SAINT CHRISTOPHER NEVIS ANGUILLA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1979.

BETWEEN: ANTHONY THEOPHILUS RIBEIRO - Appellant

and

KENNEDY ALPHONSE SIMMONDS - Respondent

Before: The Honourable Sir Maurice Davis, Q.C. - Chief Justice
The Honourable Mr. Justice N.A. Peterkin
The Honourable Mr. Justice N.A. Berridge (Acting)

Appearances: H. Brown for the Appellant,
H. Benjamin with him.

Dr. W. Herbert for the Respondent,
T. Byron with him.

F. Bryant for the Attorney General (As Intervenor)

1979; July 9th and 10th

JUDGMENT

DAVIS, C.J.

This is an appeal from the Judgment of Hewlett, J. in an election petition brought by the Respondent Kennedy Alphonse Simmonds.

The matter arose out of a by-election held on 25th January, 1979, to fill the seat for the constituency of St. Christopher 2 at which both the Appellant Anthony Theophilus Ribeiro and the Respondent were candidates. The other two candidates who contested the election were Cardinal Christmas and E.H.R. Cowelby Blake. The Appellant Ribeiro was returned as the elected candidate with 1047 votes. Simmonds polled 1034 votes, and, of the other two candidates, Christmas got 6 votes, and Blake got 2 votes. The number of votes rejected was 99. Simmonds petitioned

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the Court for a scrutiny by the Court of the 99 rejected votes in particular and for a re-count. At the hearing, the learned Judge ordered the Supervisor of Elections to produce the ballot papers, which he did, from nine ballot boxes. It was observed that the ballots cast for each candidate and the rejected ballots were not put away in sealed envelopes as required by the Elections Ordinance, but they were in fact separately bundled and bound by rubber bands. The Judge then considered the ballots in each of the ballot boxes. The count was carried out in open Court and is recorded in the body of the Judgment. The end result showed the following: Simmonds 1092 votes, Ribeiro 1070, Christmas 6, Blake 3, and rejected votes as 16. He then determined that the Appellant Ribeiro was not duly elected and that the Petitioner Simmonds ought to have been returned, and he certified this determination to the Governor. It is against this determination that the Appellant has appealed to this Court.

The grounds of appeal are listed at pages 3,4 and 5 of the record. There are a variety of them, but, in view of the submissions and arguments which have supervened, a number of them may conveniently be grouped together. First and foremost is the submission which had also been made in limine to the trial Judge, namely, that the Petitioner's complaint in questioning the return as declared by the returning officer was a complaint relating to his conduct, and that accordingly the Returning Officer should have been joined as a Respondent. The submission made to this Court is that failure to do so is fatal to the petition. Counsel cited to the Court and relied on, among others, the following three cases:-

(1) Sabga v Solomon, 1963 5 W.I.R. 66;
(2) Brathwaite v Edwards et al, 11 W.I.R. 475;
(3) Williams v Manley et al, 1973, 20 W.I.R. 333.

I think it is abundantly clear, and it is accepted by both sides, that in an election petition if the petition complained of the conduct of the Returning Officer then, whether or not he is deemed by the law to be a respondent in these circumstances, failure to join him as a respondent is fatal to the petition. The reason for this it would seem is that it not only gives him an opportunity of answering any complaints made against him, but it also enables the Judge hearing the petition to be in a position to call upon him to answer for his acts or omissions in the

