

IN THE SUPREME COURT)
OF WESTERN AUSTRALIA)

THE FULL COURT

Coram: Jackson C.J., Virtue S.P.J., Burt J.

Heard: 20 April 1971 &
21 April 1971.

Judgment: 17.5.71

THE QUEEN

v.

His Worship JOCELYN MARTIN FORREST,
Stipendiary Magistrate, constituting
a Court of Disputed Returns for the
purpose of the Local Government Act
1960-1970

ex parte:

GARY NEIL WHITELY

Applicant

Order Nisi for a Writ of Certiorari.

Mr. R.I. Viner with Mr. G.G. Winterton (Robinson Cox & Co.)
appeared for the applicant.

Mr. K.H. Parker appeared for the Stipendiary Magistrate but
withdrew by leave of the Court.

AUTHORITIES CITED FOR APPLICANT:

Hilton v. Brebner (1968) 13 F.L.R. 89
Hobbs v. Morrey (1904) 1 K.B. 74
Pritchard v. Mayor etc. of Bangor (1888) 13 App. Cas. 241.
Gosling v. Valey (1847) 7 Q.B. 406
Bridge v. Bowen (1916) 21 C.L.R. 582
Drinkwater v. Deakin (1874) L.R. 9 C.P. 626
Re Bristol South East Parliamentary Elections (1964) 2 Q.B. 257
Re Smith Ex parte McKenna 7 Tas. S.R. 61 (1911)

JUDGMENT OF THE COURT:

This is the return of an order nisi calling upon Jocelyn Martin Forrest, S.M. to show cause why a writ of certiorari should not issue to remove into this court the decision of the Court of Disputed Returns, constituted by the Magistrate under s. 137(1)(b) of the Local Government Act, whereby an election held for the office of President of the Shire of Carnarvon was declared to be invalid and to show cause why that decision should not be quashed.

The order was obtained on the application of one Gary Neil Whitely who, as clerk of the Council (s. 86) was the

returning officer for the election. Whitely appeared before us by counsel as prosecutor on the writ; each of the candidates in the election was served with the order nisi but none of them appeared in support of, or to oppose the orders sought.

The record, so called, of the proceedings before the Court of Disputed Returns as brought into this court consisted of a document entitled "A Summons to Witness" addressed to Whitely and the reasons for the decision which reasons contain the declaration of invalidity.

From these documents the following facts emerge. On 15th May 1970 the Governor by order in Council and to give effect to a poll then recently taken pursuant to s. 10, subs.(7) et seq. of the Act, declared the mode of election of Shire President be altered from election by the Council to election by the electors of the Municipality. Such an election thereupon became necessary and the Council fixed 12th September 1970 as being the date upon which it was to be held. The Shire Clerk (Whitely), in the words of the Magistrate's reasons, "then set about preparing a revised list of electors pursuant to s. 59". It seems that he prepared a list of additions to and deletions from the settled roll and then submitted this list to the Council who on 26th August: "resolved that the electoral roll be altered by additions and deletions as per the list submitted by the Shire Clerk and as permitted by s. 59 of the Local Government Act". How many additions to or deletions from the roll appeared on that list is not known but it was established that the name of one Young appeared on it as an addition to it. The roll with the listed alterations to it was used for the purposes of the election. It will be seen that the alterations made in the terms of the resolutions were made "during the period of 29 days next preceding (the) election" within the meaning of s. 59(2) and hence they were not alterations which the Council had power to make. They were not "authorised by this section" within the meaning of sub-s.(3) of s. 59. From this, two consequences follow. The first is that Young, who as will appear was a candidate in the election, was not qualified.

See s.35(1)(c); and the second and, we think, the more significant consequence is that the election had been held upon a roll which had been altered in breach of s. 59(1) and hence upon a roll which had not been compiled according to law.

The election was held on the date which had been fixed and upon the final count it was established that one Tuckey had polled 668 votes and one Davis 664 votes. The candidate Young was defeated in the course of the progressive count. Tuckey was declared elected. Davis thereupon and within the time limited by s. 137(2) made complaint, as it appears recited in the witness summons to Whitely that:

"An election held within the Magisterial District of Carnarvon, to wit at Carnarvon being an election for the President of the Shire of Carnarvon was invalid contrary to s. 137 of the Local Government Act 1960 (and amendments), upon the grounds that Alan Young was not eligible for nomination as a candidate pursuant to s. 35 of the Local Government Act 1960 (and amendments)."

Upon that complaint the Magistrate issued a summons directed to Whitely in his capacity as Returning Officer and to each of the candidates and he entered upon an enquiry pursuant to s. 137 of the Act. At the enquiry each of the persons summoned to appear did so and Davis and the Returning Officer were each represented by counsel.

The facts as recited in these reasons relative to the amendment of the Roll were not in dispute before the Magistrate and upon that state of fact the Magistrate in the terms of his reasons concluded that "the amendment to the Roll made by the Council on 26th August, which amendment added Mr. Young's name to the Roll was invalid, - that a substantive prohibition of the Local Government Act had been breached In the circumstances therefore I consider that I do not have a discretion merely to uphold the election provided that the will of the electorate has been demonstrated and I have no option as I see it but to declare the election invalid and I so declare".

