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In the Supreme Court

Election Petition

Suit No. C.L. W-008 of 1984

Between Keith Webster

Petitioner

And Derrick Smith and
Vanril Brown

Respondents

Hugh Small, K.D. Knight and

Anthony Pearson for Petitioner

R.N.A. Henriques, Q.C. and John Vassel

for Respondent Smith

Dr. Lloyd Barnett and Angela Hudson-Phillips

for Respondent Brown.

1984 - 4, 5, 6, 7, 11, 12, 13, 14, 19, 25, 28 and 29
June, 8 and 9 October and 14 December

SMITH, C.J. :

At the general election of members of the House of Representatives held on 15 December 1983 there was a contest in the constituency of Kingston West Central. The candidates were the first respondent, Mr. Derrick Smith, and Mr. V.G. Smith. The second respondent, Mr. Vanril Brown, was the returning officer. The first respondent was returned as the duly elected representative for the constituency, having obtained 4426 votes as against 49 for his opponent.

Mr. Keith Webster was an elector who was entitled to vote at the election in the constituency. He presented a petition dated 9 January 1984 to the Supreme Court complaining of the return or the election of the first respondent. He prayed that his election be declared null and void because of irregularities in respect of persons who were recorded as voting at the election or, alternatively, because the election "was not conducted as to substantially comply with the provisions of the Representation of the People Act." The irregularities stated in the petition are as follows :

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- " (a) there were widespread instances of impersonation of electors whose names appeared on the Voters List
 - (b) that persons whose names did not appear on any list of electors for the said constituency and so were not entitled to vote, did in fact vote in the said election
 - (c) that persons who did not produce a proper identification card were allowed to vote without being sworn and thumb printed
 - (d) that persons whose names appear in the poll books as having voted in the said election did not in fact so vote.

It is common ground that the principles applicable for resolution of the issues raised in the petition are those established at common law and conveniently stated in Woodward v. Sarsons (1875) L.R. 10 C.P. 733. Lord Coleridge, C.J., who delivered the judgment of the Court of Common Pleas, stated the common law rule as follows, at p. 743 :

" The questions raised for decision seem to be, - first, what is the true statement of the rule under which an election may be avoided by the common law of parliament ? - secondly, is the present case brought within the rule? - thirdly,
As to the first, we are of opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. "

In explaining the rule, Lord Coleridge, C.J. said (ibid) that the tribunal should be satisfied that there was no real electing by the constituency at all if it were proved to its satisfaction that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer. He went on to give a number of illustrations which would justify the tribunal in coming to the conclusion that the opportunity of electing a candidate was not fair and free.

Mr. Small conceded that the petition cannot succeed on the ground that the proved irregularities had affected the result of the election. He frankly admitted that it cannot be said that there was no real election under the first part of the common law rule, as explained. The concession and admission could not be avoided as there

was no evidence on which the petitioner could rely to satisfy the first part of the rule. It was not alleged in the petition that there was any impediment in the way of the majority of the electors in the constituency being able to exercise their franchise freely and fairly. Additionally, the disparity in the votes polled for the contending candidates was so vast that it would be futile to contend that the proved irregularities affected the result of the election. There were 111 polling divisions in which votes were polled. Evidence in proof of the allegation of 'widespread instances of impersonation' was called in respect of 46 polling divisions. Even if all the votes in these polling divisions are disregarded, in the remaining 65, the votes polled for the respective candidates were 2406 and 19.

Reliance for success of the petition is placed on the second part of the common law rule, namely, that the election was not really conducted under the subsisting election laws. Mr. Small conceded that not every irregularity or series of irregularities will avoid an election. He submitted that it must be shown that the irregularities complained of were so serious and widespread that the Court can come to the conclusion that "such procedures" were not in compliance with the scheme of the electoral laws - "not substantially implementing the scheme for electing." Further, that if the petitioner can prove that departures from the scheme are substantial he need not show that they have affected the outcome of the election. It was said that the Court was concerned to preserve the integrity of the election system and will not allow the election of a member of parliament to be clouded in suspicion as this would affect the election system.

