IN THE COURT OF APPEAL
OF THE COOK ISLANDS
HELD AT RAROTONGA

C.A. 1/94

IN THE MATTER	of S.74 of the Electoral Act 1966
BETWEEN	PUPUKE ROBATI
	Appellant
AND	PIHO RUA PIHO
	First Respondent
AND	TERE MATAIO
	Second Respondent
AND	SOLOMONA ELIKANA
	Third Respondent

Coram: Barker JA (Presiding)
Hillyer JA
Henry JA

Hearing: 6, 7 July 1994

Counsel: W.D. Baragwanath Q.C and M.C. Mitchell for appellant
S.B.W. Grieve and T.G. Nicholas for first respondents
Solicitor-General J. McFadzien for second and third respondents

Date of Judgment: 7 July 1994

Date of Reasons for Judgment: 8 August ~~July~~ 1994

REASONS FOR JUDGMENT OF THE COURT
DELIVERED BY SIR IAN BARKER

On 7 July 1994, we gave judgment on this appeal at the conclusion of the argument. We held there were errors of law in the judgment of Dillon J given in the High Court on 31 May 1994. Accordingly, we determined that the election of the appellant and the election for the constituency of Rakahanga could not be said to be void by reason of breaches of the secrecy provisions of the Electoral Act 1966 ('the Act') and that the remaining complaints in the petition remained for determination by the learned Judge. We now give reasons for that judgment.

The appellant and the first respondent were both candidates for the constituency of Rakahanga at the recent general election. After the election on 24 March 1994, the appellant was declared to be the successful candidate with 98 votes and the first respondent the unsuccessful candidate with 78 votes. There were 179 persons on the roll and 176 votes cast. Hence, there was on election day, a majority for the appellant of 20.

An election petition was filed by the first respondent pursuant to the provisions of S.74 of the Act. Without going into detail, it alleged that the appellant had, directly or indirectly, offered inducements of various sorts to electors, involving misuse of government property, electoral bribery and undue influence in various forms.

A further allegation in the petition was that the appellant had "directly or indirectly interfered with the right of certain voters to cast a vote in secret by requiring certain voters to call out from the polling booth in audible tone the name of the candidate for whom the voter was about to vote or for whom the voter had voted, thereby interfering with the secret ballot and otherwise influencing the voter from exercising his or her free will when casting a vote".

The petition was heard by Dillon J, partly in Rakahanga and partly in Rarotonga. Most of the evidence at the hearing was concerned with the allegations of corruption etc which were vehemently denied by the appellant. Although submissions were made by counsel concerning these allegations, no express findings were made. The Judge said -

> "These allegations of irregularities in the course of the campaign leading up to the election arose from the alleged misuse of Government property, electoral bribery, and undue influence in various forms. These allegations were strenuously denied by the respondent and countered by similar claims against the petitioner his agents and the witnesses he called in support of his petition.
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> It would require an exhaustive and detailed examination of those claims and counterclaims for a proper evaluation of the evidence presented and with the very real possibility of not being able to resolve what evidence should be accepted and what should be rejected; but more importantly whether the evidence so presented by the petitioner as unacceptable should indeed be classified as such simply because Rakahanga has a small and isolated population.
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> I refer by way of example only to the claim that involved Dr Robert Woonton in an allegation of

> bribery. There had not been a doctor in Rakahanga for many years. Dr Woonton was asked by the only nurse on the Island to attend her clinic. He did, and freely treated a great many people even including Mr Rua Piho. This gesture one would have thought could be categorised as charitable; however because it occurred in the day immediately after the election date was announced in February 1994 and because Dr Woonton was the leader of the party to which the first respondent belonged, it was classified as bribery.
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> The difficulty in trying to disseminate evidence of this nature would not only be an exercise in futility, but as the voting figures clearly identify, would also be very destructive to the peace, goodwill and spirit of the small island community of Rakahanga. It could identify people who the Court believed or did not believe; it could impugn the authority of leaders in the community, and it could affect the respect and loyalty and spirit that is so essential to the preservation of the identity of the Northern Group islands of the Cooks.
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> For those reasons I do not propose to undertake that exercise."

