

COMMONWEALTH OF THE BAHAMAS
IN THE ELECTION COURT

2010
No.00221

IN THE MATTER OF The Parliamentary Elections Act 1992

AND

IN THE MATTER OF an Election for the Elizabeth Constituency
held on the 16th day of February, 2010

BETWEEN

LEO RYAN PINDER

Petitioner

AND

JACK THOMPSON

(Returning Officer)

First Respondent

ERROL BETHEL

(Parliamentary Commissioner)

Second Respondent

DUANE SANDS

Third Respondent

CASSIUS STUART

Fourth Respondent

ANDRE ROLLINS

Fifth Respondent

AND

RODNEY MONCUR

Sixth Respondent

Appearances: Mr. Philip Davis with Mr. Wayne Munro, Mr. Valentine Grimes and Mr. Keod Smith for the Petitioner
Mr. David Higgins with Ms. Kayla Green-Smith and Ms Kenria Smith for the First and Second Respondents
Mr. Thomas Evans Q.C. with Mrs. Dianne Stewart; Mr. Milton Evans, Ms. Veronique Evans, Mr. Howard Thompson and Ms. Sharlene Sealy for the Third Respondent

DECISION

ALLEN S.J.:

ISAACS S.J.:

A bye-election for the New Providence Constituency of Elizabeth was held on Tuesday 16 February 2010. The petitioner, the third respondent and the fourth through sixth respondents were the candidates in that election. The first respondent is the returning officer of that election and the second respondent is the Parliamentary Commissioner of The Bahamas.

2. The application by Petition, which resulted in the inquiry by this Court, is brought pursuant to section 69 of the Parliamentary Elections Act (Chapter 7 of the 2000 Edition of the Statute Laws of The Bahamas)(hereinafter “**the Act**”) and the Representation of the People (Voting Under Protest) Rules.

3. The Petition alleges that after a count and recount of the ballots cast in the bye-election, there were six protest ballots cast as follows:

“(a) Polling Division 4- 1 marked for Your Petitioner

(b) Polling Division 5- 1 marked for Your Petitioner

1 marked for Cassius Stuart

(c) Polling Division 7- 1 marked for Your Petitioner

- (d) Polling Division 8- 1 marked for Your Petitioner**
- (e) Polling Division 10- 1 marked for Your Petitioner”**

4. The Petitioner prayed that this Court:

- “(i) Determine the validity of the protest votes cast for all candidates in the aforesaid Election;**
- (ii) Determine whether any or all of the aforesaid voters were entitled to be properly registered and were entitled to vote in the aforesaid Election;**
- (iii) Determine whether, if so entitled, the votes of any or all of the aforesaid voters should be allowed;**
- (iv) Determine whether it is necessary to order that the register be rectified;**
- (v) If the answer to paragraph (iv) is in the affirmative this Honourable Court directs that the said Register be rectified accordingly;**
- (vi) Certifies in writing to the First Respondent the number of protest votes which it has allowed in respect of each candidate in the said Election;**
- (vii) Causes copies of such certificate to be forwarded to His Excellency the Governor General and to the Clerk of the House of Assembly;**

AND THAT

- (viii) The costs of and incidental to these proceedings be provided for; and**
- (ix) Your Petitioner may have such further or other remedy as may be just.”**

5. An inquiry under section 69 is triggered where an unelected candidate's regular votes is equal to, or exceeds the number of regular votes cast for any other candidate, but is less than the aggregate of the number of

regular votes and the number of protest votes cast for such other candidate, and that other candidate notifies the returning officer in writing that he wishes to have the validity of the protest votes cast for him determined by the Election Court.

6. Section 69(4) of the Act sets out the parameters of the inquiry. That subsection states:

“(4) On hearing such application if the Election Court is satisfied after taking into account the matters mentioned in paragraphs (a), (b), (c) of subsection (1) of section 58 or any of them that a voter was entitled to be properly registered and entitled to vote in the relevant constituency then it shall allow such vote, and if necessary, order that the register be rectified accordingly, and at the conclusion of the hearing of the application the Election Court shall certify in writing to the returning officer the number of protest votes which it has allowed in respect of each candidate for the constituency, and shall cause copies of such certificate to be forwarded to the Governor-General and to the clerk of the House of Assembly; and the determination so certified shall be final to all intents and purposes.”

