SUPREME COURT OF NAURU

Miscellaneous Cause No. 15 of 1977

IN THE MATTER of the Electoral Act 1965-1973;

and

IN THE MATTER of an election in the constituency of Ubenide.

DECISION:

This is a petition presented under the provisions of section 29 of the Electoral Act 1965-1973 to this Court as the Court of Disputed Elections. It relates to a general election held on 12th November, 1977. It is presented by one of the thirteen unsuccessful candidates for election in the constituency of Ubenide and challenges the validity of the election of the four members declared on 14th November, 1977, to have been elected as the members of Parliament for that constituency.

The grounds stated in the petition fall into two classes. The first class comprises alleged irregularities in the conduct of the election. It is alleged that certain police officers marked the ballot-papers of certain voters. The second class comprises allegations that the whole system used for recording and evaluating votes at the general election was unlawful, so that the members were not elected "in such manner as is prescribed by law", as is required by Article 29 of the Constitution.

The grounds of the second class were dealt with first by counsel in their addresses and it is convenient for this Court similarly to deal with them first in giving this decision.

It is not in dispute that the Returning Officer provided ballot-papers conforming substantially with Form 7 in the Schedule to the Electoral Act 1965-1973 and that he evaluated the votes in accordance with the provisions

of the Electoral (Electoral System) Regulations made by the Cabinet in January, 1971. The system of evaluation provided for by those Regulations is commonly known, and was referred to by counsel throughout the hearing, as "the Dowdall System". I shall similarly refer to it in this decision.

It is also not in dispute that section 27 of the Electoral Act 1965-1973 does not apply to an election of members for a four-member constituency; it does not purport to do so. Ubenide is such a constituency.

In the amended petition the petitioner alleges -

> "A.2. - that the laws of Nauru do not effectively prescribe the manner in which ... members (of Parliament) are to be elected, as the method of casting votes is not prescribed by any Nauruan law, either expressly or by implication"; and
>
> :A.3. - that there is thus a lacuna in such laws".

In the alternative he alleges -

> "A.4. - (that) the method of voting is as prescribed by the Electoral Act 1965-1973".

Mr. Ramrakha did not proceed with the alternative allegation set out in A.4.

He presented his arguments in support of the allegations contained in A.2 and A.3 on three bases. First, he submitted that sections 21 and 25 of the Act, the only sections stating the manner in which votes are to be recorded, cannot stand separately from section 27; and that, as section 27 does not apply to the election of members for a four-member constituency, those sections cannot prescribe the method of recording votes for such an election. Second, he relied upon the words used in the heading of Form 7, which is the form of the ballot-paper electors are required by section 21 to use. Those words are "Election of a Member (or two Members, as the case requires) of Parliament". Third, although he did not relate directly to the question of the validity of sections 21 and 25 his argument that a voting system providing for each elector

to have more than one vote would be repugnant to the Constitution, that argument is applicable to that question and must be considered in relation to it.

I shall deal first with the argument based on the words used in Form 7. The petitioner asserts that, as the form makes no provision for its use in an election of more than two members, it cannot lawfully be used in an election of four members and, in consequence, the reference in section 21 to Form 7 restricts the scope of that section to elections in single-member and two-member constituencies.

Since 1970 the Electoral Act has provided for the election of members for seven two-member parliamentary constituencies and one four-member constituency, Ubenide, and since 1973 it has clearly been intended to contain the provisions for the conduct of parliamentary elections. Mr. Ramrakha suggested -- but did not press the point - that the amending Act of 1973 was a nullity because Parliament was not lawfully elected in 1971 by reason of the use of the Dowdall System for valuing the votes. As Mr. Tadgell pointed out, however, no application has been made to have the 1971 election declared invalid and, unless such a declaration is made, the election remains valid and the laws made by the Parliament so elected remain valid. In those circumstances, since the form is as suitable for use in respect of the election of members for the four-member constituency as it is in respect of the election of members for two-member constituencies, no significance should, in my view, be attached to the fact that the words in italics, that is to say the alterntive heading of the form, were left unamended. If I am wrong in taking that view, I am, nevertheless, satisfied that, subject to section 21(1) being intra vires the Constitution and having effect in respect of two-member constituencies, the Returning Officer was, in the absence of express provision as to the form to be used for the recording of votes in the four-member constituency, entitled to use a form suitably adapted from Form 7. He was required

