IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 23 of 1984

Between:

MAAN SINGH s/o Sarju Prasad — Appellant

- and -

1. THE TOWN CLERK OF SUVA
2. NAVIN MAHARAJ — Respondents

B. Toomey Q.C., G.P. Lala & M. Patel for the Appellant
D.C. Maharaj for the 1st Respondent
Sir Vijay R. Singh, Jasbir Singh & H.M. Patel for the 2nd Respondent

Date of Hearing : 24th July, 1984
Date of Judgment : 27th July, 1984

JUDGMENT OF THE COURT

Speight, V.P.

The appellant was the unsuccessful plaintiff in an action in the Supreme Court, wherein he sought a declaration that a vote cast by a Councillor, in a ballot for election of Lord Mayor of Suva on 29th November, 1983, was disallowed.

Had his action been successful, then the voting for Lord Mayor would have produced a tied ballot, with the consequences that the result would have to be determined

by lot. That is the result that the appellant now seeks to achieve via this Court.

The facts and issues can conveniently be set out by reciting portion of the decision of Kermode, J. in the Supreme Court.

> "On the 28th November, 1983, an election for the office of the Lord Mayor of Suva was held at the Chambers of the Suva City Council under the Chairmanship of the Acting Town Clerk, Mr. Kailash Mehrotra.
>
> There were 20 elected Councillors at that meeting including the plaintiff and the first defendant.
>
> The plaintiff and the first defendant were both nominated for the office and a ballot was held.
>
> It is not in dispute that there were 20 votes cast resulting in the first defendant receiving ten votes, the plaintiff nine votes and one vote was held by the Chairman of the meeting to be informal. The ballot papers were destroyed after the election but there is no dispute as to how the rejected ballot paper was marked.
>
> The plaintiff's case is that the informal vote was in fact a vote for him and that the result of the ballot was a tie which should have been decided by drawing lots as provided by section 21(3) of the Local Government Act 1972.
>
> Each ballot paper had the two names of the plaintiff and the first defendant on it. The instructions given to the Councillors by the Chairman of the meeting regarding voting was for the person voting to place a tick alongside the name of the person for whom he was voting. The vote which was held to be informal had a line through the name of the first defendant and no tick or other marking after the name of the plaintiff.

The legislative provisions for the election of the Lord Mayor of Suva are contained in sections 20, 21 and 22 of the Local Government Act which provide as follows :

'20. Each council shall elect a mayor in accordance with the provisions of sections 21.

21. (1) The mayor shall be elected annually by the council from among the members of the council and shall unless he resigns or ceases to be qualified or becomes disqualified from being a councillor under this Act, or his office otherwise becomes vacant, hold office until his successor is elected at the first meeting of the council after the expiry of twelve months from his election.

(2) The election of the mayor shall be by secret ballot and shall be the first business transacted at the annual meeting held after a general election to the council and thereafter at the first meeting of the council after the expiry of twelve months from the last election of a mayor.

(3) If at any election under subsection (2) there is given to two or more candidates an equal number of votes in excess of those given to any other candidate, or where in the case of there being only two candidates an equal number is given to each, the election between the two candidates with an equal number of votes shall be decided by the drawing of lots.

(4) The town clerk or, if there be no town clerk, the person appointed to be returning officer for the purpose of supervising elections to the council, shall preside at the annual or other meeting referred to in subsection (2).

(5) A council may with the prior approval of the Minister pay to the mayor such quarterly allowance as it consider reasonable.

22. The mayor of the city of Suva shall be known by the style or title of Lord Mayor of Suva.'

Mr. K.N. Mehrotra the then acting Town Clerk presided over the meeting called to elect the Lord Mayor. Except for the challenge to his ruling that the vote was informal there is no allegation that he did not conduct the election in accordance with the act and in a proper manner.

In his affidavit Mr. Mehrotra has set out in some detail how he conducted the election.

On the 22nd November, 1983, he gave each Councillor written notice of the Annual Meeting of the Council to elect the Lord Mayor and Deputy Mayor.

Attached to each notice for the information of Councillors was a memorandum stating that the election of Lord Mayor and Deputy Mayor is carried out under the provisions of sections 21 and 23 of the Local Government Act. The text of the two sections was quoted in the memorandum.

Three scrutineers were appointed at the meeting to count the votes.

At the meeting before using ballot papers Mr. Mehrotra explained to the Councillors that in accordance with past practice Councillors were to indicate their preference by placing a tick against the name of the candidate for whom they wished to vote.

