

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 9 of 1989

BETWEEN:

HUBERT HENRY - Appellant

and

DONALD HALSTEAD - Respondent

Before: The Honourable Mr. Justice Floissac - Chief Justice
The Honourable Mr. Justice Byron
The Honourable Miss Justice Joseph (Acting)

Appearances: Mr. L. Luckhoo, Q.C., Mr. L. Osborne with him for
the Appellant
Dr. F. Ramschoye, Q.C., Mr. C. Derrick with him for
the Respondent.

1991: Nov. 28, 29.

JUDGMENT

FLOISSAC, C.J.

The respondent presented to the High Court a petition praying that the parliamentary election held on the 9th March, 1989 for the constituency of St. John City West be declared invalid. At that election, the appellant was the returning officer, Henderson St. Clair Simon was the successful candidate and the respondent was the unsuccessful candidate.

On the 30th June, 1989 the election Judge, (Redhead J.) declared the election invalid and ordered the appellant and Mr. Simon to pay the respondent's costs, "certified fit for one Queen's Counsel and two Junior Counsel to be taxed if not agreed".

Originally, this appeal was an appeal against the whole decision of the election Judge. But certain events supervened. A second election was held on the 17th August, 1989 and Mr. Simon was again returned as the duly elected Member of Parliament for the constituency. As a result of these supervening events, the validity or otherwise of the first election ceased to be a live issue, and this appeal became unnecessary save with regard to costs. For this reason, on the 17th June, 1991 Moe, J.A., (delivering the judgment of this Court) said:

/"I would....

"I would decline to entertain the appeal against the Judge's decision that the election was null and void. However, in the light of what has been stated above, I would entertain argument on the award of costs against the returning Officer and make no order as to costs in this appeal."

In accordance with that judgment, this Court heard arguments on the sole live issue in this appeal, namely, the question whether the election Judge was right or wrong to have awarded costs to the respondent and against the appellant.

The Jurisdiction in regard to the award of costs by the High Court (sitting as an Election Court) is governed by sections 46, 61, 62 and 63 of the Representation of the People Act, 1975 (No. 19 of 1975).

Section 46 provides as follows:

- "(1) An election petition shall be tried by the High Court of the West Indies Associated States Supreme Court and the Judge presiding at the trial of an election petition is hereinafter referred to as the election court.
- (2) The election court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority as a Judge of the High Court of the West Indies Associated States Supreme Court."

Section 61 provides that:

"All costs of and incidental to the presentation of an election petition and the proceedings consequent thereon, except such as are by this Act otherwise provided for, shall be defrayed by the parties to the petition in such manner and in such proportions as the election court may determine; and in particular any costs which in the opinion of the election court have been caused by vexatious conduct, unfounded allegations or unfounded objections on the part either of the petitioner or of the respondent, and any needless expense incurred or caused on the part of the petitioner or respondent, may be ordered to be defrayed by the parties by whom it has been incurred or caused whether or not they are on the whole successful."

Section 62 contains further provisions as to the costs of an election petition, but those provisions are not relevant to this case.

Section 63 virtually repeats section 46 by providing that:

"The High Court shall, subject to the provisions of this Act, have the same powers, jurisdiction and authority with respect to an election petition and the proceedings thereon as if the petition were an ordinary action within its jurisdiction."

/By virtue....

By virtue of the said provisions of the Representation of the People Act, 1975, the award of costs by the High Court (sitting as an Election Court) is governed by Order 62 rule 3 of the Rules of the Supreme Court. Paragraphs 1 and 2 of rule 3 provide that:

- "(1) Subject to the following provisions of this Order, no party shall be entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the Court.
- (2) If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

The general rule and the exception thereto embodied in Order 62, rule 3(2) are neatly explained in Halsbury's Laws of England (Fourth Edition) Volume 37, paragraph 717 as follows:

"On the principle that costs follow the event there is such a settled practice that a successful party should receive his costs that it is necessary for the unsuccessful party to show some ground for the court to exercise its discretion to refuse an order which would give them to him, and the question whether the ground is sufficient is entirely for the judge at the trial, and if he has exercised his discretion on facts connected with or leading up to the litigation which have been proved before him or which he has himself observed during the trial the Court of Appeal may not intervene even if it deems his reasons insufficient."

Footnote 2 of the said paragraph 717 refers (inter alia) to the leading case of DONALD CAMPBELL & CO. LTD V POLLOCK (1927) A.C. 722 where Viscount Cave L.C. cited with approval the following passage from the judgment of Lord Sterndale M.R. in RITTER V GODFREY (1920) 2 K.B. 47 at 52 - 53:

"But there is such a settled practice of the Courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial. If, however, there be any grounds, the question of whether they are sufficient is entirely for the judge at the trial, and this court cannot interfere with his discretion."

/The ground.....

The ground upon which Counsel for the appellant relied in support of his submission that the Election Court should not have awarded costs against the appellant is the fact that the appellant cannot be blamed for the irregularities which were held to have affected the result of the election and by which the election was avoided. The principal irregularity complained of was the prolongation of the voting beyond the statutory voting hours. This was done on the authority of an order of the High Court. If the order was ultra vires and the voting thereunder was an irregularity, this was not the fault of the appellant. Nor was it the fault of the respondent or Mr. Simon. Fault is therefore a neutral factor in this case.

The fact remains that the respondent was the successful party in the proceedings before the Election Court and therefore prima facie was entitled to be awarded his costs of those proceedings.

In ALLTRANS EXPRESS V C.V.A. HOLDINGS (1984) 1 ALL E.R. 685 at 692 - 693, Griffiths L.J. (dealing with the question of costs) said:

"This Court must not be tempted to interfere with the Judge's order merely because we would have exercised the discretion differently from the way in which the judge did. Before a court can interfere it must be shown that the Judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong, because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

No such error of commission or omission on the part of the Election Court has been established in this case. I would therefore dismiss the appeal with costs to be taxed.

V.P. FLOISSAC,
Chief Justice

I concur

C.M.D. BYRON,
Justice of Appeal

I concur

MONICA JOSEPH,
Justice of Appeal (Acting)