7. It is also useful to set out the provisions of the law relating to voting at an election. In that regard, sections 57 and 58 provide:

“57. (1) No person shall be permitted to vote in any polling division at any election unless-

- (a) he produces his voters card or other sufficient means of identification and it is apparent that he has not already voted at the same election in the same constituency or in any other constituency; and**
- (b) his name is on the part of the register for that polling**

division, and the presiding officer has scrutinized the voter's card or other means of identification produced by him and is satisfied as to his identity and his right to vote.

(2) The name of every voter who is permitted to vote upon the production of sufficient means of identification other than his voter's card, and the means of identification produced shall be entered on a list to be kept by the presiding officer.

(3) ...

58. (1) If during the course of identifying any person before voting in any polling division at any election under the provisions of paragraph (b) of subsection (1) of section 57, the presiding officer is not satisfied as to the identity of such person or of his right to vote because-

- (a) such person's voter's card has any defect;
- (b) the entry relating to such person in the register is incorrect; or
- (c) such person has a voter's card but his name does not appear in the register for the relevant constituency or polling division,

then the presiding officer shall permit such person to cast a vote upon a coloured ballot paper and such vote shall be known as a protest vote.

(2) In any other case in which the presiding officer permits any person to vote such vote shall be cast upon a white ballot paper."

8. Counsel for the third respondent suggests that this Court, in determining the validity of a vote under section 69(4), is limited to considering only those matters referred to in section 58(1)(a),(b) and (c). We respectfully disagree and repudiate the notion that we are able to modify the Act to supply

words to accord with the view that the Court 'may only' take into account the matters mentioned in section 58.

9. Whereas, a presiding officer is mandated and limited by the express words of section 58(1)(a),(b) and (c), there is no such express limitation on the investigatory powers of this Court when determining the validity of a protest vote under section 69 (4).

10. Counsel also contended that the register is conclusive for all purposes except for matters specified in section 9(2) of the Act and that the register can only be corrected to remove a person who is not qualified to be on the register by reason of such matters. He commended the cases of **Stowe v Jolliff** TLR Vol IX 734 and **Pembroke Boroughs OH&M Vol.V**, Case 10 in support of this argument.

11. Those authorities are more than a hundred years old and involved the interpretation of various statutory provisions, which are not akin to the provisions in the Act and are therefore not very helpful in interpreting its provisions.

12. The attitude of Courts has drastically changed since those decisions. Courts now scrupulously and jealously protect the universality of the right to vote and guard against the unnecessary disenfranchisement of voters. This is so because the right to vote is so crucial to the proper functioning of a parliamentary democracy.

13. Furthermore, the third respondent provided evidence in this inquiry to seek to establish the invalidity of the protest vote of Voter A.

14. We are of the view, that given our jurisdiction under section 69(4), evidence may also be received to prove that a person who is not on the register was entitled to be properly registered and was entitled to vote.

15. There is no dispute that the votes were cast for the candidates as alleged in the Petition. This is confirmed by the Form Q, produced by the first respondent. In order to protect the identity of the six voters who cast protest votes, each was assigned a letter of the alphabet from A through F, and they shall be referred to by those assignments in this decision.

16. There is no dispute either, that the protest votes were cast in the polling divisions as claimed in the Petition and the parties also agree that the map of Elizabeth, exhibited by the second respondent, correctly shows its boundaries.

17. **Voter A**: This voter produced a voter's card to the presiding officer, which showed she was registered in polling division 4, but her name was not on the register. Her address was described on that voter's card as "**S/ Pine Barren Rd. W/Barn Close**" and her voter's number is shown thereon written in red ink. That address is within the Elizabeth Constituency.

18. The counterfoil produced by the first and second respondents however, is not the counterpart of that voter's card and it is alleged that it is the counterfoil of the replaced card. The counterfoil describes her address as "**W/ Academy Street N/Pine Barren Road**", which is not in the Elizabeth Constituency, but in the Fox Hill Constituency. The form B shows the same address.

19. A comparison of the voter's card, and the other documents exhibited, shows they are consistent in the name, date of birth and voter's number and the photo on the voter's card is consistent with that on the

counterfoil. The card also appears to have the voter's signature and that of the revising officer as well as the stamp of the second respondent's department.

20. The voter filed two affidavits and gave viva voce evidence. She told the Court that when she collected her card she realized she had been put in the wrong constituency and visited the second respondent's department to have it changed. She testified that she was issued a new card whereupon she relinquished the old one.

21. Her evidence that she was issued a new card was supported by her husband's evidence and that of Michael Bullard and indeed, the second respondent admits that the card seems to be one issued by his department and in relation to the handwritten voter's number, he was not disclaiming it was written by his department as that was the practice when a card was reissued. He also acknowledged that the original counterfoil was possibly with him, but he didn't know what happened to it.

