

EASTERN CARIBBEAN SUPREME COURT

**SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

IN THE HIGH COURT OF JUSTICE

SKBHCV2020/0109

Election for the Constituency of Saint Christopher 1 held on the 5th
day of June, 2020

BETWEEN:

IAN PATCHES LIBURD

Petitioner

AND

JERMAINE LAKE
*(Returning Officer for the
Constituency of Saint Christopher 1)*

First Respondent

GEOFFREY HANLEY

Second Respondent

Appearances:-

Mr. Douglas Mendes S.C., Mr. Christopher Hamel-Smith S.C., Mr. Michael Quamina, Ms. Talibah Byron, Ms. Gabrielle Gellineau and Ms. Leah Abdulah for the petitioner.

Mr. Dane Hamilton QC leading Mr. Dane Victor Elliott Hamilton for the first respondent.

Mr. Anthony Astaphan S.C. leading Mr. Sylvester Anthony and Mrs. Angelina Gracy Sookoo-Bobb for the second respondent.

2020: September 17 & 25

JUDGMENT

- [1] **WARD, J.:** Federal Elections in Saint Christopher and Nevis were held on 5th June, 2020. The petitioner was the unsuccessful candidate for the Peoples' Action Movement in the Constituency of Saint Christopher No.1. A total of 1,658 votes were cast for the second respondent while the petitioner polled a total of 1,634 votes. A total of 98 ballots were rejected by the first respondent, who was the returning officer for that constituency.
- [2] The petitioner has filed a petition challenging the return of the second respondent who won the seat by 24 votes on the grounds, inter alia, that in breach of section 91(2)(b) of the National Assembly Elections Act¹, ("the Act") the returning officer wrongly rejected a number of ballot papers. The petition avers that of the 98 rejected ballot papers, 22 were rejected either on the ground that they were not marked for any candidate or on the ground that they had been given for more candidates than there were seats.
- [3] Of the remaining 76 ballot papers, 8 were rejected on the basis that a tick instead of an X was used to signify the voter's choice; 3 were rejected on the basis that they had double crosses in the box next to the petitioner's name; 15 had an X over the petitioner's party symbol, the hat; 21 had an X with an appendage of either a "long arm" or a "long leg" which extended outside of the box next to the candidate's name; 10 had circles drawn around the petitioner's party symbol; and 3 had markings in a single box.

¹ "91(1)...

(2) After all the ballot boxes have been received they shall be opened for the count of votes and in the presence of the such of the candidates or their agents, and if the candidates or any of them are absent, then in the presence of such are as present, and of at least two voters if none of the candidates is represented, by the returning officer or designated officer and the returning officer shall –

(a) Record and count the number of votes given to each candidate (allowing the candidates and their agents full opportunity to see such votes but not the official number on the back of the ballot paper), and a poll clerk and not less than two witnesses shall be supplied with tally sheets upon which they may keep their own score as each vote is called out by the returning officer or designated officer;

(b) Reject all ballot papers –

- (i) which have not been marked for any candidate;
- (ii) on which votes have been given for more candidates than there are seats to be filled;
- (iii) upon which there is any writing or mark by which the voter could be identified, but no ballot paper shall be rejected on account of any writing, number or mark placed thereon by any presiding officer."