by law to hold the election for the constituency; the Constitution required that it be held. If no method of recording votes for the election of members for the four-member constituency was prescribed, the common law applied. In so holding I respectfully adopt the view taken by Barton J. in Bridge v. Bowen (1916) 21 C.L.R. 582 that "the common law applies when it is not expressly or impliedly excluded by statute". The common law applies in Nauru by virtue of the Custom and Adopted Laws Act 1971. The Presiding Officer was required by the common law to use a suitably effective method of holding the election. If the method of recording votes for the election of members for other constituencies was prescribed, he was entitled, and indeed almost certainly required by the circumstances, to choose a method as close as possible to it.

In support of his submission that any provision for a voting system by which each elector has more than one vote would be repugnant to the Constitution, Mr. Ramrakha referred to Articles 28 and 29. They are as follows -

> "28. - (1) Parliament shall consist of eighteen members or such greater number as is prescribed by law.
>
> "(2) For the purpose of the election of members of Parliament, Nauru shall be divided into constituencies.
>
> "(3) Unless otherwise prescribed by law, the constituencies and the number of members of Parliament to be returned by each of the constituencies are those described in the Second Schedule.
>
> "(4) A person shall not be at the same time a member of Parliament for more than one constituency.
>
> "29. Members of Parliament shall be elected in such manner as is prescribed by law, by Nauruan citizens who have attained the age of twenty years."

Mr. Ramrakha referred also to the absence of any provision for the office of Leader of the Opposition.

Although he conceded that the Constitution did not expressly provide that each elector should have only one vote, he submitted that the whole concept of a one-party, or rather a non-party, Parliament required that large groups of persons having similar interests should be able to obtain representation and that this could be achieved only if each elector had only one vote. If the Constitutional Convention had taken so firm a view of the matter, one would have expected express provision to be included in the Constitution to ensure that effect was given to it, particularly as till then the voting systems in use in Nauru for elections to the Legislative Council, the Nauru Local Government Council and the Constitutional Convention itself were preferential voting systems. Instead, there is a provision simply for the number of members and constituencies. As Mr. Tadgell pointed out, if every elector had only one vote and all electors in a constituency voted for the same one candidate, the election would fail to produce a Parliament of the size required by the Constitution. For these several reasons I find unconvincing Mr. Ramrakha's argument that, by implication, the Constitution restricts the voting system for parliamentary elections to one giving each elector only one single vote. On the contrary I am satisfied that any system which was fair, just and certain would not be repugnant to the Constitution, provided that it was effective to produce the number of members for each constituency required by the Constitution. Accordingly I find that the provisions of sections 21 and 25 of the Electoral Act 1965-1973 are not repugnant to the Constitution.

Finally, although Mr. Ramrakha asserted that sections 21 and 25 cannot stand alone, without section 27, he did not support that assertion by reference to any specific provisions of those sections which cannot stand independently of section 27. I have examined their provisions and, while no doubt they restrict the type of system which can be used, either by virtue of regulations made under section 27A or under the common law, for the evaluation of votes, that is to say that only preferential voting systems can be used,

I do not find any reason for holding that they cannot stand independently of section 27.

Accordingly, the petitioner has failed to establish that there is no provision in the law for the recording of votes at general elections or that the Returning Officer used an unlawful method for the recording of the votes cast by electors in Ubenide constituency on 12th November last year.

In respect of the evaluation of the votes cast at that election, the petitioner bases his case on three grounds. First, he asserts that the Electoral (Electoral System) Regulations were ultra vires the Electoral Act 1965-1973. His second ground is that those Regulations have never come into force; and his third ground is that the Dowdall System of valuing votes, being a preferential system, is repugnant to the Constitution.

