice
The Honourable Mr. Justice St. Bernard
The Honourable Mr. Justice Peterkin

Appearances: Sydney Christian for appellant
C.O'R Phillips Q.C. Claude Francis
for 1st respondent.
J.E. Fuller for other respondents.

1976, July 21, 22, Oct.

J U D G M E N T

ST. BERNARD, J.A.

At a general election held on the 18th day of February, 1976, the appellant and the first respondent were candidates for the Constituency of St. Phillips South. At the close of the polls the Returning Officer declared the result was a tie with each candidate polling 497 votes. As a result of this the Supervisor of Elections by Gazette dated 20th February, 1976, gave notice of a fresh election of that Constituency to be held on the 6th March, 1976. The first respondent, by petition, challenged the holding of fresh elections on the ground that he had been validly elected for the Constituency as the Returning Officer had rejected six votes in his favour as being void because the mark on

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the ballot was made in ink and not in pencil as provided for at the polling station. The trial judge upheld this contention and declared the first respondent as the duly elected candidate.

There were five grounds of appeal. The first two grounds dealt with excerpts from the judgment of the trial judge which he adopted from the well known case of Woodward v. Sarsons (1874-1880) All E.R. 262. Grounds three and four dealt with omissions and irregularities on the part of the Returning Officer and other election officials relating to the conduct of the elections, while ground five alleged that the judge was wrong in holding that the six rejected ballots were valid without having inspected them.

Counsel argued ground five first. On this ground he submitted that it was never established that there were six rejected votes in favour of the respondent Harris since all the witnesses who gave evidence in this regard gave different versions and there was no inspection of these ballots as they could not be found after the election. He referred the Court to the evidence of Ivor Bird, Alfred James, Ickford Emanuel and Herbert Dyett, the Returning Officer and pointed out that although they all stated, save Emanuel, that there were rejected votes in ink cast in favour of Harris their versions were all different. Emanuel, he said, stated that there was one spoilt vote at Bethesda cast for Harris and there were four rejected votes from Freetown but he could not remember whether they were in ink or whether they were blank votes. He remembered, however, that Ivor Bird had a heated argument with the Returning Officer over votes in ink which he had rejected.

In regard to irregularities and omissions referred

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to in grounds three and four Counsel submitted that no rejected ballots were marked in accordance with rule 53 (3) of the Election Rules, 1975. Similarly there were irregularities or omissions in respect of rules 49 (1), 53 (3) and (4), 56 (1), 61 (1) (b) and 60 (2), and because of these irregularities the result of the election was affected.

In reply to these arguments Counsel for the respondent Harris submitted that up to the time the votes were counted there were no irregularities and that at the end of the count the evidence was overwhelming that Harris was ahead in votes and ought to have been declared the duly elected candidate.

A review of the evidence indicates that there were no irregularities in conducting the elections up to the time when the votes were all counted. When the votes were counted the Returning Officer inquired of the poll clerks the total number of votes cast for each candidate. Molly Dickson gave her total as 499 for the appellant and 500 for the first respondent. Norris Scholar, the other poll clerk, gave his total as 498 for the appellant and 500 for Harris, the respondent. The Returning Officer then inquired of the agents for the respective candidates their totals. Ivor Bird who was assisted by Alfred James gave the totals as 496 for appellant and 499 for Harris, while Ickford Emanuel gave his totals as 499 for each candidate. The Returning Officer in order to satisfy himself, then counted the votes for each candidate in the presence of the agents and poll clerks who assisted and got totals of 497 votes for each candidate. He then declared there was a tie.

Counsel for the respondent submitted that the recount by the Returning Officer was irregular as he was not requested to do so by either of the candidates. He should

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have, he stated, accepted the totals of the poll clerks and declare Harris the duly elected candidate and allow the appellant to seek his remedy by election petition. Counsel for the appellant agreed with this submission which was based on rule 52(1) of the Election Rules, 1975. This rule reads as follows:

> "52(1) A candidate, if present when the counting or any recount of the votes is completed, may require the returning officer to have the votes recounted, or again recounted but the returning officer may refuse to do so if in his opinion the request is unreasonable."