Mr. Mehrotra stated in his affidavit that the Councillors unanimously agreed to accept that procedure. He then repeated his instructions that Councillors should tick the name of the candidate they wished to vote for and place the ballot paper in the ballot box. These statements have not been challenged.

Mr. Mehrotra then asked the scrutineers to distribute the ballot papers on which only the two names of the plaintiff and the first defendant appeared. He showed the Councillors the ballot box and again explained to the Councillors that they must indicate their choice by placing a tick against the name of the candidate of their choice and then placing the ballot paper in the box provided.

The Councillors then voted with the result stated earlier in this judgment.

Mr. Mehrotra declared the informal vote invalid and the second defendant duly elected as Mayor."

That completes the learned Judge's recital as contained in his judgment.

We continue: there are regulations governing the mode of voting by enrolled Suva voters, for the election of candidates for Council viz: The Local Government (Elections) Regulations (Cap. 125) 1972 but none for the election of Mayor. Consequently the only statutory or regulatory requirements are in Section 21(1) and (2) (supra).

The mode of conducting the ballot is left to the Town Clerk or his surrogate. (Section 21(4)).

According to the affidavits, the Acting Town Clerk presided; he apparently discussed the mode of voting with the councillors at the meeting and it is said in his affidavit that it was "unanimously agreed" that ballot papers would be used, showing the names of the two candidates and the vote would be cast by each councillor placing a tick alongside the name of the preferred candidate. In fact this is the mode prescribed for the Council elections. Some stress has been placed upon the fact that the Acting Town Clerk spoke three times about this as the appropriate method, and that there was no dissent.

It may shorten later discussion if we say now that we do not place over much reliance upon the claim of "unanimous agreement" in the sense that it is submitted, particularly by Sir Vijay Singh for the 2nd Respondent

that each councillor conscientiously and clearly affirmed that he understood that that was the only course to be followed and that he accepted that as the method he would adopt.

One is only too well aware that even in the most erudite committees and board meetings, some member may be less alert, or less intelligent than others, and silence or lack of question or dissent may sometimes be taken as proof of understanding and assent.

In the present case it was submitted on behalf of the respondents in the Supreme Court that the matter was one for the discretion of the returning officer, and that he was not satisfied that the challenged voting paper was an expression of intention to vote for the appellant. This view was adopted by the learned Judge when he said (page 12 of his decision, page 60 of the Record) that

> "the returning officer, by rejecting the vote as being invalid was clearly not satisfied it was a vote for either of the two parties."

With great respect we do not find that the recorded facts justify this conclusion. The Acting Town Clerk's affidavit (para. 10) says merely :-

> "as this (the absence of a tick against any name) was contrary to my instructions ... I declared that ballot paper to be invalid" -

Plainly the paper was rejected because it did not comply with the mode of voting which the Acting Clerk had, on

three occasions, instructed should be followed, and there is nothing to show that he turned his mind to the question of the voter's intention.

We accept the submission made by Mr. Toomey for the appellant, that electoral laws usually have two separate classes of provisions. There are clearly mandatory requirements contained in electoral statutes, providing for such essentials as secrecy of ballot; and what have been held by Courts as directory provisions (usually contained in regulations) as to the mode of recording a vote. Such an example is: Woodward v. Sarsons L.R. 10 C.P. 733 which we have found to be a persuasive early enunciation of the principle that the purpose of an election is to ascertain if possible the will of the electors.

In that case it was held that the mandatory enactment must be fulfilled exactly but it is sufficient if directory enactments are fulfilled substantially.

Now in the Local Government Act (supra) provision is made for secret ballots for election of councillors, and Regulations thereunder already referred to provide the mode of voting - but there is no provision as to the method of electing the Mayor, except for Section 21 which leaves the matter in the hands of the Town Clerk. A fortiori therefore by derivation from Woodward v. Sarsons it would seem that his directions can legitimately be claimed to be directory only. In such cases it cannot be said that failure to comply with the directed method automatically makes the vote invalid.

In a number of cases the relevant instrument

makes provision for the mode of voting, but also provides that despite a breach of the prescribed procedure, the "clear intention" of the voter is to be given effect to if it can be ascertained with reasonable certainty. For example: Rule 43 - Local Election Rules (U.K.) - pursuant to the Representation of the People Act 1949 (Section 2); Section 115(2)(a)(ii) New Zealand Electoral Act 1956.

Discussion of the application of such "clear indication" provisions may be found in the Levers v. Morris & Anor. (1971) 3 All E.R. 1300 and Wybrow v. Chief Electoral Officer (1980) NZLR 147.

But those cases relate to statutory provisions which specifically encourage the ascertainment of a voter's intention as the test of validity. However the common law relating to elections is in Mr. Toomey's submission of similar thrust.