I have already discussed Mr. Ramrakha's submissions that any provision for a preferential system of voting is repugnant to the Constitution. There is no need to repeat that discussion. It is sufficient to say merely that, for the reasons I have already given, I reject those submissions and that I find that the Dowdall System is fair, just and certain, and that it is not repugnant to the Constitution.

There is no doubt that the Dowdall System is a system for valuing votes. It is a different system from that provided for by section 27 of the Act. The regulation-making power relied on by the Cabinet when it made the Electoral (Electoral System) Regulations was that contained in section 27A of the Electoral Act 1965-1970. That section was inserted into the Electoral Ordinance 1965 (as the statute was then entitled) by an amending Act of Parliament in 1970. It reads -

> "27A. Nothwithstanding anything to the contrary herein Cabinet may make regulations as it thinks fit to provide for postal voting or voting by proxy or both and for prescribing the method of counting votes and determining the result of a poll in any constituency: Provided that no such regulation may make any distinction between constituencies returning the same number of members."

The first question to be decided in order to determine whether the Cabinet acted within the powers conferred on it by that section is whether that section authorises the making of regulations the provisions of which are inconsistent with those of the Act. Although it is unusual for a power to be granted to make regulations which override a substantive provision of the Act under which they are made, such instances do occur from time to time. For instance, in the English case of Miller v. Boothman (1944) K.B. 337 it was held that the section 60 of the Factories Act 1937 gave the Secretary of State a power to modify or extend by regulations the substantive provisions of the Act. Section 32 of the Interpretation Act 1971 of Nauru provides that, when an Act confers a power to make subsidiary legislation, that subsidiary legislation shall not be inconsistent with the provisions of any Act (including that Act), Ordinance or applied statute, "unless the contrary appears" in the Act conferring the power. Does "the contrary appear" in this case from the use of the words "notwithstanding anything to the contrary herein"? Those words are clearly intended to confer a power which can be exercised in spite of provisions "herein" which would otherwise prevent such regulations being made. Section 9 of the Interpretation Act 1971, which is substantially the same as section 22 of the Interpretation Ordinance 1956-1967 which was in force in January, 1971, provides that every section of an Act is to have effect as a substantive enactment. It might be expected, therefore, that the word "herein" in section 27A should mean "in this section". However, there is not "anything to the contrary" in section 27A. If the words are to be given an effective meaning - and clearly they were important words, intended to have an effect - the word "herein" must be taken to mean "in this Act". With that meaning the phrase makes very good sense.

However, that is not conclusive of the question whether the power given by section 27A is a power to make regulations inconsistent with the substantive provisions of

the Act and which override those provisions, although it points in that direction. In order to decide that question it is necessary to examine the subject-matter in respect of which the section empowers the Cabinet to make regulations. Would regulations on any of those subjects necessarily conflict with any of the substantive provisions of the Act? One matter for which regulations may be made to provide is postal voting. The whole concept of postal voting is inconsistent with the concept of personal attendance of electors at the polling places as a necessary requirement of the voting procedure, which is a requirement contained in the substantive provisions of the Act.

The provisions of section 27A must be construed in such a manner ut res magis valeat quam pereat. I am satisfied, therefore, that that section was intended by Parliament to, and does in fact, confer power on the Cabinet to make regulations in respect of the subject-matter specified therein which are inconsistent with and will override substantive provisions of the Act relating to that subject-matter.

The second question to be decided in respect of section 27A is whether it authorises the making of regulations for evaluating votes or only for the mechanical process of enumerating them. The relevant words of the section are "for prescribing the method of counting votes and determining the result of a poll". Mr. Ramrakha has submitted that those words must be read ejusdem generis with the words "to provide for postal voting for voting by proxy or both". As he points out, regulations for postal voting or for voting by proxy would be concerned principally with the mechanism of voting. In considering this matter it is necessary to have regard to the history of section 27A. As originally enacted it authorised the making of regulations only to provide for postal voting and for prescribing the method of counting votes and determining the result of a poll. The provision in relation to voting by proxy was added only in 1973. In those circumstances there is not a strong case for applying the ejusdem generis rule.