The main irregularity relied on is the instances of alleged impersonation. In the further and better particulars requested and delivered, the names of some eight hundred persons were given as electors whom it is alleged were impersonated. Only a small proportion of these persons were called to the witness box. The witnesses called consisted of persons who either claimed that they were themselves impersonated or could prove that persons recorded as having voted were either dead or

absent from the constituency on polling day. The challenge to the evidence of these witnesses was minimal and did not, in any case, affect the value of the evidence given. 149 cases of impersonation were established to my satisfaction. Of these, 18 were cases of electors who had died before polling day and 4 were proved to have been abroad. The distribution among the polling divisions I find to be as follows :

PD5-6; PD6-1; PD7-1; PD8-19; PD13-6; PD14-1; PD15-4; PD16-1; PD19-10; PD22-1; PD23-1; PD24-2; PD25-7; PD27-2; PD30-1; PD35-2; PD37-2; PD49-1; PD51-2; PD52-2; PD54-2; PD55-7; PD57-2; PD58-2; PD59-4; PD60-5; PD62-5; PD66-5; PD67-2; PD68-3; PD71-1; PD72-6; PD73-4; PD74-1; PD75-3; PD76-4; PD83-2; PD87-3; PD89-1; PD91-2; PD92-4; PD95-3; PD98-3; PD100-1; PD101-1; and PD110-1.

The Director of Elections, Mr. Noel Lee, gave evidence that no Identification cards were issued for use at the December 1983 general election. He said that he prescribed for use, in place of identification cards, the certificates of enumeration which were issued to electors in 1980. The fact that he had done so, he said, was announced in the press. The inescapable inference from the proved cases of impersonation, and, therefore, the overwhelming probability, is that the impersonators did not produce certificates of enumeration for purposes of identity. They should, therefore, have been sworn before they were allowed to vote, as required by s. 34 of the Representation of the People Act, and the fact that they were sworn entered in the respective poll books. There was no record made in the poll books that the oath of identity was administered in any of the proved cases of impersonation. In polling division 5 a total of 45 votes were polled. There were 6 cases of impersonation. The presiding officer, Coleen Anderson, gave evidence that three-quarters of the voters produced enumeration papers; the rest, she said, were sworn; but there was no record to this effect in the poll book. In polling divisions 49, 51 and 73 where there were 1, 2 and 4 cases of impersonation, respectively, evidence was given by the presiding officer (Adassa Wright), the poll clerk (Wilhel Hardy) and the presiding officer (Charmaine Anderson) at the respective polling stations that everyone who

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voted at those polling stations produced a certificate of enumeration. In view of the improbability of the certificates of the electors getting into the hands of the impersonators, I do not believe that in the cases of impersonation certificates were produced, as they said.

At PD8, 76 electors were recorded as voting but only 72 ballots were found in the ballot box; at PD13, 83 names were listed as voting but 84 ballots were used; at PD16, 23 names were listed as voting but only 22 ballots were found in the box - the presiding officer, who gave evidence, could not explain the discrepancy; at PD36, the poll clerk listed 83 electors as having voted but only 77 ballots were found in the box - the poll clerk could not explain the discrepancy when asked in the witness box to do so; and at PD75, 25 names were listed but 24 ballots only were found in the box. These discrepancies, in my opinion, tend to indicate complicity by the election officers concerned in fraudulent voting. Names of electors were, apparently, listed in anticipation of persons attending to vote in those names and they did not attend.

In support of the allegation of widespread impersonation, evidence was given by the losing candidate, Mr. V.G. Smith, and by Mr. Ralph Brown, a former member of parliament for the constituency. Both spoke of the rate at which electors were seen going to polling stations on polling day. Mr. Smith said that he visited several polling stations - about 80 - and was on a general tour of the constituency from 8 o'clock in the morning until 3 o'clock p.m. and "it was hardly an election day;" hardly anyone was going to the stations; he did not see any queues. He said that when, on the evening of polling day, he heard the results announced his reaction was that "it was a fantasy - it couldn't be real" because of the poor turn-out. Mr. Smith said that he could not reconcile the number of votes received by his opponent with what he had seen on polling day and what he had experienced of past elections.

Mr. Brown said that starting from about 9 o'clock in the morning he spent the day touring the constituency. He said that he became aware of the results of the election on the night of 15 December and he saw nothing in his tour of the constituency to indicate the level of votes polled by the winning candidate - "not even 50%." Mr. Brown said:

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"What appeared to have happened in my mind, and as a result of what I saw during the day, was that there was a bogus election in Kingston West-Central." His conclusion, he said, was influenced by the fact that his (Brown's) opponent in the 1980 general election in the constituency received 700 odd votes less than the respondent Smith in the December 1983 election.

In my judgment, the evidence of these two witnesses was too vague to form a confident basis for the assessment of numbers in support of the allegation of widespread impersonation. The evidence may have been of some value had a greater number of actual cases of impersonation been proved. Though all the electors on the official lists in PDs.2, 10, 29, 35 and 42 and one less than the total in PDs.18 and 19 were recorded as having voted, in each of 61 polling divisions less than fifty percent voted and in 25 of these the vote was less than twenty-five percent. As regards the comparison with the 1980 results, the Director of Elections gave evidence that the constituency boundaries were changed in 1981 by the removal of one polling division and the addition of six, taken from Kingston East-Central.