The grounds argued on behalf of the Returning Officer before us in support of the issue of the writ and as formulated in the

order nisi were as follows:-

- (1) The Court of Disputed Returns was in error in deciding that the election was invalid on a ground which was not the ground alleged in the complaint, namely the Court held the election to be invalid on the ground that a substantive prohibition of the Act had been breached by the invalid (as the Court found) amendment of the roll of electors by the unauthorised addition of the name of the person Alan Young to the roll, whereas the real question before the Court of Disputed Returns was whether or not the election was invalid by reason of the fact alleged in the complaint, namely that the person Alan Young was not eligible to nominate in the election as a candidate for the office of President
- (ii) Notwithstanding that the Court of Disputed Returns decided that Alan Young was not eligible to nominate as a candidate the Court of Disputed Returns was in error in deciding that as a matter of law on the facts as found by the Court the election was invalid.

It seems convenient to deal with the second ground first.

It is clear that Young was not qualified to nominate. At the time of his nomination he was not qualified to hold office if elected. Section 92(a). His name did not appear on the electoral roll. Section 35(1)(c).

In support of this ground, counsel referred us to a number of authorities dealing with the question whether votes are or are not to be considered as having been thrown away. That is a question which may arise when a disqualified candidate has been declared elected and when in the terms of s. 137 (1) the issue is as to whether "a person ought to be returned as a member of the Council in preference to the person actually returned as elected". That was not the question in the present case, it not being here suggested that Tuckey was disqualified or that Davis ought to have been returned in preference to him. The complaint as made was that "the election so held" (that is to say, the entire process whereby the will of the electors was ascertained as well of the result which it apparently produced) - "was invalid" which complaint if made out would require the Returning Officer "to prepare for, conduct, ascertain and declare the result of a fresh election". See s. 137(1)(d). The idea of votes thrown

away would seem to us to have no bearing on that question. Otherwise it is enough to observe of this ground that it does not assert, nor is it the case that the magistrate held the election to be invalid for the reason that Young was not eligible to nominate as a candidate. The election was held to be invalid because the roll upon which the election had been conducted had been amended in a way which was positively prohibited by the statute.

This then brings us to a consideration of the first ground.

In a sense it raises what one might describe as a pleading point. It does not assert that the Magistrate was wrong in declaring the election to be invalid because of the unauthorised amendments made to the roll. What it does assert is that that was not the "real question" and, one might add, the more particular question, arising out of the complaint, it being whether Young was eligible to nominate. The idea basal to this ground is that a magistrate constituted a Court of Disputed Returns for the purposes of the Local Government Act and enquiring into a complaint that an election is invalid cannot so declare upon a ground which does not fall within the particulars (if any) which have been formulated in the complaint. This appears to have been accepted by the Magistrate in the course of his reasons although in the expressed basis for his decision it is departed from. Whether the point taken is sound must, we think, in every case depend upon the Statute which creates for its own purposes the Court of Disputed Returns and particularly upon the character and extent of the powers which are by that Statute conferred upon it. Section 137 of the Local Government Act does not require that the complaint which initiates the proceedings should do more than assert that the election was invalid. Particulars are not a necessary part of the initiating process and if given they cannot in our opinion act as a fetter upon the court's power to enquire into the matter of the complaint, this being that the election is invalid. We have no doubt but that the magistrate may well in the course of the inquisition and as a matter for his discretion require that the

particular grounds going to invalidity be formulated so that all persons before him having an interest in the enquiry be given an adequate opportunity to answer what is being alleged. But that is not to say that a failure to particularise goes to power and in our opinion it does not.

On the particular facts of this case the need for further particulars does not seem to have arisen. The eligibility of Young as a candidate and the unauthorised amendments made to the roll were not in truth two independent questions; one was dependent upon and was the consequence of the other and one could not be enquired into without enquiry being made into the other. Furthermore the facts relating to those questions were not in dispute.

Hence at the end of the enquiry it did appear, and it was not before us otherwise contended that the election was conducted upon a roll of electors which in its final form had been prepared in direct violation of the statutory prohibition. The "election was entirely a statutory proceeding" - Bridge v. Bowen (1916) 21 C.L.R. 582 at p. 613 per Isaacs J. and it so appeared that it had not been conducted in conformity with the Statute and this in a way which was in the true sense basic to it in that it adopted a mode of election which could not be said to have been "by the electors" within the meaning of s. 10(7)(a). See the definition of "elector" in s. 6. The Magistrate in our opinion was right in making the declaration of invalidity. The relevant law is correctly stated in the 3rd edition of Halsbury, Vol. 14, p. 150; "If, on the other hand, the transgressions of the law by the officials being admitted, the Tribunal sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or it is open to reasonable doubt whether those transgressions may not have affected the result, and it is uncertain whether the candidate who has been returned has really been elected by the majority of persons voting in accordance with the laws in force relating to elections, the tribunal is then bound to declare the election void". See also In re Smith ex parte McKenna (1911) 7 Tas. L.R. 61; in

re James ex parte Nettlefold (1914) 10 Tas L.R. 11 and Q. v. Cooper (1890) 4 Q.L.J. 5.

The case is certainly not one in which this court upon an application made by the Returning Officer, he being a person who has no interest in the result of the election, should exercise its discretion to order that the writ should issue.

The order nisi should be discharged.