The verb "to count" is capable of meaning either simply to carry out the process of enumeration or to give a value to things which are the subject of a process of enumeration. It may have other meanings but none are appropriate to the context in which it is used in section 27A. In order to determine its meaning in that section it is necessary to have regard to the other provisions of the Act. As Mr. Tadgell has pointed out, the Act already provides in section 26 for the mechanism of the scrutiny of ballot-papers. It may be objected that it also provides in section 27 for the value to be given to votes cast in the election of members for two-member constituencies; but section 27 does not provide for the value to be given to the votes cast by electors in the four-member constituency of Ubenide. Such a provision had not been required in the Electoral Ordinance. The Electoral Ordinance Amendment Act 1970 was passed towards the end of 1970; a general election had to be held in January, 1971. Although inexpertly done, the Ordinance was amended by that Act so that it could be applicable to that election. The proviso to section 27A shows clearly that the legislature recognised the possible existence of some differences connected with "counting votes" and "determining the result of a poll" in two-member constituencies and the one-four-member constituency. Having regard to all these facts I am satisfied that the meaning which the word "counting" was intended by Parliament to have in section 27A was "giving a value to votes in the process of enumerating

them" and I so find. The Electoral (Electoral System) Regulations are, therefore, not ultra vires the power conferred by section 27A. Insofar as they are inconsistent with the provisions of section 27, they override them.

There still remains, however, the question whether the Regulations have ever come into force. Unless express provision is made to the contrary, subsidiary legislation comes into force on the date of its publication in the Gazette. (Interpretation Act 1971, section 29.) In January, 1971, subsidiary legislation came into force on publication of a notice in the Gazette that it had been made, unless another date was specified. (Interpretation Act 1956-1967, section 36.) The Electoral (Electoral System) Regulations were published in the Gazette on 22nd January, 1971. However, they contained as regulation 2 the following provision -

> "2. These Regulations shall come into operation on a date to be fixed by the Cabinet, by notice in the Gazette."

Mr. Tadgell has conceded that no notice expressly fixing the date on which the Regulations were to come into operation was published in any Gazette presently available for reference. A set of Gazettes from January, 1971, up to the date of the hearing of this petition was available for reference by the parties and the Court but no person was willing to give an assurance that it was a complete set. Nevertheless, it clearly contained most, if not all, of the Gazettes issued during the period. Mr. Tadgell, therefore, further conceded - rightly, I consider - that this Court might properly find that it was established on a balance of probabilities that no notice expressly fixing the date was ever published in the Gazette. I do so find.

Where the word "shall" is used in a written law conferring a power, it is to be interpreted, unless the context otherwise requires, to imply that the power must be exercised. We are not concerned here with the question whether the Cabinet must fix a date of commencement; as the

Cabinet itself made the Regulations, it seems unlikely that it was issuing a command of that nature to itself. Rather, the regulation is intended to specify the date on which the Regulations are to come into operation. It is to be a date fixed by the Cabinet; that date is to be fixed by a notice in the Gazette.

On its face the provisions of Regulation 2 appear to be mandatory both in respect of the body by whom the date is to be fixed and in respect of the manner. However, Mr. Tadgell has referred to several cases, of which the leading one is Montreal Street Railway Company v. Normandin (1917) A.C. 170, where Courts have considered the circumstances under which an apparently mandatory provision for the performance of a public duty should be treated as being merely directory. The principle to be applied is stated by Sir Arthur Channell delivering the advice of the Privy Council in the Montreal Street Railway Company case at page 175 as follows -

> "When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done."