22. It was never suggested to the voter that the voter's card was not genuine or was obtained by fraud or other improper means and the second respondent did not suggest that it was.

23. The Court accepts there were inconsistencies between the voter's evidence and that of her husband and Michael Bullard as to the date the new card was issued and other matters we felt were peripheral. The question is whether anything turns on these inconsistencies if we are satisfied that she was in fact issued the card and it is genuine.

24. Indeed, if we accept the evidence of the second respondent that the voters' cards for the 2007 general elections were not issued until after 10 April 2007, if we accept that the new card was issued on her application as she said and if we accept that the stamp on the back of the card indicates she voted on 2

May 2007, then it follows that the new card would have had to have been issued after 10 April 2007 and before 2 May 2007.

25. The voter testified that she lives with her husband on the south side of Pine Barren Road with their 7 children along with Michael Bullard and a number of other persons. Michael Bullard supports her evidence of where she resided and so does Bishop Philemon Wilson and Bishop Ross Davis.

26. The voter's husband testified they lived together. His name is on the register of Elizabeth and the address entered there is the same as on A's voter's card.

27. We accept there were inconsistencies between the evidence of the voter and her husband as to when they moved to Pine Barren Road, but we find, on his evidence and that of Bishop Philemon Wilson, Bishop Ross Davis and the application for registration to the National Insurance Board dated 12 January 2006 which shows her address as Pine Barren Road, and given there is no sufficient evidence to refute it, that this voter lived at the address on her voter's card since at least 2006.

28. In any proceedings, there are bound to be discrepancies between the evidence of witnesses for the reason that persons have different powers of observation and different powers of recollection after the passage of time. Where the discrepancies are minor and may be explained by the passage of time and such as nothing turns on them, the Court may ignore them and accept the witness's evidence. It is only where the inconsistencies are serious and go to the root of a witness's evidence, such that it weakens or destroys the credibility of that witness and the reliability of the evidence given, that the tribunal will reject the evidence in whole or in part.

29. We considered the submission by Counsel for the third

respondent that we should not find this voter credible because, in addition to the inconsistencies in her evidence, the first time the voter mentions visiting the second respondent's office to change her voter's card was when she gave evidence here.

30. There may well be reasons, consistent with the truth, why it is not mentioned in her affidavits. It is possible, for instance, that she may not have been asked about it, or she may have told the person preparing the affidavits, but it may have been inadvertently omitted.

31. After considering the evidence as a whole, we are satisfied on the substantive issues that this voter has told us the truth and in relation to what we consider are peripheral or minor matters, that she was simply mistaken. In the premises, we accept that the voter was issued the voter's card by the second respondent's department between 10 April 2007 and 2 May 2007, that the card is genuine and that she lived at the address shown on the card since at least 2006.

32. It was suggested that the law only allows the second respondent to reissue a voter's card where the revising officer is satisfied that the original card is lost, stolen or completely destroyed and not likely to be found or recovered, or where a card has been mutilated or defaced.

33. However, having issued a voter's card to reflect the correct address, it was incumbent on the revising officer to also produce a new counterfoil and to correct the register accordingly.

34. In our view, this voter acted responsibly and did all she could reasonably do, to bring the error to the attention of the second respondent, but we find the second respondent failed to do what was required, to ensure this voter's name was included on the relevant register. It is no answer that the second respondent did not know of this matter until after the election.

35. In the premises, we are satisfied that voter A was entitled to be properly registered and was entitled to vote in Elizabeth and we allow the vote and order that the register be rectified to include this voter accordingly.

36. **Voter B**: This Voter produced a voter's card and was included on the register in polling division 5. The voter's name and address were consistent on the voter's card, the counterfoil (form D) and on the form of oath (form B), but the voter's date of birth, although consistent on the voter's card and on forms B and D as "**15 June 1963**", was shown as "**15 January 1963**" on the register. The second respondent admits this was an error and acknowledges his responsibility for it.

37. The third respondent contends there is no evidence as to which of the entries is correct, and his vote ought not to be allowed. However, in light of the second respondent's admission and given that the counterfoil and the oath subscribed by this voter are consistent as to his date of birth, we are satisfied that the correct entry is 15 June 1963.

38. We allow the vote and order the register be rectified to reflect the correct date of birth accordingly.

39. **Voter C**: This voter produced a voter's card and was a voter affected by the boundary changes in 2007. The voter's card was corrected to reflect this change from Holy Cross to Elizabeth and shows she voted in 2007. This voter's name was on the register which shows her date of birth as "**13 January 1970**". That is also the date of birth on the counterfoil (form D). The date of birth however on the voter's card, which is the counterpart of the counterfoil, and on the oath (form B), is "**3 January 1970**".