- [4] Were it not for the rejection of these 60 votes over the objection of the petitioner's counting agents, the petition avers that the petitioner had a majority of the good and valid votes cast in the constituency and, had they been counted, he would have been declared the winner and returned as duly elected for the constituency.
- [5] The petition contains a prayer that the Court "examine the rejected ballots and determine whether same were lawfully rejected and, if not, determine for whom the votes were cast." Further, in the event that the first respondent is unable to identify or produce the rejected ballots, that the court examines the ballots cast at the said election, determine whether any of the said ballots ought to be rejected and determine for whom the lawful ballots were cast.
- [6] By Notice of Application filed on 16 July, 2020, the petitioner applied to the court pursuant to section 95(2) of the Act for an Order for the production and inspection of all the ballots which were rejected by the Returning Officer. The grounds of the application state that production for inspection is required so as to provide the court with particulars, and in particular the serial number on the rejected ballots. This course is said to be necessary for the purpose of the petition and in order to dispose fairly of the petition. The application is supported by affidavits sworn by Craig Tuckett, one of the petitioner's counting agents at the vote count.
- [7] The application is vigorously opposed by the second respondent who filed three affidavits in opposition; two of which were from the counting agents of the second respondent.
- [8] Learned Senior Counsel, Mr. Anthony Astaphan, submitted that there is no automatic right to an order for inspection or production or scrutiny of election documents under section 95 of the Act. There must be a specifically pleaded and particularized dispute in relation to specific rejected ballots. This requirement imposes an obligation on the petitioner to provide proper particulars and clear evidence of specific and identified ballots, and objections on these specific ballots which were isolated at the final count. Scrutiny is not designed to assist the petitioner to ascertain these particulars.
- [9] Mr. Astaphan submitted that the real question in issue here, is whether there are proper particulars and clear evidence of disputes in relation to specific ballots and objections to the said ballots which were identified and isolated for review by the court. Mr. Astaphan submits that the answer to this question is, no.

- [10] It is therefore convenient at this juncture to set out the evidence before the court touching and concerning the rejected ballots in respect of which production and inspection is sought.

Evidence of Craig Tuckett

- [11] Mr. Tuckett avers that before the count commenced, the returning officer indicated what type of ballots would be accepted and which would be rejected. He specifically indicated that ballots marked with a tick instead of an X would be rejected. The petitioner's agents strongly objected to this position, insisting that once the voter's intention is clear then such ballots should be accepted.
- [12] He further avers at paragraph 27 of his first affidavit that there were 98 rejected ballots. He states that 22 were rejected without objection by either side, either because they were not marked for any candidate or they had been given for more candidates than there were seats.
- [13] At paragraph 28 of his affidavit Mr. Tuckett states that of the remaining 76, 60 ballots which were cast in favour of the petitioner were objected to by the agents of the 2nd respondent and rejected by the returning officer. Mr. Tuckett furnishes reasons for the rejection of each of the 60 ballots. According to him 8 were rejected on the basis that a tick instead of an X was used to signify the voter's choice; 3 were rejected on the basis that they had double crosses in the box next to the petitioner's name; 15 had an X over the petitioner's party symbol, the hat; 21 had an X with an appendage of either a "long arm" or a "long leg" which extended outside of the box next to the candidate's name; 10 had circles drawn around the petitioner's party symbol; and 3 had markings in a single box. Mr. Tuckett says that at the end of the count he demanded a recount on the basis that the count was not fairly done because many of the rejected ballots were good ballots cast in favour of the petitioner.

The evidence of Jermaine Lake

- [14] As it relates specifically to the rejected ballots, the returning officer does not in his reply to Mr. Tuckett's affidavit deny that among the rejected ballots were ballots as described at paragraph 28 of Tuckett's first affidavit. He averred that at the end of the final count of box 6, Mr. Tuckett requested a recount on behalf of the petitioner which he (the returning officer) was prepared to facilitate.