Then later -

> "As a result of this finding it is not necessary to consider either the evidence or the submissions that allege or deny electoral bribery or undue influence and associated allegations. The breach of secrecy was so serious as to vitiate the result; to void the election; and to necessitate the Chief Electoral Officer now taking the appropriate steps to arrange a bi-election."

The Judge noted that during the hearing of the petition questions as to the alleged interference in the conduct of the election arose. He ruled that the secrecy provisions of the Act were infringed; that therefore the whole election should be aborted with the result that the Chief Electoral Officer had no option but to call a by-election which he scheduled for 28 July 1994.

In our judgment on 7 July 1994, we indicated that the by-election may or may not need to be held depending on the Judge's ruling on the other grounds contained in the election petition on which he did not give a decision.

Ss. 82 and 82A enacted in 1993, give a limited right of appeal to this Court from the decisions of the High Court on election petitions. The sections read -

> "82. **Decision of High Court to be final** -
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> (1) Every determination or order by the High Court or by a Judge of the High Court in respect of or in connection with any proceedings under Ss.17,30 or 60 of this Act, or in respect of or in connection with an election petition, shall be final and conclusive and without appeal, whether to the Court of Appeal of the Cook Islands, or to Her Majesty in Council or otherwise, and except as provided in this section, shall not be questioned in any way.
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> (2) Notwithstanding the provisions of subsection (1), where any party to any proceedings to which this section applies is dissatisfied with any decision of the High Court or a Judge thereof as being erroneous in any point of law, that party may appeal to the Court of Appeal of the Cook Islands by way of case stated for the opinion of that Court on a question of law only.
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> (3) In its determination of the appeal the Court of Appeal may confirm, modify or reverse the decision appealed against or any part of that decision.
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> (4) Notice of appeal shall not operate as a stay of proceedings in respect of the decision to which the appeal relates unless the High Court or the Court of Appeal so orders.
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> (5) The determination of the Court of appeal on any appeal to which this section applies shall be final and conclusive and without appeal, whether to Her Majesty in Council or otherwise, and shall not be questioned in any way."

"82A. **Court of Appeal may refer appeals back for consideration** -

(1) Notwithstanding anything in S.82, the Court of appeal may in any case, instead of determining the appeal to which S.82 applies, direct the High Court or a Judge thereof to reconsider, either generally or in repect of any specified matter, the whole or any specified part of the matter to which the appeal relates.

(2) In giving any direction under this section the Court of Appeal shall -

(a) advise the High Court or the Judge of its reasons for so doing; and
(b) give to the High Court or the Judge such directions as it thinks just as to the rehearing or reconsideration or otherwise of the whole or any part of the matter that is referred back for reconsideration."

The learned Judge stated a case as required by S.82(2) although there was no agreement between counsel as to the form of the case. Counsel for the appellant wished the parameters of the case to be enlarged considerably. We found it difficult to fit this type of case within the strict rules relating to the formulation and hearing of appeals by way of case stated. We think it would have been preferable, given the Legislature's wish to confer a limited right of appeal in election petitions, if the Act had provided for a simple appeal on a point of law. The unnecessary constrictions of the case stated procedure encourage, as happened here, time-consuming and unnecessary arguments as to the form of the case stated.

The Judge found the following facts relating to breach of the secrecy provisions as recorded in the case stated -

"5.2 Nine votes were recorded at the polling booth having been cast by persons who are either unable to read or to write.

5.3 In respect of such persons it was established that the presiding officer Temu Hagai would read out the names of the two candidates three times; the voter would say who he wanted to vote for; that Mr Hagai would then mark the voting paper; the voter therefore never touched the voting paper.