40. The form B of this voter also shows that the voter used her passport

as the source of identification when registering, and that passport records her date of birth as “**3 January 1970**”. The second respondent admits the error both on the counterfoil and register and concedes this vote as does the third respondent.

41. In the premises, we allow this vote and order the register be rectified to reflect the correct date of birth accordingly.

42. **Voter D**: This voter’s name was not on the register for Elizabeth. When presenting to vote, the voter produced a voter’s card, the counterfoil of which shows that “**Elizabeth**” was crossed out in red ink and “**Yamacraw**” inserted. The address of “**152 W/ Commonwealth Boulevard S/Malaysia Way**” was altered, by crossing out the “**S**” and inserting an “**N**” which consequently put the address outside of Elizabeth. The form of oath (form B) shows similar alterations.

43. This voter did not give evidence, and we assume, in the events which happened, that the voter’s card produced on election-day showed the original address, which, but for the house number, was in the Elizabeth Constituency.

44. The second respondent testified at first that he did not know who made the corrections. He however, accepted that he is the keeper of election records, including all counterfoils and the forms B and is the only person with the power to make the alterations on a voter’s counterfoil and form B.

He admitted subsequently that he may have authorized the alteration of the voter’s oath and the register and conceded that the alterations should have been initialed.

45. He testified that he personally walked Commonwealth Boulevard and located house 152, north of Malaysia Way. He said he spoke to persons there,

but did not know if he spoke to the voter. There is no evidence before us that Voter D lives in the house visited by the second respondent.

46. The second respondent also accepted that the voter was first put on the register on 12 January 2010 and was removed from the register on 30 January 2010. He testified that the register was deemed closed at 11p.m. on the day before the Writ of Election, which was 20 January 2010. Under section 25 of the Act, no name or entry can thereafter be removed from any of the appropriate parts of the register until after polling day.

47. The second respondent admitted his obligation to correct the register and to his credit, acknowledged that he cannot change the register unless he verifies the information or contacts the voter and if he is unable to do so, the information must remain on the register.

48. We are amazed then that the second respondent determined that this voter resided at “**152 W/Commonwealth Boulevard, N/Malaysia Way**”, when he was unsure whether he encountered her and did not, by any other means, connect the voter to that address, and removed her from the register. For all he knew, the house number indicated on the counterfoil and register may have been incorrect and this voter may in fact live at a house on W/ Commonwealth Boulevard and S/ Malaysia Way.

49. But even assuming he had reasonable cause to believe that she resided at the address outside of Elizabeth, section 22(2) of the Act requires him to send out a notice in the prescribed form as soon as is practicable, notifying the voter of the objection, which is required to be heard in public not less than seven days after the voter is notified.

50. If the objection could not be heard before the close of the register, the law requires the second respondent to mark the fact of the objection in the

appropriate column of the register opposite the voter's name, and the presiding officer must then require that person, if he claims to vote on polling day, to take the same oath as if his right to vote had been challenged by a candidate at the polling place, and give him a white ballot. Had the law been followed, Voter D should have been able to vote on a white ballot.

51. When the second respondent purported to remove this voter's name off the register on 30 January 2010 then, he could not lawfully do so. He is not competent to summarily remove persons off the register whether, or not, he has reasonable cause to believe the information on the register is wrong and they should not be on the register.

52. The case of **Johnley Walter Ferguson v Virgeneas Alfred Gray et al** (No. 1166 of 2002) was commended for our consideration in support of the respondents' submission that this vote ought not to be allowed. Unfortunately, we did not find the passages to which our attention was drawn very helpful, in that, there was no general principle of law stated in those passages which was applicable to this case. Further, we do not agree that the removal of this voter's name by the second respondent can be described as an irregularity of procedure and such that nothing turns on it. We find his act in removing this voter's name from the register after its close, to be unlawful and incapable of invalidating her vote.

53. Moreover, in no circumstances at all, can a voter's oath be altered and no alteration of any other document can be made without the knowledge and consent of the voter, which must be indicated by initialing. What the second respondent did in this regard, is not only a breach of the Act, but is also a breach of the rules of natural justice.

54. We would also add that the circumstances of this voter may be

distinguished from those of the voter in **Ferguson v Gray** (above), in that there is no evidence that voter D lied on oath, or was guilty of misleading any election official, as in the case of the voter in **Ferguson v Gray**.