Since 22nd January, 1971, four general elections have been held on the basis that the Dowdall System was to be applied for the evaluation of votes. Four Parliaments have come into existence as the result of those general elections; on at least four occasions Parliament has elected a member to be the President and he has appointed a Cabinet; the several Cabinets have performed many executive acts; the four Parliaments have passed a considerable number of Acts. Many people have acquired rights under the legislation, e.g. phosphate royalties paid under the provisions of the Nauru Phosphate Royalties (Payment and Investment) Act 1968-1970

as subsubsequently amended from time to time by Acts passed between 1971 and to-day. This, then is clearly a case where, if by construing the provisions of regulation 2 of the Electoral (Electoral System)Regulations, in relation to the manner of fixing the date, as merely directory the Regulations can be held to be in force, that course should be followed by this Court. The purpose of publication of a notice in the Gazette is two-fold. First, it provides a readily ascertainable record (or at least one which should be readily ascertainable) of the fact that the act to which the notice relates was done. Second, it informs the public of the fact that the act has been done. In respect of the Electoral (Electoral System) Regulations, the public was fully informed of the introduction of the Dowdall System of evaluating votes; very detailed explanatory notes, of which a copy was tendered in these proceedings as Exhibit 13, were distributed on or about the 21st January, 1971. So no public interest would be imperilled by taking the course to which I have just referred.

However, that course can be taken only if the Cabinet did in fact fix a date for the regulations to come into operation. A Cabinet Submission in relation to the general elections held on 23rd January, 1971, the Electoral (Electoral System) Regulations then in draft form and the use of the Dowdall System for the election was made to the Cabinet by the Secretary for Justice, Mr. Dowdall, on 19th January, 1971. A copy of that submission was tendered in these proceedings as Exhibit 10. It concluded with the following Recommendation -

> "Cabinet is advised to adopt the Exhaustive Ballot Paper System of election in all constituencies in the forthcoming Parliamentary Elections and accordingly to make the Regulations attached hereto and entitled the Electoral (Electoral System) Regulations."

On 20th January, 1971, the Cabinet held a meeting at which that submission was considered. The Cabinet's decision on the matter was recorded as follows -

> "Cabinet approved the entire substance of the Recommendation to adopt the Exhaustive Ballot Paper System of election in all constituencies in the forthcoming Parliamentary Elections and accordingly to make the Regulations attached to the Cabinet Submission and entitled the Electoral (Electoral System) Regulations, but preferred that the system of election submitted be forthwith referred to as the "Dowdall System" and not the "Exhaustive Ballot Paper System"."

It is clear that at that meeting the Cabinet made the regulations and decided that they should be in force by 23rd January, 1971. This could have been best achieved by omitting regulation 2 altogether. However, for some reason which is not apparent - possibly due to an oversight - it was left in and was part of the regulations as made.

Regulation 2 provides for "a date to be fixed", that is to say the reference is to a prospective event, not a past event. So the decision made on the 20th January that the Regulations should be in force by the date of the election cannot itself be the act required to bring them into force. However, it is clear that the Cabinet persisted in that decision; it was never revoked, expressly or impliedly. On the contrary acts were done which show that the Cabinet continued to be of the same mind as when the decision was made; the decision can be described as a continuing decision. The executive authority of Nauru is vested in the Cabinet by Article 17 of the Constitution which provides also that the Cabinet has the direction and control of the government of Nauru. The issue of the explanatory notes by the Secretary for Justice was an executive act. Applying the maxim omnia praesumuntur rite acta esse, this Court is entitled to infer that he acted in accordance with the will of the Cabinet. The Cabinet took no action to withdraw the explanatory note or to inform the public that the Dowdall System would not be used for the general election to be held on 23rd January, as surely it would have done if the Secretary for Justice had issued the note without its authority or if it had changed its mind about bringing the Regulations into force by 23rd January.

