(10)

MONTSERRAT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 2 of 1987

BETWEEN: ODEL ADAMS — Plaintiff/Appellant
Attorney General for
Montserrat

and

NELLIE ARTHURTON
BEVERLY BRAMBLE
RONNIE COOPER
GLENFIELD GRIFFITH
CANDICE O'GARRO
INEZ O'GARRO
JOHN SKERRITT
VERONICA WALKER — Defendants/Respondents
JOHN DUBLIN

Before: The Honourable Mr. Justice Robotham - Chief Justice
The Honourable Mr. Justice Bishop
The Honourable Mr Justice Moe

Appearances: J.S. Weekes for Plaintiff/Appellant
Nellie Arthurton and Candice O'Garro appear in person.
No appearance by the other defendants/respondents.

April 11, 12, 198[illegible]

JUDGMENT

ROBOTHAM, C.J.

On 25 August 1987, a general election for the purpose of electing members to the Legislative Council of Montserrat was held and in the Constituency of Plymouth, one Vernon Jeffers was duly elected and returned.

On 10 September 1987, Percy Arthurton, an unsuccessful candidate in the said Plymouth Constituency brought an election petition seeking to have the election of Jeffers declared irregular, null and void on the ground that a number of ballot papers on which voters registered their votes, did not have the names of the candidates in alphabetical order, indicating that

(a) more than one or different printing plates were used in the preparation of the ballot papers;

(b) the ballot papers for the said Plymouth District were tampered with at some time and place prior to the date of the election by a person or persons unknown.

Further that such tampering (a) tended to confuse the minds of voters or marginally literate voters that they should put their mark at the top

/or in.....

or in the middle as the case may be and (b) impeded or prevented the fair exercise of the franchise by voters, contrary to law.

The Petitioner Arthurton prayed for scrutiny of the ballot papers used and unused, and in the event that any of them were found to be irregular as contended, that the election be declared null and void.

Nine affidavits in support of this petition were filed by the respondents all in identical form. Para. 1 - gave the name of the deponent, and stated that he was a registered voter; Para. 2, that he voted at the election, and para. 3 read:-

> "The ballot paper which was handed to me and on which I voted had the names of the candidates for the said Electoral District set out as hereunder appearing and not in alphabetical order:
>
> 1. Bramble
> 2. Arthurton
> 3. Jeffers

The nine (9) affidavits then concluded with the usual attestation clause. There was absolutely nothing in these affidavits to support any of the allegations made in the petition filed on behlaf of Mr. Arthurton.

Scrutiny of the ballots having been asked for, an order of a Judge of the Supreme Court to that effect had to be sought in acordance with section 78 of the Constitution and Elections Ordinance Cap. 153. That section reads:-

> "78(1) The Supervisor of Elections shall keep the election documents.....in safe custody, and shall allow no person to have access to them;
>
> Provided that, if an election petition has been presented questioning the validity of any election or return, the Supervisor of Elections shall,on the order of a Judge of the Supreme Court, deliver to the proper officer of that Court the documents relating to the election that is in dispute.
>
> 78(2) No such election documents in the custody of the Supervisor of Elections shall be inspected or produced except on the order of a Judge of the Supreme Court; and an order under this subsection may be made by any such Judge upon his being satisfied by evidence on oath that the inspection and production of such election documents is required for the purpose of instituting or maintaining a prosecution for an offence in relation to an election or for the purpose of a petition which has been filed questioning an election or return. (Emphasis above added).

In response to the affidavits filed by the nine voters Howard Fergus the Supervisor ofElections, swore that the ballot papers were printed at his request and in accordance with the law, and that to the best of his knowledge information and belief they were in compliance with the law. The returning officer for the constituency of Plymouth Joseph Daniel, swore that he checked the ballot papers to be used in the Plymouth Constituency

/and that.....

and that to the best of his knowledge , information and belief they were in the form prescribed by law.

Redhead J. heard the application for scrutiny of the ballots on 10 September, and refused the application.

On the affidavits as they stood, lacking not only flesh, but bone, I hardly see how he could have done otherwise. Indeed there was no appeal from his decision, and certainly none by the petitioner Percy Arthurton.

One would have thought that there being no appeal by the party aggrieved, the matter would have ended there, but alas this was not to be. There was intervention by the press, reports in which goaded the Honourable Attorney General to make an application on his own behalf for an order for the inspection of the ballot boxes. Mr. Weekes in the course of his submissions before us conceded that some of the articles were vicious and scathing and subversive of justice.

I say the Honourable Attorney General was goaded into doing this, as that is the impression which must of necessity have been left with anyone reading the three articles, and his affidavit in support of the application. In his application he now sought to rely on the same 9 affidavits which he resisted in the election petition. The trial judge questioned the propriety of this.