55. In our view, the register in effect on polling day was the register containing the names of the persons therein at the close of the register, which included this voter's name. We are therefore satisfied that this voter was entitled to be properly registered and entitled to vote in Elizabeth. We allow her vote and order the register be rectified to restore her name accordingly.

56. **Voter E**: This voter was on the register and voted in the 2007 general election. According to the evidence of the voter and the presiding officer, this voter was made to vote on a coloured ballot only because she was challenged by an agent of the third respondent. The respondents have conceded this vote should be allowed and we agree.

57. **Voter F**: We found this to be the most difficult to determine. This voter did not produce a voter's card and was not on the register for Elizabeth. She used a driver's licence as her means of identification and the presiding officer must have been satisfied of its sufficiency, but not of her right to vote.

58. Her voter's card was exhibited and showed she was registered in Yamacraw and voted in 2007. She was unable to say, however, whether she voted in Yamacraw or Elizabeth at that time. The only thing she was able to recall in that regard was that she voted at the Thelma Gibson School.

59. The documents show that she registered on 23 November 2005 and her address is listed on her voter's card and counterfoil as "**E/Yamacraw Drive S/Yamacraw Hill Rd.**"

60. The evidence of this witness further is that she moved from the address in Yamacraw on 27 May 2006 to **#4 Kemps Street off South Pine Yard Rd**. She produced a lease showing her as the tenant of the aforementioned premises with effect from that date. It is not disputed that the whole of Pine Yard Road and all houses on the north and south sides of that road are within Elizabeth. The voter swore that she was entitled to be registered and to vote in Elizabeth, and it was not suggested to her on cross-examination, that she did not live there and was not eligible to register and vote in Elizabeth.

61. As the cases of **Turnquest v the Parliamentary Registrar** [1982] BHS.J No.31, **Saunders v Symonette** [1988] BHS.J. No. 39, **Moxey v The Parliamentary Registrar** [1986] BHSJ No 134 and indeed the scheme of the Act clearly indicate, neither a voter's card, nor the register, qualifies one to vote and, it seems to us that the requirements of section 57(1)(b) of the Act are directory and not prohibitory. The voter's card and register are simply the basis of identification and entitlement to vote.

62. We believe it is also incorrect to say that the validity of a person's vote depends on whether or not that person made an effort to transfer to the relevant constituency. Indeed, the second respondent acknowledged he has an obligation to continuously review the register and to make provision for persons who need to transfer, to do so. He also acknowledged that the voter has no obligation to do so. We agree that is the law.

63. As we have said, this voter did not have a voter's card for Elizabeth nor was she on the register, but she was allowed to vote by the presiding officer, and having been allowed to vote, and in the unique circumstances which arise in this case, this Court's jurisdiction is invoked.

64. It is not in this Court's power under section 69(4) of the Act, to determine whether the presiding officer was correct in permitting her to vote. Our

jurisdiction is to determine the validity of the vote, not the validity of the presiding officer's decision.

65. This Court has then to determine whether or not her vote should be validated and before validating her vote, we must be satisfied, not whether she is properly registered, but rather, whether she was entitled to be properly registered and was entitled to vote in Elizabeth.

66. On the evidence, and in the absence of any evidence to refute it, we are satisfied that this voter lived in Elizabeth since 27 May 2006 and was so entitled and we allow this vote. We order the register be rectified to include her name.

67. Again, this process has exposed failures, omissions and errors on the part of the Parliamentary Commissioner and his staff which may, if not corrected, threaten the fairness of the electoral process and ultimately our democracy. It is not an answer to say that the Parliamentary Commissioner did not have resources to do what he is mandated by the law to do. No Court can accept that as an explanation for disenfranchising a voter.

68. We say emphatically, that the Parliamentary Commissioner must be provided with sufficient resources, both financial and human, to ensure he is able to properly discharge the duties imposed on him by law.

69. We wish to pay tribute to the industry of Counsel and to the artful and professional way they adduced the evidence and presented their arguments. We were greatly assisted by them in our quest to ascertain the facts and the law applicable to the determinations we had to make.

70. We shall certify to the returning officer the number of protest votes allowed and forward copies to the Governor General and to the clerk of the

House of Assembly as required. We shall also forward our order for rectification of the register to the second respondent.

71. Finally, on the question of costs, we reserve any such order pending any arguments Counsel may wish to make in that regard.

Dated this 23rd day of March, 2010

Anita Allen S.J.

Jon Isaacs S.J.

ELECTION COURT