5.4 There was a conflict of evidence whether the announcement by Mr Hagai of the candidate selected by the voter was audible to people other than the voter and 2 scrutineers. Because the Court was of the opinion that Mr Hagai had erred in using the method prescribed by the Manual of Instructions for blind voters it did not resolve such conflict.

5.5 There were nine votes cast at electors' houses, those persons being unable through illness or infirmity to attend at the polling booth.

5.6 When sick votes were being taken Sergeant Vaikai, Mr Kairua, the Rev Elikana, Mr Hagai and two scrutineers were all present. In addition on some occasions members of the family were also present to hear the announcement of the candidates and the selection made by the sick voter."

These findings of fact require a consideration of S.50 of the Act viz -

"**Blind or disabled voters** -

(1) If any voter is blind, or is unable to read or write (whether because of physical handicap or otherwise), and so desires, the presiding officer shall, together with any scrutineers present not exceeding two, and if necessary an interpreter, retire with the voter into the inner compartment and there make up the voting paper according to the instruction of the voter, and the presiding officer shall sign his own name at the foot thereof.

(2) If any elector is precluded by reason of illness or infirmity from attending at any polling booth, the Returning Officer in charge shall make such arrangements as are in his opinion reasonably practicable to enable the voter, if he so desires, to vote:

Provided that every person present when an elector so votes shall refrain from making himself acquainted with the vote given by the elector, and shall not in any way attempt to influence or interfere with the elector in the exercise of his vote or allow any person to see or become acquainted with the elector's vote or to assist the elector to vote or to interfere in any way with the elector in relation to his vote."

The Judge recorded his determinations of fact -

"**Events at the Polling Booth** -

(a) The nine voters recorded at the polling booth were either unable to read or write, there being no blind voters for the Rakahanga elections.

(b) Because the presiding officer applied to such persons the procedure prescribed by the Manual of Instructions in the case of blind workers he was in error.

(c) Such conduct unlawfully infringed the secrecy of the ballot.

(d) The proviso to sub-section (2) of S.50 of the Electoral Act applies only to sub-section (2) and not to sub-section (1).

Events at the homes -

(e) The claim that each home was in fact a polling booth was not in accord with the interpretation provisions of the Electoral Act. However, S.50(2) provides for such votes and this court must therefore consider how and in what manner they were made.

(f) The conduct described in paragraphs 5.5 and 5.6 unlawfully infringed the secrecy of the ballot."

The Judge went on to conclude and raised the following issues for the Court -

"**Conclusion**

(g) Since such conduct entailed breaches of the secrecy of the ballot it could not constitute the type of conduct falling within S.78.

(h) Such conduct materially affected the result of the election.

(i) It was therefore necessary to make the following determinations:

1. That the petitioners have established serious breaches of the secrecy provisions of the Electoral Act 1966;

2. That the irregularities established have materially affected the election process;

3. That the first respondent was not duly elected and that his election is void and the election for the Constituency of Rakahanga itself is void.

(j) Pursuant to S.79(2) the Court directed the Registrar to transmit the determination to the Chief Electoral Officer.

(k) Leave was reserved to all parties to apply for further directions should this be necessary;

(l) All questions of costs were reserved.

Issues for the Court of Appeal:

The question for the opinion of the Court of Appeal is whether the High Court having determined as facts -

(a) serious breaches of the secrecy provisions of the Electoral Act 1966; and

(b) irregularities that materially affected the election process

erred in law by determining that the first respondent was not duly elected; his election was void; and the election for the Constituency of Rakahanga itself was void."

This formulation recognises a difference between the parties as to the questions of law requiring determination, in effect leaving them open. At the hearing of the appeal they were able to be identified.

Two questions became determinative of the present appeal, namely -

(1) did the use of the blind voter procedure unlawfully infringe the secrecy provision in respect of illiterate voters? and

(2) did the Court have jurisdiction to investigate complaints of secrecy breaches in respect of sick voters?