Para. 11 of his affidavit reads:-

> "Notwithstanding the Order of Mr. Justice Redhead, the allegations are being persisted in, as evidenced by a copy of the local newspaper, the "Reporter" of Friday, 25th September 1987, exhibited herewith as exhibit "E"."

Para. 12

> "That the allegations in the affidavits and circulating in the community, at large, tend to suggest the commission of criminal offences."

Para. 13

> "That in view of the foregoing, I conceive it my public duty to make such enquiries and institute such prosecutions as may be necessary, in pursuance of section 78 of the Constitution and Elections Ordinance of Montserrat. These courses of action can only be properly taken if the ballot boxes are opened at such time and place and under the supervision and in the presence of such persons as the Court may determine."

A breakdown of these 3 paragraphs reveals the basis of the application as:

(1) the persistence of allegations of impropriety;

(2) the existence of allegations tending to suggest the commission of criminal offences:

(3) a conception of his public duty to make enquiries, to be followed by

/(4).....

(4) institution by him of such proceedings as may be necessary.

I have no doubt that the Honourable Attorney General was pursuing this course with utmost good faith and noble motives but one must ask what prosecution when the application was filed was he about to institute or maintain? The answer is none, and there would be none unless per chance the scrutiny of the ballot boxes revealed that there was an offence for which a prosecution against someone could be launched. In short his application was no more than a fishing expedition and outside the provisions of section 78(2).

Instituting a prosecution is the commencement of proceedings and takes place when a complaint is laid before the Court (Stroud's Judicial Dictionary, Vol. 3, 4th edition - 1384,)Sec. 78 contemplates that there must be evidence before the Judge to justify the commencement of a criminal prosecution for an offence relating to an election, or for the purpose of a petition which has been filed.

Maintaining a prosecution means to support or carry on one which has already been brought. (Stroud's Vol. 3 1594.)

Redhead J. having considered the motion of the Honourable Attorney General refused it and quite rightly so in my view.

It is ironical that the Attorney General's motion failed on the same ground as that on which he successfully resisted Mr. Arthurton's motion for inspection. In neither case could the motion be brought within the requirements of section 78. That section is quite clear in its terms. It vests in the Judge the exercise of a discretion whether or not he should order the inspection or production of the election documents. It is implicit in its terms that he can only exercise this discretion in favour of an applicant if he is satisfied by evidence on oath that the inspection and production of such documents is required for the purpose of instituting or maintaining a prosecution for an offence in relation to an election, or for the purpose of a petition questioning an election or return.

The trial Judge in dismissing the Attorney General's application said:-

> "In my view the application is speculative, and is based on conjecture and cannot point to any offence having been committed. In fact it is not even shown that there were grave errors which were admitted by some person or persons who were charged with a statutory responsibility and that these errors would evoke a criminal sanction. I am firmly of the opinion that the affidavit must show that the production of the election documents is for instituting or maintaining a prosecution. He cannot in my view swear to an affidavit and simply say that he conceives it his public duty to make such enquiries and to institute such prosecutions as may be necessary notwithstanding that he does so in good faith. He must go further and show the order is for instituting or maintaining a prosecution..... It is to be

/observed.....

observed that the section does not say "for the purpose of investigating an offence in relation to an election."

I am in total agreement with these findings of the trial Judge, and nothing has been urged before this Court by Counsel for the appellant which alters my views in any way.

Before us Mr. Weekes for the appellant submitted that the Attorney General needed the order for inspection "in order to decide whether any offence in relation to the election had been committed and who or what persons were guilty of any such offence." In my humble view, when Counsel made this submission, he completely and effectively demolished his appeal. He confirmed the existence of a fishing expedition.

Counsel none-the-less valiantly tried to bring himself within the decision of McWhirter and Another vs Platten - 1969 1 ALL ER 172. In that case, in a London Borough election, in two of the wards votes were declared in excess of the votes cast to the extent of 32 per cent and 8½ per cent, and in the third ward there was a deficiency by comparison of 20 per cent. An order for inspection of the counted ballots was refused by a Judge. The provision for inspection stipulated that the county Court Judge should be satisfied that the order was required for the purpose of instituting or maintaining a prosecution in relation to ballot papers. It was therefore in similar terms to section 78 of the Montserrat Law Cap. 153.

On appeal, the Court of Appeal allowed the appeal on the ground that the disparity in the figures showed that somebody might have been guilty of a grave dereliction of duty in relation to the counting of the ballots, and that it was an offence "in relation to ballot papers." Further that the order was required to enable the votes to be recounted because until that was done it was impossible to particularise the dereliction of duty, the act, or ommission within sec. 51(1) of the Act of 1919 which constituted the offence, or who should be prosecuted.

In McWhirter's case it was clear that an offence under Section 51 of the Act had been committed.

Section 51 provides:-

> (1) If any person to whom this section applies, or who is for the time being under a duty to discharge as deputy or otherwise any of the functions of such a person, is without reasonable cause guilty of any act or ommission in breach of his official duty he shall be liable on summary conviction to a fine....."