The evidence of Warner and Johnson

- [15] The evidence of the counting agents for the second respondents contradicts Tuckett's in many respects, as it relates to what ballots were rejected. They deny that at the outset, the returning officer indicated that ballots with a tick would be rejected. That issue only arose on the first occasion that such a ballot presented itself when the returning officer declared it to be invalid without objection from either side. That ballot had been cast in favour of the second respondent. When the first such ballot cast for the petitioner presented itself, there was momentary silence which was broken by Warner-Paul's exclamation: "We can't change the rules in the middle of the game." Accordingly, that ballot and all subsequent ballots marked with a tick were rejected by the returning officer without objection by either side. Ms. Warner-Paul deposed that most of these ballots marked with a tick were cast for the second respondent, contrary to Mr. Tuckett's assertion that all such ballots were cast for the petitioner..
- [16] Further, the 2nd respondent's counting agents aver that ballots marked with any variations of an X that were within one box were all accepted, including ballots marked with a double staff, an X with three crosses and an X with a long tail. The only instance where an X was not accepted was where it went outside of the box in a southern direction into the box below or from the box below to the outside. Ms. Warner-Paul also maintained that there were no ballots with circles drawn around the symbol. A ballot with an H was, however, accepted according to her and Mr. Johnson.
- [17] They both strenuously deny that Tuckett asked for a recount immediately after the count stating that he only did so around 11:30a.m. and, even so, failed to state a reason for requesting a recount.
- [18] It is common ground among the three counting agents, however, that ballots with an X which strayed outside the petitioner's box were rejected. Similarly it is agreed that the first respondent failed to observe the procedure stipulated at section 91 of the Act for dealing with rejected ballots. More particularly he failed to keep a record on the special form printed in the poll book of every objection, made by the counting agents of the candidates, to any ballot paper found in the ballot box; failed to number the objections and place a corresponding number in the back of the ballot papers to which objections were made and initial same; and failed to isolate the rejected ballots in a special sealed envelope, but instead the rejected ballots were returned to the ballot boxes with

the valid votes. It is also agreed that valid votes were pierced with a spike while the rejected ballots were not.

Petitioner's submissions

[19] On behalf of the petitioner, Mr. Douglas Mendes SC submitted that on the face of section 95(2) of the Act, before an order for production and inspection is issued, there must be evidence on oath in support of the application which must satisfy the Court that the production and inspection of the documents is required for the purpose of an election petition. It is within the discretion of the Court to determine whether to make the order. Mr. Mendes submitted that these conditions have been met. He submitted that the Petitioner has pleaded with great specificity that of the 98 ballots which were rejected, 60 of them were cast in his favour and were all valid votes. He has also pleaded with great specificity the reasons why each of the 60 ballots was rejected. These matters are also supported in the affidavit of Craig Tuckett filed in support of the application. Mr. Mendes argued that since the second respondent won the election by 24 votes, if the petitioner is right in his contention that 60 valid votes in his favour were wrongly rejected, he would be entitled to claim that he was the lawfully elected candidate. For these reasons, he submitted that the petitioner has established a strong *prima facie* case that production and inspection of the rejected ballots is required for the purpose of the petition. The failure of the first respondent to discharge his duties in accordance with the Act has placed the petitioner in a position whereby he cannot provide any greater particulars than he has advanced and he should not be disadvantaged thereby. Mr. Mendes also submitted that the Court is not required at this stage to determine the question of the validity of the rejected ballots.

[20] Mr. Dane Hamilton QC, aligned himself with the position taken by the petitioner that sufficient particulars have indeed been supplied to establish that production and inspection is required for the purpose of the petition and referred the Court to **Arthurton v Fergus**². That being so, Mr. Hamilton submitted that the appropriate stage to consider whether the ballots that were rejected were valid or not was after they had been produced and inspected.

² [1998] LRC (Const) 115

The 2nd respondent's submissions

- [21] On behalf of the second respondent, Mr. Anthony Astaphan derided the petitioner's claim to be entitled to the order sought on two bases. He submitted that the first obligation on the petitioner is to plead, and show by evidence, that the ballots claimed by him are valid ballots in accordance with section 81(3)³ of the act as interpreted by a line of cases emanating within the Commonwealth Caribbean. He contended that on the face of the allegations in relation to the marks made on the ballots in paragraph 6 of the petition, and paragraph 7 of the application, the petitioner is not able to show, and has not shown that these ballots or a substantial number of them are in law, valid ballots and which were in any event cast for the petitioner.
- [22] Secondly, Mr. Astaphan submitted that the petitioner has failed woefully to provide sufficient particulars of the impugned ballots to justify scrutiny of same. He submitted that the standard to be met before an order for production or inspection leading to scrutiny could be granted required that there be a specifically pleaded and particularized dispute in relation to specific rejected ballots. This requirement imposes an obligation on the petitioner to provide proper particulars and clear evidence of specific and identified ballots, and objections on these specific ballots which were isolated at the final count. That responsibility devolved upon the petitioner's counting agents.