Question 1:

The Judge did not find any misconduct at the polling booth. We must accept that finding. There is a clear difference between the procedure to be adopted for blind and illiterate voters under S.50(1) and the procedure for sick voters under S.50(2) who of course may also be blind or illiterate. The Judge did not find that the presiding officer dealing with the 9 illiterate voters at the polling booth spoke in a loud voice so that it could be heard by those outside. We can see no reason for holding that the method used to ascertain the votes of the illiterate voters was unconstitutional and in breach of the secrecy provisions. The presiding officer was quite right to be guided by the Manual which set out a commonsense practical mode of recording the votes of blind voters. We do not understand why the learned Judge saw a distinction between the procedure for blind voters and for illiterate voters. An illiterate voter is in the same position practically speaking as a blind

voter for the purposes of reading the voting paper. There was accordingly no breach of the secrecy provisions with regard to the events at the polling station.

Question 2:

With regard to the sick votes, S.50(2) indicates a different procedure. There is no provision for the presiding officer or scrutineers to attend or for anybody other than the returning officer to be present. A sick voter may be perfectly capable of reading and, if so, must be allowed to cast his or her vote in total secrecy, handing the completed voting paper to the returning officer. There could be no justification for other persons attending the sick voter, unless of course the sick voter was also an illiterate voter, in which case the persons permitted to be present under S.50(1), namely the presiding officer and two scrutineers, would be entitled to attend. It seems that other persons did attend upon the sick voters but we rule that it was not possible for any ground based on that allegation to have been investigated.

S.74(4) of the Act reads as follows -

> "The petition shall allege the specific grounds on which the complaint is founded, and no grounds other than those stated shall be investigated except by leave of the Judge and upon reasonable notice being given, which leave may be given on such terms and conditions as the Judge deems just:

> Provided that evidence may be given to prove that the election of any rejected candidate would be invalid in the same manner as if the petition had complained of his election."

There was no reference to the procedure adopted for sick voters in the petition. Counsel's recollection is imprecise as to when objection was taken to reliance being placed on irregularities in the voting procedures at the homes of the sick. However, it is clear that an objection was made and the Judge did not rule on it; nor did counsel for the first respondent seek amendment of the petition to include irregularities with sick voters as a ground. Counsel then appearing for the first respondent apparently relied on the submission that the home of the sick voter was a polling booth, a submission which was in our view rightly rejected by the learned Judge. There is a distinction made by S.50(2) itself. A sick voter is one who cannot attend any polling booth by reason of illness or infirmity. Therefore the home where such a voter votes cannot be a polling booth.

We consider that S.74(4) goes to the High Court's jurisdiction. Unless the ground was alleged in the petition or leave was given to add it later, the ground cannot be relied upon by the petitioner.

This is not just a procedural point, but has practical importance. It had not been raised at any time before counsel and the Judge travelled the long distance to Rakahanga for the partial hearing and it only surfaced

there when evidence on the issue was adduced to which objection was taken. Had leave to investigate this ground then been sought and granted further witnesses at Rakahanga might have been called; moreover, when the hearing resumed in Rarotonga the returning officer could have been called. He did not travel to Rakahanga but was available to give evidence at Rarotonga had he been required at the resumed hearing. S.74(4) goes to jurisdiction; it is not possible for a petitioner to rely on a ground which was not specifically pleaded or for which special leave to amend was not granted.

Accordingly, the Court was not empowered to investigate this challenge to the sick votes.

Having reached these conclusions, we note that the final outcome of the other grounds of challenge will remain for consideration of the parties and of the Judge.

The case stated is answered in accordance with the views expressed in this judgment.

The appellant having succeededis entitled to costs which we fix at $4,000 plus disbursements as fixed by the Registrar.

R.D. Barker J.A.

Solicitors: M.C. Mitchell, Avarua, for petitioner
Crown Law Office, Avarua, for second respondent