It was manifest here that there was grave dereliction of duty by the election officers in the counting of the votes. This was an offence under section 51. When therefore it was sought to inspect the boxes, it was merely to determine who should be prosecuted under section 51. As Lord Parker C.J. said at page 176 letter I.

/It may.....

> "It may be for all I know that not only will the supervisor be revealed but there will be revealed those who were actually responsible for the counts. Be that as it may, it seems to me that this order was clearly required for the purposes of a prosecution of an offence against Section 51."

McWhirter's case therefore clearly could not help or advance Mr. Weekes arguments. An offence was identified there. In this application by the Attorney General, no offence was revealed.

The appeal is totally devoid of merit and must be dismissed but before finally parting with this matter there are some views of my own which I wish to place on record.

There would have been no further proceedings after Redhead J refused the application of Mr. Arthurton, if the press had not indulged in unfounded, unjustifiable, uninformed, and irresponsible reporting.

The "Reporter" carried three articles and two letters on the decision. There were banner headlines on page 1, "Judge Redhead rules against opening of Ballot Boxes". There appeared in the body of the article:-

> "Wouldn't you think a matter which affects all the people, like an election, would be argued in front of the people, and not in Chambers? The question was asked by one of the many island residents who spent time waiting fruitlessly outside the Courthouse while the Petition was being argued within."

This is a blatant example of an uninformed Press seeking to tear down and disparage the administration of justice, rather than to be informative. If the author of the article had taken the trouble to inform himself and in turn the public, that certain matters under the Rules of The Supreme Court are heard in Chambers, then such an irresponsible statement could not have been made. This application was a matter to be heard in Chambers under the said Rules of the Supreme Court. These Rules have the force of Law and must be adhered to despite what a petulant press or uninformed public may think.

The second article was a half page editorial on page 6 headed "The case of the Irregular Ballot Boxes". I quote:

> "There was an air of anxiety throughout the island prior to the hearing. The discussion and debates centred around whether or not the Plymouth election would have been declared null and void, not whether the boxes would have been opened or not. The opening of the boxes was taken for granted. No Court of Justice, it was felt, could withhold the examination of ballots which not only nine intelligent and trustworthy persons said were faulty, but many more including voters who may well have voted for any of the three candidates.
>
> The Judge's ruling sent shock waves through the island. .....What other evidence did the Judge want? ..... What often seems reasonable, fair and just, very often has to give way to what is permissible or not under the law. And so it was in this case....."

/There was.....

There was more but here was exhibited a classic example of trial by the Press, in complete disregard for the jurisdiction authority and role of the sole judicial arbiter on the matter, namely the Judge of the High Court, whom we have indicated acted properly within the law and on the evidence before him when he refused both applications.

This trial by the Press was further perpetrated in another article on page 7 headed "Is Justice Served"? I quote shortly:

> "Justice must not only be served. It must also seem to be served."

The author got his quotation wrong. Was it deliberately dished out to the public in this manner in order to support his later statement?

> "Justice Redhead's decision not to order the opening of the ballot box in the Plymouth District, may have served the law, but was justice served or seemed to have been served?"

This Court has often had cause to express concern over the dishonest, irresponsible and disparaging reports masquerading under the guise of journalism which on numerous occasions published in regional newspapers. WE recognize the constitutional right of freedom of the press, but a free and effective press must also be a responsible press. If they descend into the realms of publication of articles which tend to bring the administration of justice or any person into ridicule or contempt, they are liable to be punished under the laws of contempt, or face suits for libel, and should not then be heard to complain.

Resort to the law of contempt as a means of upholding the dignity and authority of the Courts, is seldom done. We do not advocate the stifling of comment, but such comment must be fair. That is the proper way whereby the balance between maintaining freedom of speech and upholding the dignity and authority of the Court can be maintained. - (See Lord Denning in Regina v Commissioner of Police (exparte Blackburn) 1968 2 Q.B.D. 150 at 154).

Finally a responsible press must realise that for every fundamental right that is given such as the freedom of speech/press there is a counter-balancing right. This may take the form of not trampling the rights of others, or by refraining from bringing the administration of justice into disrepute by irresponsible, unjust and unjustifiable statments. It behoves the press therefore to see that their reports transcend the realms of hysterical, inflamatory and irresponsible journalism, so as not to bring into question the bona fides or the propriety of their publications. It is only when the due and orderly adminstration of justice can stand side by side with fair and honest journalism can it be truly said that justice has been done to all.

/As already.....

As already indicated, this appeal is dismissed with no order as to costs.

L.L. ROBOTHAM,
Chief Justice

I agree that the appeal should be dismissed.

E.H.A. BISHOP
Justice of Appeal

I also agree that the appeal should be dismissed.

G.C.R. MOE
Justice of Appeal.