The other irregularities alleged in the petition arise inferentially from the fact of impersonation and are stated at para. 3(b)(c) and (d) of the petition and in the second paragraph of this judgment. The petitioner cannot be permitted to rely for the success of his petition on irregularities not alleged by him; but at the hearing reference was made and evidence given of irregularities arising generally from the conduct of the poll in various polling divisions in the constituency. I shall refer to them mainly for the purpose of identifying these flaws in the electoral system as appeared in this constituency in the hope that corrective measures may be taken where possible by the responsible authority with a view to establishing and preserving the integrity of the system generally.

The poll books which were examined during the hearing showed that many of the election officers fell below the level of competence which should be expected of persons entrusted with such important duties.

At eight polling divisions (nos. 3, 8, 13, 40, 49, 73, 76 and 84) the forms of oath of election officers and agents were not completed. The oath for the agent at PD49 was left blank though the presiding officer said in evidence that she swore the agent; she said that she did not know there was a form of oath in the poll book; one wonders how she knew the form of oath to be administered. At PD75, the only oath taken was by the presiding officer and it was done in the presence of herself, instead of the poll clerk; she also took the poll clerk's oath in the presence of herself. At ten polling divisions (nos. 8, 13, 16, 27, 36, 49, 58, 68, 72 and 75) the statements of poll in the poll book were left blank and had to be completed by the returning officer; at PDs. 3 and 76 the statements were not signed by the presiding officers. At PDs. 13, 24 and 84 the names of electors were listed with no indication that they had voted. At PDs. 72, 73, 80 and 82 the addresses of the electors were omitted. The consecutive numbers of electors were omitted at PDs. 49 and 84; at PD 82 the registration numbers on the voters list were used instead of the consecutive number and at PD 40 the consecutive numbers used were not from the voters list. At PDs. 5, 76 and 87 the poll books were written up in pencil and at PD 73 a pencil was used then the writing was erased and written over in ink. The poll book for PD 89 bore a note by the returning officer that a name (Ronald Hollman) was added to the official list of electors without authority and a vote recorded in that name. The presiding officer at this polling station, Linval Campbell, was a "seasoned" election official, as he said in evidence, having been a presiding officer in some four or five previous elections in the Western Kingston constituency. So the unauthorised addition of a name was not done in ignorance.

The instances of impersonation and some of the other irregularities identified were, no doubt, facilitated by the fact that the losing candidate had no agent in any of the polling stations. Mr. V.G. Smith said that due to the shortage of time he was not able to procure the full complement of agents. He had fifty but, again because of shortage of time, he did not submit their names to the returning officer; he expected to do this on

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the morning of the election but could not find the returning officer either at his official office or elsewhere, though he searched for him up to midday. Apparently because the names of the agents had not been submitted, Mr. Smith was unable to get the presiding officers to accept his agents in their polling stations; after efforts made at "at least" twenty stations between 8 and 12 o'clock without success he gave up.

The agents of the winning candidate were, apparently, in place, except in PD 5. Indeed, the poll book for PD 51 showed that two agents took the oath at that polling station and the poll clerk, Wilhel Hardy, who gave evidence, confirmed that there were four persons in the station, including the presiding officer and herself; she said she did not know if the other two were Mr. Derrick Smith's agents, though they each had an electoral list and were "ticking off on them." At this polling station, there were 40 names on the official list and 40 electors voted - 39 votes going to Mr. Derrick Smith, the other being rejected. There were also two agents for Mr. Derrick Smith at the polling stations in PDs. 21 and 27. Coleen Anderson, the presiding officer in PD 5, said that there were no agents in her polling station. There were 6 proved cases of impersonation at this station. At the polling station for PD 74, the appointed poll clerk, Bonita Rowe, worked as presiding officer and Mr. Derrick Smith's agent at the station performed the duties of the poll clerk, after taking the oath.

The Director of Elections said that presiding officers and poll clerks to work in the constituency on polling day had to be recruited "at short notice." There was no direct evidence given of the period of notice. Counsel for the returning officer asked Mr. V.G. Smith in cross-examination whether he was aware that there was "considerable difficulty" recruiting presiding officers and poll clerks for the election. The answer was in the negative and the returning officer did not give evidence before me. I understood this question to be asked not only with respect to the short period available for recruitment but, as well, to the evidence given by Mr. V.G. Smith that he "scrutinized" the list of election officers sent to him by the electoral office three days before the election and saw that the "entire number" of officers were from West Kingston. This evidence

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was, obviously, intended to suggest that the officers appointed were likely to be biased in favour of Mr. Derrick Smith. When Mr. V.G. Smith was confronted with the list in cross-examination it was demonstrated that his evidence about the origin of the officers was exaggerated as they were not all from Western Kingston. Of 222 officers, the list showed that 75 were from Tivoli Gardens; the number from other areas of Western Kingston was not identified during the evidence as was the number from Tivoli Gardens.