Discussion

- [23] The essential issue for resolution on this application is whether the petitioner has sufficiently particularised the ballots in issue to raise a strong *prima facie* case that production and inspection is required for the purpose of the petition.
- [24] Mr. Astaphan invites me to first make a determination as to whether the disputed votes are, in law, valid votes. In principle, he is correct to submit that if, as a matter of law, they, or a sufficient

³ "(3) The voter, on receiving the ballot paper, shall forthwith enter one of the polling compartments in the polling station and then mark his ballot paper by marking with a black lead pencil and not otherwise a cross within the space opposite the name and symbol of the candidate for whom he or she intends to vote, and he or she shall then fold the ballot paper as directed so that the initials and the numbers on the counterfoil can be seen without opening it, and hand the paper to the presiding officer who shall, without unfolding it, ascertain by examination of the initials and the number appearing thereon that it is the same paper as that delivered to the voter and, if the same, he or she shall, subject to section 86, in full view of the voter and of all others present remove the counterfoil and deposit the ballot in the ballot box."

number of them, are not valid votes, then production and inspection would serve no purpose and should be denied.

- [25] The difficulty with this approach in this case, however, is that there is considerable disagreement as to the nature of the markings that were made on a large number of the rejected ballots. It is not a case where, the parties all agree, say, that the rejected ballots were all marked with a tick. In such a case production and inspection would serve no purpose. The question whether they are valid would be a matter of law. However, as seen from the summary of the affidavit evidence at paragraphs 11-17 above, there is strident disagreement regarding the manner in which many of the relevant ballots were marked.
- [26] The authorities are not always clear or consistent on what constitutes a valid ballot. For example, in **Cato v Allen**⁴, it was held that where a petitioner makes an imperfect cross, that may be considered an honest attempt to make a cross and would not invalidate the ballot. In relation to ballots with crosses with additional markings, it was held that the question is "When one strikes out all that is unessential for the formation of the cross does it show an intention to vote for the person claiming the vote?" In **Active v Scobie**⁵, it was held that a ballot with more than one cross for the same candidate is valid. In **Simmonds v Ribeiro**⁶, it was held that an X over the symbol complies with section 81(3) and was not invalid but that ballots marked with a tick were not.
- [27] In the case at bar, there is evidence from the petitioner that a number of ballots marked with imperfect crosses or crosses with appendages or with a mark over the symbol of the petitioner's party symbol were rejected. This is disputed by the second respondent. To my mind, before one can determine whether a ballot is valid or not, it would be necessary to ascertain precisely how the ballots were marked in order to pronounce on their validity. It seems to me that in the absence of agreement by the parties to settle these areas of difference, it would be impossible to pronounce on the question of validity without production and inspection of the ballots. But production and inspection of election documents is not automatic: **Stowe v Joliffe**⁷.
- [28] Accordingly, I am of the view that the issue that engages the court at this stage is whether the petitioner has established that production and inspection is required for the purpose of the petition.

⁴ (1958) 1 W.I.R. 68

⁵ (1969) 13 WIR 189

⁶ OECS Law Reports Vol 2, 165.

⁷ (1874) LR CPC 446

[29] The starting point of this discourse must be section 95 of the Act. It provides:

“Custody of election documents.

95. (1) The Supervisor of Elections shall keep the election documents referred to in subsection (1) of section 94 in safe custody and shall allow no person to have access to them.