Therefore, I find that up to and including 23rd January, 1971, there was a continuing intention of the Cabinet that the Regulations should come into force on or before that date. By authorising, expressly or tacitly, the Secretary for Justice to issue his explanatory note and by not taking action to deny its authenticity, the Cabinet reaffirmed on 22nd January its decision made on 20th January that the regulations should come into operation by 23rd January. I find as fact, therefore, that the Cabinet did fix either 21st January, 1971, 22nd January, 1971, or 23rd January, 1971 as the date on which the Regulations were to come into operation, and that it did so after the Regulations had been made and published. Accordingly I find that the Electoral (Electoral System) Regulations are in force and have been in force since not later than 23rd January, 1971.

There remain to be considered the grounds of the first class to which I referred earlier. In his petition the petitioner alleges only that "on the 12th day of November, 1976 (sic) various and known numbers of the police force did mark the ballot-papers of various and known electors of the Ubenide Constituency". The year "1976" is clearly an error; it should be "1977".

Mr. Ramrakha sought to broaden the ground to include an allegation that the whole election was vitiated by the presence of police officers within the polling stations in places where they might, either deliberately or unintentionally, exert pressure on electors to cast their votes differently from the manner in which they would otherwise have cast them. In view of the provisions of section 37 of the Electoral Act 1965-1973, I might be inclined to allow him to do so if any evidence were before this Court which might support that allegation. On the contrary, however, all the witnesses who were questioned on this matter categorically denied that they were influenced in any way by the police officers; and the evidence of the police officers was to the effect that they did nothing which might have had that result.

Whether it is desirable that police officers should be inside the polling-stations is a matter for the Returning Officer to decide. Provided that they do not enter any voting compartment, or attempt to interfere with any elector or to influence him in the manner in which he casts his votes, or in any way breach the secrecy of the ballot, there is no reason why they should not be inside polling-stations. This case has demonstrated, however, the risk that their presence there may lead to improprieties and allegations of impropriety.

Mr. Tadgell has drawn attention to the lack of express provision in the Electoral Act 1965-1973 in relation to persons other than Presiding Officers marking ballot-papers for electors and has invited this Court to hold that no prohibition of their doing so is to be implied. I should be most reluctant to hold that that was so and an examination of the provisions of the Act reassures me that it would not be proper for me to do so. The Act is clearly intended to provide for secret ballots and the power given to Presiding Officers to ~~make~~ mark ballot-papers in specified circumstances is intended to be regarded as an exception to that general principle. It would seem that, if persons who cannot speak and understand the Nauruan language are to be appointed as Presiding Officers, additional provision is required in the Act for interpretation. Provision is doubtless also required to cater for various circumstances other than those specified in the Act where an elector requires assistance, not necessarily to have his ballot-paper marked for him but to be given information as to its contents so that he may be able to mark it himself in a manner designed to give effect to his preferences for the various candidates.

As I have just indicated, I find that it was improper for a police officer to mark an elector's ballot-paper for him. However, the evidence establishes clearly that the two electors concerned were not influenced by the police officers and that their ballot-papers were marked in accordance with their own wishes. Further, even if that were not so, the number of votes separating the fifth from the fourth, and

last successful, candidate was more than six. The total number of votes which the fifth candidate might have gained and the fourth candidate lost if the two ballot-papers had been marked otherwise than as they were was less than two. That would still have left a gap of more than two votes between those candidates and would not have affected the result.

The improprieties proved in these proceedings were not so serious in themselves as to vitiate the whole conduct of the election; nor could they have affected the result.

One other ground was included in the petition, namely that on 5th November, 1977, "the day published as being the last day for the transfer of electors the Registrar or officers on his behalf did refuse the applications for transfer to the constituency of Ubenide (of) certain and known eligible Nauruan voters". In his reply to the petition made on behalf of the Returning Officer, Mr. Lang pointed out, correctly, that under the provisions of section 11 of the Electoral Act 1965-1973 appeals against such refusal lie to the District Court, the decision of which on the matter is final. That ground was not argued during the hearing of the petition and the petitioner must be taken to have abandoned it. It was without merit.

Accordingly the petition is dismissed.

3rd March, 1978. Chief Justice