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conduct of the election. The question therefore which falls to be considered is whether or not in the instant case the petition complains against the conduct of the returning officer. In my view the three cases cited are all cases in which complaints have clearly been made against the conduct of the returning officer. In the Sabga case it was alleged that he failed to enlarge polling stations in breach of election rules. In the Brathwaite case the complaint boiled down to this, that although the petitioner had obtained a majority of the votes cast, the returning officer had improperly returned the respondent as having been elected. A clear allegation of dishonesty. In the Williams case it was alleged that the returning officer wrongly rejected ballots which ought properly to have been accepted by him as good and valid votes. But this allegation was made against the background of an allegation that the ballots in question were deliberately and fraudulently tampered with after they had been cast and counted at the preliminary count. When one considers that between the preliminary and final counts the ballot boxes are, by law, in the safe keeping of the returning officer, it was a clear imputation of fraud and dishonesty on his part. In the petition now under consideration the words used are, "that the majority of the said rejected ballots were good and valid votes for the Petitioner and should have been counted." But this allegation has not been made against the background of any further allegation of fraud or dishonesty. Indeed, it was made abundantly clear at the onset that the Petitioner was saying that his decision was given bona fide and was an error of judgment. In rejecting the submission the learned Judge put it this say:

> "But in the instant matter, the petitioner in my view is saying that the majority of those 99 votes that the returning officer interpreted as falling within the definition of a rejected ballot paper were in fact good and valid votes and should have been counted, for which reason, he is entreating the Court to look at them and decide. I fail to see how I can read into that petition any suggestion by the petitioner of mala fides on the part of the returning officer, or any suggestion or imputation of questionable conduct or negligence, or failure of duty. In my judgment, it is an error of interpretation of what is really mixed law and fact - a bona fide but erroneous decision upon the validity of certain ballots which cannot amount to a complaint of conduct."

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I would agree. In my opinion the returning officer does not have to offer any explanation to anyone for having given his bona fide interpretation of the 99 votes as being rejected votes. It is easier for us to say from hindsight that he ought to have been joined because certain failures and negligences on his part have transpired during the course of the hearing, but in my view before he is required to be joined there must be a clear allegation that the returning officer did something in the conduct of the election that he ought not to have done, or that he left undone something that he ought to have done. I do not think that either is alleged in the instant petition. As a consequence I would hold that the Judge was right in rejecting this submission.

The other grounds of appeal which it might be said could possibly do any substantial service to the Appellant are those concerned with the question of jurisdiction, namely, grounds 5,6 and 8. These grounds are inter-related. Put quite briefly, the submission here is that the requirements of the House of Assembly Elections Ordinance, and in particular section 76, were not satisfied, and so the Court remained functus at all times as there was no evidence to found its intervention. Put another way, it was submitted that there was no authority in law to recount ballots in their totality, and that only if the proper procedural steps were taken could the rejected votes have been recounted. Section 76(5) of the Ordinance reads:

> "The returning officer shall keep a record on the special form printed in the poll book of every objection made by any candidate or his counting agent or any voter present, to any ballot paper found in a ballot box, and shall decide every question arising out of the objecting. The decision of the returning officer shall be final, subject to reversal on petition questioning the election or return; and every such objection shall be numbered, and a corresponding number placed on the back of the ballot paper and initialled by the returning officer."

In the instant petition the returning officer failed to keep a record in the poll book of the objections made to the rejected ballots, and nowhere is there any indication as to why they were objected to. In omitting so to do he has failed to pinpoint the areas of objection. Counsel for the Appellant went on further to submit that the Rules