Provided that, if an election petition has been presented questioning the validity of any election or return, the Supervisor of Elections shall, on the order of a Judge of the High Court, deliver to the proper officer of that Court the documents relating to the election that is in dispute:

Provided also that after the expiration of twelve months from the day of any election it shall be lawful for the Supervisor of Elections to cause the said documents used at such election to be burnt.

(2) No such election documents in the custody of the Supervisor of Elections shall be inspected or produced except on the order of a judge of the High Court; and an order under this subsection may be made by any such judge upon his or her being satisfied by evidence on oath that the inspection or production of such election documents is required for the purpose of instituting or maintaining a prosecution for an offence in relation to an election or for the purpose of a petition which has been filed questioning an election return.

(3) Any such order for the inspection or production of election documents may be made subject to such conditions as to persons, time, place and mode of inspection or production as the judge deems expedient.”

[30] I derive from this that before I may make such an order, the petitioner is required to produce evidence on oath that satisfies me that inspection or production of such election documents as are in dispute is required for the purpose of a petition which has been filed questioning an election return.

[31] I further derive from the case of **Stowe v Joliff** that production and inspection is not available for the mere asking. The standard to be attained by an applicant for production and inspection of elections documents is a strong *prima facie* case. In that case, the court had to consider an application for production of rejected ballot papers and counterfoils. Grove J stated:

“But, as to the rejected ballot papers and the counterfoils, I think no case is made out for an order for their production. The application is not confined to any particular ballot papers, but inspection of all the rejected ballot papers is asked for. Is this Court, in every case, to grant inspection as a matter of course upon the mere production of an affidavit of the agent that in his judgment and belief such inspection is necessary to enable him to prepare the petitioner’s case? If that had been the intention of the legislature, it might have been expressed in a few lines: I do not think these long provisions would have been necessary...

Then comes rule 40, which provides that “no person shall be allowed to inspect any rejected ballot papers in the custody of the clerk of the Crown in Chancery, except under the order of the House of Commons or under the order of one of Her Majesty’s superior Courts, to be granted by such Court on being satisfied by evidence on oath that the inspection or production of such ballot papers is required for the purpose of instituting or maintaining a prosecution for an offence in relation to ballot papers, or for the purpose of a petition questioning an election or return.” Was it intended by this that inspection should be granted on the mere application of the petitioner? So to hold would be to say that every petitioner is to have access to everything on a scrutiny, upon a mere suggestion that it would afford him useful information...

I do not say that the Court has not power under any circumstances to allow inspection of the rejected ballot papers and the counterfoils of ballot papers; but I think, before such inspection is allowed, a very strong *prima facie* case should be made out” “

[32] In **Ezechiel Joseph v Reynolds**⁸ that burden was described by Rawlins C.J. as being discharged in the following circumstances:

"It seems to me that if a petitioner pleads, with sufficient particularity, that the ballots that were rejected in error exceeded the margin of victory in an election, the court may examine and count the rejected ballots. In any event, where there is an objection to the count, the election court may demand that all records relating to the ballots be brought intact into the

⁸ HCVAP2012/0014

court by the officer who has custody of them, once the judge is satisfied on the pleadings, including any affidavit, that there may be reason to examine the ballots." (para115)

[33] In **Arthurton v Fergus**⁹, in illustrating the type of pleading that might sustain a prayer for scrutiny in a petition that claimed the petitioner had the majority of lawful votes, Redhead J, stated:

"It seems to me that a petitioner can only make such a claim that the successful candidate had not received a majority of lawful votes from what he has observed at the counting of the votes from his own knowledge or that of his agent. For example, the petitioner may allege that the successful candidate had votes allotted to him which ought not to be allotted to him for a variety of reasons, or he may allege that the ballot papers were wrongly marked; or the voter voted for more than one candidate, and to all of these he would have taken objection at the counting of the votes. He cannot say that the successful candidate was not elected by a majority of lawful votes when he does not know how many votes he is challenging. He must have knowledge of what votes he is challenging; and must have a basis for his challenge. All the authorities show that where a scrutiny was allowed it was in respect of votes which had been objected to by the returning officer and that objection was challenged by the candidate."