As I have said, the competence which should be expected of election officers was shown to be lacking in many of the officers whose work was examined during the hearing, and only 54 poll books were examined. It seems self-evident that, in the absence of permanently maintained lists of election officers, their recruitment at short notice runs the risk of incompetent, dishonest and/or politically biased persons being employed. Even if they are qualified in every respect, there should be sufficient time allowed to enable them to be properly instructed on the intricate details of their duties. In a general election which is called at short notice, and in which there is a contest in all the constituencies, the burdens on the Director of Elections and his staff and on returning officers must be nothing short of tremendous and I have grave doubts that electoral duties in such an election can be performed with the efficiency that should be expected. In his closing submissions in this case, counsel for the returning officer stated that, insofar as his client was concerned, the time given did not allow for the (electoral) machinery to be effectively put in place. He said that a real burden was placed on the system.

Regarding the election with which I am here concerned, the Director of Elections said in evidence that election officials were appointed up to the night before polling day and up to then officials were being trained. The presiding officer in PD 49 said that she received no training - she attended no classes and did not receive a book of instructions; she was familiar with the voting procedure because she worked as a poll clerk in the 1980 elections in West Kingston. The poll clerk in PD 3 received no instructions but had an instruction booklet. The presiding officer in PD 27, Calvert Palmer, said that he did the poll clerk's job "because she was having difficulties." He said she had been to one class

only and "did not understand." The poll clerk in PD 74 who performed the duties of presiding officer said he received training at the Kingston senior school, presumably in the duties of a poll clerk, and had worked once before in an election, as an outdoor agent for "Mr. Eddie."

To return to the governing principles of law, in my judgment, the evidence adduced in support of the petition falls far short of satisfying the requirements of the second part of the common law rule, namely, that the election was not really conducted under the subsisting election laws. In explaining this part of the rule, Lord Coleridge said (ibid, pp. 744. 745) :

" the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as a matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in carrying out the election under those laws: It is necessary to be able to say that, either wilfully or erroneously, the election was not carried out under those laws, but under some other method. "

Lord Coleridge went on to give the examples of a candidate being selected by the tossing of a coin or by the result of a horse-race and continued (ibid) :

" So now, when the election is to be an election by ballot, if, either wilfully or erroneously, a whole constituency were to vote, but not by ballot at all, the election would be a free exercise of their will, but it would not be an election by ballot, and therefore not an election under the existing election law. But, if in the opinion of the tribunal the election was substantially an election by ballot, then no mistakes or misconduct, however great, in the use of the machinery of the Ballot Act, could justify the tribunal in declaring the election void by the common law of Parliament. "

The election in the constituency of Kingston West Central on 15 December 1983 was, of course, conducted under the provisions of the Representation of the People Act. The irregularities proved cannot therefore, avoid the election of the first respondent, Mr. Derrick Smith. I doubt very much whether an election petition brought in reliance on the second part of the common law rule can ever succeed in modern Jamaica.

The petition fails and is, therefore, dismissed.

Before parting with the case, I am obliged to refer to evidence given by Mr. Ralph Brown that persons who had agreed to attend court to give evidence in support of the allegations of impersonation refused to

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attend, after the hearing of the petition had begun, because of intimidation. The intimidation arose, he said, from published reports of "terrible" and "terrifying" experiences which he had in the environs of the court building when the hearing of evidence began; as well as from graffiti which appeared overnight on walls, doors and steps of residents of Beverley Gardens, an area within the constituency. I refer also to the fact that after the luncheon adjournment on 5 June, the second day of the trial, Mr. Small, leading counsel for the petitioner, reported threats to his life and other hostile behaviour in the environs of the court and beyond by persons whom the trial had attracted.

As I said when these matters were brought to my attention, some measure of control can be exerted in the immediate environs of the court; but the court is powerless in respect of acts of intimidation occurring farther away unless evidence to establish them and identify the perpetrators can be brought. It is well to record, however, that instances of obstruction to justice are manifesting themselves more and more in the society with apparent impunity. Insofar as the allegations in this case are concerned, it is my view that there is a likelihood of repetition in similar cases in the future until those able to influence political adherents encourage their followers to tolerate those who hold and express views and opinions opposed to theirs and not to regard them as enemies.