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governing election petitions in the U.K. must apply here mutatis mutandis as there are no local rules, and that the failure by the Respondent to particularise the votes in contention by interlocutary process during the 21 day limitation period is a failure which is fatal to the petition, upon which no proceedings should have been had. He referred the Court to Atkins Vol. 18, p. 194, form 28, which sets out the procedure to be followed in relation to rejected ballots. Quite apart however, from this latter submission, and irrespective of whatever merit it may possess, this Court (Davis C.J., St. Bernard J.A., and Berridge J.A. (Ag.)) has already decided in the election petition appeal of Williams v Giraudy, No. 6 of 1977, St. Lucia, that the trial Judge was entitled to refuse a request for scrutiny of all the votes cast on both sides where there were no proper particulars for scrutiny before him, and that scrutiny is not an automatic exercise in every election petition, but rather is giving final decision on specific votes isolated at the final count. The trial Judge in my view ought to have followed this decision and refused the request for scrutiny in the instant case. Had he done so I think I would have agreed and allowed the matter to rest there. The question whether or not there were valid votes among the rejected ballots, and for whom, would have remained buried in the ballot boxes. Instead, he not only counted the 99 rejected votes but carried out a re-count of all the ballots cast. This latter re-count resulted in substantially the same result as that of the returning officer and so made no difference to the result. The question which falls to be considered is ought he to have carried out a scrutiny of the 99 rejected votes in these circumstances. I think he would have been justified in refusing. But in my opinion the matter does not rest there. The Judge referred for his authority and jurisdiction to the case of Active v Scobie et al, 13 W.I.R. 189, in which Berridge J held that the Court could decide upon the validity of all the ballots marked "Rejected - Rejection objected to" and not confine itself to the particular number complained of. He also referred to sections 86 A and 87 of the Ordinance which deal respectively with the trial of election petitions and the powers of the Judge. The latter section gives to him the same powers, jurisdiction and authority as in the trial of a civil action in the Supreme Court, but this is subject to the provisions of the Ordinance. notwithstanding this, the

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powers do appear to be very wide. In carrying out the scrutiny the Judge followed, quite rightly in my view, the principles ennunciated in the cases of Cato v Allen, 1 W.I.R. 68, and Ragoobir v Punch and Dass, Supreme Court, Trinidad and Tobago, (unreported), and it is conceded that all the votes rejected by the returning officer and accepted by the Judge as being valid were, indeed, valid votes. Three of the 99 dealt with votes cast in ink and not lead pencil which, it was contended by Counsel for the Appellant, were all valid votes for the Appellant. They were rejected by the Judge. Even so, the end result of the Judge's count in open Court showed that Simmonds had won the election by 22 votes.

Satisfied as I am of the fairness and accuracy of the Judge's count, ought the Court to say in these circumstances that the appeal should be allowed because of certain technicalities which were not observed and which may be said to have resulted in a comedy of errors? I think not. I do not think that the intention of the law is that an election should be won or lost on technicalities in Court, but rather that the wish of the people, expressed through the ballot box, should prevail. The Court should put first and foremost in my view the intention of the electorate. At the heart of the matter, as I see it, was the question whether or not all or any of the 99 rejected ballots could be said to have been lawfully cast, and for whom. The Judge has in the final analysis answered this question with fairness and with accuracy, and his determination should in my opinion be allowed to prevail.

Certain specific irregularities at the hearing are alleged and set out in ground 10. They do not in my opinion affect the result of this appeal, but I would like to mention that set out at (f) which alleges that the trial Judge erred in awarding costs against the Appellant. I would agree. It is conceded that the Appellant had to be named as a respondent in the Petition, and also that nothing was alleged, or for that matter proved, against him.

There has been some argument concerning the application of the English election rules, and we have been addressed by Counsel, including the Attorney General as Intervenor, on the interpretation to be placed on section 11(1) of the West Indies Associated States Supreme Court (St. Christopher Nevis & Anguilla) Act, 1975. This Court has already expressed its

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views on section 11, and they are to be found in the judgment given in the appeal of Powell v Payne, Civil Appeal No. 7 of 1977, St. Kitts. I would like to add, however, that I do not accept the Judge's opinion that reference to the words "procedure" and "practice" in section 11 is a reference to the Rules of the Supreme Court only.

The remaining grounds have either already been dealt with or, as I see it, can have little, if any, effect on the conclusion as I do not consider that there is any merit in them such as would do any service to the Appellant.

In the result I would dismiss this appeal. In my view there should be no order made as to costs.

SIR MAURICE DAVIS
Chief Justice

N.A. PETERKIN
Justice of Appeal

N.A. BERRIDGE
Justice of Appeal (Ag.)