[34] Applying these principles to the evidence before me, I am satisfied that the petitioner has met the requirements of section 95(2) in that he has furnished evidence on oath of a specific number of votes that he contends were wrongly rejected.

[35] He has sufficiently particularised these votes so as to enable the respondents and the court to know which ballots are being challenged and the basis for so doing: 8 that were rejected on the basis that a tick instead of an X was used to signify the voter's choice; 3 that were rejected on the basis that they had double crosses in the box next to the petitioner's name; 15 that had an X over the petitioner's party symbol, the hat; 21 that had an X with an appendage of either a "long arm" or a "long leg" which extended outside of the box next to the candidate's name; 10 that had circles drawn around the petitioner's party symbol; and 3 with markings in a single box.

[36] If the petitioner is correct that these ballots were wrongly rejected, it would mean that he would have had a majority of lawful votes if these votes had been counted. This is so even if the second

⁹ [1998] LRC (Const) 115

respondent is right that the 8 ballots marked with a tick and the 10 marked with a circle are invalid, because if the petitioner is right, that the remaining 42 disputed ballots are valid, they would exceed the second respondent's margin of victory. I reiterate that I make no determination as to the validity of any ballot at this stage.

- [37] It is difficult to see, and when asked, Mr. Astaphan did not specify, what further particulars should have been supplied. It certainly could not be the official number at the back of the ballots as section 95(2)(a) of the Act prohibits the returning officer from showing this to the counting agents. To be fair, Mr. Astaphan did not suggest that these numbers should have been particularised. Curiously it was the petitioner who referred to this.
- [38] While the returning officer did not separate the rejected ballots into sealed envelopes as the law requires, but, instead returned them to their respective ballot boxes, and while he did not make a note in the poll book of every objection made to any ballot as mandated by section 91(5) of the Act of the Act, I agree with Mr. Mendes, and all deponents agreed, that all of the rejected ballots were not pierced through with a metal spike as the valid ballots were. This means that they are easily identifiable and distinguishable from the valid ballots by the absence of piercing. They can thus be isolated for production and inspection.
- [39] I further agree with Mr. Mendes' submission that the ballot boxes can be safely opened under the supervision of the Court and the rejected ballots retrieved without risk of compromising the secrecy of the vote in any way, given that the rejected ballot will bear no indication of the identity of the voter given the procedure outlined at section 81(1) of the Act.
- [40] Ultimately, the Court is being asked to determine whether the second respondent was duly returned or elected. It seems to me that the court would need to see the ballots in issue in order to determine this. This was also the conclusion of the Court of Appeal when considering the St. Lucia equivalent to section 95(2):

"It is obvious that section 70(2) contemplates that the court may order all documents that are related to an election, which are in the custody of the Clerk of the House or in the custody of any electoral officer be produced or inspected. This would among other things, facilitate that aspect of section 90 of the Elections Act¹⁰, which states that at the conclusion

¹⁰ In St. Kitts & Nevis: Section 101(2) of the National Assembly Election Act

of the trial, the judge shall determine whether the member of the House whose return or election is complained of or any and what other person was duly returned or elected, or whether the election was void. It seems to me that a judge in Saint Lucia would need to see the ballots, particularly those that are in issue from the count, in order to be in a position to determine 'what other person was duly elected.'

- [41] For the reasons outlined at paragraphs 34 - 40 above, I am satisfied that the petitioner has pleaded with sufficient particularity that the ballots that were rejected in error exceeded the margin of victory in the Constituency of Saint Christopher No. 1, and that he has established a strong *prima facie* case by evidence on oath that production and inspection is required for the purpose of the petition.

Trevor M. Ward, QC
High Court Judge

By the Court

Registrar