In my view there is nothing in this rule which makes a recount by the Returning Officer irregular if he does so in order to satisfy himself where or which of his poll clerks made an error in their totals. There is no provision in the Rules forbidding such an inquiry which appears to be quite reasonable conduct on the part of the Returning Officer. The question which arises, in my opinion, is, having declared the election a tie, whether there was sufficient evidence on which the trial judge could have come to a safe conclusion that the first respondent was the duly elected candidate or whether, in all the circumstances there should have been a fresh election. Counsel for the appellant contended that it was never satisfactorily established that there were six rejected votes in favour of the respondent Harris and further the irregularities complained of vitiated the election as these had affected the results of the election and that the judge was wrong in his application of section 12(3) of the Representation of the People Act, 1975. This section reads as follows:

> "12(3) No election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty

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> in connection with the election or otherwise of the Election Rules if it appears to the Election Court having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections, and that the act or omission did not affect the results."

The trial judge in applying this section followed the case of Woodward v. Sarsons (supra) and cited the following passage:

> "But there it has been urged that there has been a breach of the Ballot Act and therefore the election is by virtue of the act itself void. This was the third question which was raised in argument before us. It is said that Sec. 13 though it is in a negative form assumed as an affirmative proposition that a non compliance with the rules or any mistake in the use of the forms would render an election invalid unless it appeared that the election was conducted in accordance with the principles laid down in the body of the Act and that such non compliance or mistake did not affect the result of the election. If this proposition is closely examined it will be found to be equivalent to this, that the non observance of the rules of forms which is to render the election invalid must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters or in other words the result of the election. 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 prevented us from holding that this election was void at Common law we must hold that it is not void under the statute."

The case of Morgan v. Simpson (1974) 3 A.E.R. 722 where the case of Woodward v. Sarsons was reviewed was not cited to the judge but counsel contended that because some of the principles enunciated in the above passage were held to be erroneous the trial judge's application of the principles cited was wrong and therefore his decision that the results of the election were not affected

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by the irregularties should be reversed.

In Morgan vs. Simpson a number of cases other than Woodward vs. Sarsons was considered and Lord Denning M.R. suggested that the law (as it affected this case) might be stated in the following propositions:

> "(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not. That is shown by the Hackney case, where two out of 19 polling stations were closed all day, and 5,000 voters were unable to vote. (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the Islington case where 14 ballot papers were issued after 8 p.m. (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls - and it did affect the result--then the election is vitiated. That is shown by Gunn v. Sharpe, where the mistake in not stamping 102 ballot papers did affect the result."

In my opinion, applying these propositions of law to the instant case, the only proposition which may be applicable is that stated in number (2). There were no allegations that the elections were not conducted substantially in accordance with the law as to elections in the state and there was no evidence of any irregularities up to the time the votes were counted. All the irregularities complained of were in respect of what took place after the election. The appellant has not contended that there was not a tie but that the evidence in support of the six rejected votes was insufficient for the judge to come to the conclusion that the respondent Harris gained the majority of votes. In my view the evidence clearly shows that the respondent Harris had the majority of votes. All

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the witnesses who gave evidence in this regard stated with confidence that the majority of the rejected votes was in the respondent's favour. The Returning Officer stated that there were six votes valid in every respect save that they were marked in ink and not pencil. Of these six votes four were in Harris' favour the other two in the respondent's favour. The trial judge found that these rejected votes were valid and should have been counted as such . I agree with such a finding. It is clear therefore that although the judge may have cited passages from Woodward v. Sarsons which are now held to be erroneous yet his conclusion was right since the irregularities and omissions complained of did not affect the results of the election. Accordingly I would dismiss the appeal with costs.

(E.L.St. Bernard)
JUSTICE OF APPEAL

I agree.

(N.A. Peterkin)
JUSTICE OF APPEAL

I also agree.

(Sir Maurice Davis)
CHIEF JUSTICE