In ascertaining the common law position three cases are of relevance: R. v. Bagley (1870) Mac (NZ) 836; Woodward v. Sarsons (cit. supra); Phillips v. Goff (1886) 17 Q.B.D. 805.

In each of these the "clear intention" of the voter was upheld as being the criterion by which the challenged vote should be judged.

In Woodward v. Sarsons it was said :

> "... if there be substantially a want of any mark, or a mark which leaves it uncertain whether the voter intended to vote

> at all or for which candidate he intended to vote, or if there be marks indicating that the voter has voted for too many candidates, or a writing or a mark by which the voter can be identified, then the ballot paper is void, and is not to be counted. Or, to put the matter affirmatively, the paper must be marked so as to show that the voter intended to vote for some one, and so as to show for which of the candidates he intended to vote."

This statement of principle is of general application in the common law relating to elections, and has been followed in a number of jurisdictions even when there is no specific statutory provision as to ascertaining intention.

The permutations and variations which the pen of a capricious voter may produce, and the conclusions which Courts have or have not been able to reach upon them are evidenced and discussed with examples both in Woodward v. Sarsons and in Wybrow (supra). The later case in particular is a useful summary of authorities.

We do not think it necessary to discuss other variations. We are faced with a two candidate paper on which one name was, as it seems, completely struck out. The striking out of candidates for whom the voter did not wish to vote has been an accepted method of voting in various countries from time to time. Until 1972 it was the accepted method in municipal elections in Fiji. We have no evidence to show the state of intelligence, or mental alertness of the councillors present on the occasion in question, but it may well be that a number of them were

of voting age in 1972. Nor is there anything to support the assertion made by counsel for the respondent that each councillor understood and unequivocally acknowledged that he would vote in the prescribed way.

We have given consideration to the submission that the action by a person so instructed, in disregarding the "tick only" instruction could only mean that he intended to make his paper informal by refusing to follow instructions - perhaps because he approved of neither candidate. The point made was that in this case, unlike a general or municipal election, it could not be assumed that the unknown councillor intended to cast a valid vote.

In our view a person so motivated could follow a number of courses - such as drawing a line through the paper as a whole - or striking out both names - or ticking both spaces or indeed making no mark at all. None of these step was taken. Instead as Mr. Toomey emphasises the affidavits of the appellant and the Acting Town Clerk unequivocally show that Mr. Maharaj's name was "crossed off" or "crossed out" or had a line running through it.

In rejecting the disputed vote Kermode, J. relied upon the following dicta of Stout C.J. in Hawkes Bay Election Petition (No. 1) (1915) 34 NZLR 507 at 509 where he said :

> "We can find no reason why a voter should, if he intended to vote for a candidate, strike out part of the name. The voters can read. If they could not read they could ask the assistance of the Returning Officer. There is no suggestion that these voters were illiterate. The instructions on the ballot paper are clear. 'The voter', it says,

'is to strike out the name of any 'candidate for whom he does not intend to vote by drawing' a line through the name with a pen or pencil.' What explanation, then, is to be given why the plain directions were not complied with?"

and later :

"If electors able to read will disobey the plain instructions of the Act must it not be assumed that they did not want to vote?"

With great respect to the learned Judge and also to Stout C.J. the quoted passages do not accord with the common law approach to elections as we have endeavoured to articulate them.

That approach is not to discipline the voter who does not fulfil instructions but to strive to give effect to a clear expression of intention.

Striking out of one of two candidates, especially in systems where this has previously been the approved system, has been accepted as unequivocally indicating a vote for the other candidate - see in particular Levers v. Morris (1971) 3 All E.R. 1300 and we think that the conclusion reached there is equally valid as for a general election, and for a ballot in what Sir Vijay referred to as "a small electoral college" such as the Phillips v. Goff situation.

Mention has been made of a number of "striking out" cases where the Court has not been satisfied that a clear intention has been evidenced. But the doubts arose because only part of the name was struck out, or because parts or the whole of the names of several candidates were thus marked:

See Lee v. McPherson (No. 2) (1923) N.Z.L.R. 1307; Hawkes Bay Election Petition (No. 1) (cit. supra).

We accept that the only reasonable conclusion in the present circumstances is that the intention was not in doubt and was to vote for the candidate whose name was not struck out.

The appeal is allowed and the Court, in pursuance of its powers, sets aside the decision in the Supreme Court, and declares that the vote thereby declared informal was a vote for the appellant. Costs to the appellant against the 2nd Respondent to be taxed if not agreed upon.

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Vice President

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Judge of Appeal

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Judge of Appeal