

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M. 076/93

In the matter of an application
by Seth George Ramocan for leave
to apply for orders of Certiorari
and Mandamus (and all such orders
and directions as may be necessary
or appropriate).

Messrs. George Soutar and Richard Bonner
for the applicant

Heard: May 6 and 7, 1993

HARRISON J. (Ag.)

Arising out of the General Elections held on March 30, 1993, Seth George Ramocan who was a candidate in the constituency of St. Andrew, West Rural, made an ex-parte application seeking leave for orders of Certiorari and Mandamus to remove into this Honourable Court.

On the 7th day of May, 1993 I dismissed the application. I promised to put my reasons in writing and I now fulfil this promise.

The reliefs sought were as follows:

1. Order of Certiorari to remove into this Honourable Court for the purpose of it being quashed a return of poll issued by Alvan S. Williams, returning Officer for Saint Andrew, West Rural, whereby he certified that Vernon W. St. A. Robinson had received the majority of votes lawfully given.
2. Order of Mandamus directed to the said Returning Officer Alvan Williams requiring him (a) To continue his enquiries and to determine the results of documentary and sworn evidence ordered by him. (b) To perform his statutory duties by completing the enquiries that time had not permitted him to do.

The grounds upon which the reliefs were sought are stated inter alia:

- a) That there is an error in law on the face of the records, for the Returning Officer's Report dated 20th April, 1993, to state "that if time had permitted I probably could have rejected more boxes". Therefore it is an error on the face of the record to state "the figures for the remaining boxes are, as they were at the final count ..."
- b) There is an error in law on the face of the documents in that there were conflicting totals on the Report of the Returning Officer and Recapitulation Sheet of the Electoral Office.
- c) That the Returning Officer did not complete his statutory obligations.

A useful starting point is reference to the provisions laid down in the Representation of the People Act. This Act sets out in detail the procedure to be followed after the close of the poll during an election and subsequent to polling day, for the purpose of ascertaining the will of the electorate in the polling divisions in a constituency and in the constituency as a whole. These provisions are set out in sections 44-48 inclusive of the Act. Of relevance to these proceedings before me are sections 45 and 46 respectively which set out the procedure to be followed by the Returning Officer on the final count of votes polled in the constituency.

Section 45 contains provisions regarding the Returning Officer's primary duties and powers on a final count. Section 46, gives directions and additional powers to the Returning Officer.

The provisions of the latter section state inter alia:

"46(2) for any other cause, if the Returning Officer cannot, at the date and hour appointed by him for that purpose, ascertain the exact number of votes given for each candidate, he may thereupon adjourn to a future day and hour the final count of the votes given for each candidate, not being more than 72 hours after the time specified in the election notice under section 22.

- (3) At the time to which the proceedings are adjourned in accordance with the provisions of subsection (2), the Returning Officer shall ascertain by such evidence as he is able to obtain the total number of votes cast for each candidate and shall declare the candidate appearing to him to have the largest number of votes.
- (4) For the purposes of this section the Returning Officer shall have all the powers of and be deemed to be a Commissioner appointed under the Commission of Enquiry Act and the provisions of section 11 of the Commission of Enquiry Act shall apply to all persons required by the Returning Officer to give evidence or to produce documents before him as they apply to persons summoned to attend and give evidence or to produce documents before a Commission of Enquiry under the Commission of Enquiry Act."

Based upon the Affidavit evidence in this matter, Mr. Soutar argued that the Returning Officer had agreed to carry out enquiries into certain ballot boxes out of which there were alleged irregularities but he had failed to complete his enquiry. That he is authorised to do so is clearly provided for in section 46(2) of the Representation of the People Act. The case of R. v. Resident Magistrate for the Parish of St. Andrew Ex-parte Owen Harcourt Pike Stephenson, M. 62/80 (unreported) dated December 15 and 16, 1986 is also authority for this proposition.

It was also submitted by Mr. Soutar that the Representation of the People Act did not place an obligation on the Returning Officer to complete his enquiries within a prescribed time. That in doing what he did he had defaulted in his duties under section 46(2)(3)(4) and instead, had surrendered his judicial function by adopting an administrative role in merely accepting the figures presented to him at the preliminary count.

Mr. Soutar further submitted that certiorari should move because of the difference in the final figures shown in the Returning Officer's Report when compared with the Recapitulation Sheet provided by the Electoral Office. In the

former, Robinson was ascribed 4,021 votes, whereas the latter sheet showed a total of 4,060 in favour of Robinson. This conflict it was submitted, was also seen in the results ascribed to the independent candidate, Smith.

To cap his submission, Mr. Soutar finally submitted that there was no other remedy available to the applicant at this time because the procedures of a magisterial re-count and an election petition pre-supposed a count that was complete and that this one was not. He also impressed upon me that an injunction would not be an appropriate remedy as the Returning Officer by his return after the poll, made Mr. Robinson the winner and therefore that was a "fait accompli".

Based upon these submissions, Mr. Soutar argued that this was a fit and proper case for an order of certiorari to quash the result of the Returning Officer and for mandamus, to compel him to continue his enquiries in the remaining ballot boxes.

The affidavit evidence showed that the Returning Officer had not completed his enquiries surrounding certain irregularities in relation to the ballots. There is also beyond dispute according to the affidavit evidence, differences in the number of votes polled in favour of Robinson and Smith when one examines the Returning Officer's Report and the Recapitulation Sheet. The issue therefore for resolution is whether or not these errors and failure to complete his investigations under the provisions of the Representation of the People Act warrant removing these issues into the Full Court.

Certiorari is usually invoked to quash an order which has been made without jurisdiction or in defiance of the rules of natural justice. While it is only applicable to review a judicial act, "judicial" must be used in the widest sense. The power of obtaining an order of certiorari is not limited to judicial acts or orders in a strict sense, that is to say, acts or orders of a court of law sitting in a judicial capacity. It extends to the acts and orders of a competent authority which has power to impose liability or to give a decision which determines the rights or property of the affected parties (See *Local Government Board v. Arlridge* [1915] A.C. 120).

This therefore leads to the question, what then is the legal status of the Returning Officer? Is he acting ministerially or judicially? The true view as expressed by the authorities is that he partakes of both characters; that whilst for some purposes - such as giving notices or providing polling stations he is merely a ministerial officer; for others such as determining objections to ballot papers he is a judicial officer. In considering any question which he is empowered to deal with in respect of enquiries to ballot boxes, section 46 of the Representation of the People Act clearly defines his judicial functions. He shall have all the powers of and be deemed to be a Commissioner appointed under the Commission of Enquiry Act.

Turning now to the facts before me, it is apparent from the Affidavits filed, that the Returning Officer had directed his attention to the provisions of section 46 of the Representation of the People Act. He had commenced his enquiries but these were short-lived as he felt he had a deadline to meet. He was of the view that he had to finalise his count before Parliament opened. It is also deposed in the Affidavit evidence where he stated that if he had more time he would probably have rejected more boxes.

In light of the above disclosures, I have no hesitation in saying that these allegations levelled serious charges or complaints against the conduct of the Returning Officer in relation to his management of the election and as such this brings him in my view within the spirit and intendment of section 18 of the Election Petition Act. It is the general duty of the Returning Officer at a parliamentary election to do all such acts and things as may be necessary for effectively conducting the election by the rules and law governing such an election. Although he was not expected to take upon himself the onerous responsibility of deciding nice questions of law or fact upon the spur of the moment he is indeed the Superintendent or Steward of the election in his constituency and he must therefore account for his stewardship.

It was therefore my considered view, that the proper forum for these complaints should be and ought to be the Election Petition Court rather than a Full Court.