

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE ELECTION COURT

SUIT NO. M001/98

IN THE MATTER OF THE REPRESENTATION OF  
THE PEOPLE ACT

AND

IN THE MATTER OF THE ELECTION PETITIONS  
ACT

AND

IN THE MATTER OF THE APPLICATION BY THE  
CONSTITUTED AUTHORITY ESTABLISHED UNDER  
SECTION 44(A)(1) OF THE REPRESENTATION OF  
THE PEOPLE ACT FOR THE VOIDING OF THE  
TAKING OF A POLL IN THE CONSTITUENCY OF  
WEST CENTRAL ST. ANDREW

**CORAM:** THE HONOURABLE CHIEF JUSTICE  
THE HONOURABLE MR. JUSTICE WALKER  
THE HONOURABLE MR. JUSTICE LANGRIN

Patrick Robinson, Deputy Solicitor General, Lackston Robinson,  
Miss Nicole Foster and Cordell Green for the Applicant

Mrs. Ruby Walcott, Abe Dabdoub and Phillip Forrest for  
Andrew Holness

Dudley Thompson, Q.C., Miss Norma Linton, Walter Scott and  
Richard Rowe for Warren Blake

Wentworth Charles for Steve Daley

**Heard:** March 2, 3, 4, 5 May 28, 1998.

WOLFE C.J.

December 18, 1997, was declared as the day for General Elections in Jamaica to elect members for the lower house of Parliament. Three political parties, viz, the People's National Party, the Jamaica Labour Party and the National Democratic Movement (hereinafter referred to as the P.N.P., the J.L.P. and the N.D.M., respectively) contested the elections. The island of Jamaica is divided into sixty (60) constituencies for purpose of electing members to the House of Representatives. West Central St. Andrew is one of the designated constituencies. Three persons contested the election in this constituency, Dr. Warren Blake of the P.N.P., Mr. Andrew Holness of the J.L.P. and Mr. Steve Daley of the N.D.M.

The constituency of West Central St. Andrew is divided into seventy-four polling divisions. The seventy-four polling divisions are served by eighty-eight polling stations. Each polling division is divided into polling stations. The number of polling stations in a polling division is determined by the number of electors in the polling division. It is recommended that a polling station should have assigned to it not more than two hundred and fifty (250) to three hundred (300) voters.

Mr. Andrew Holness of the J.L.P. was declared duly elected as the Member of Parliament for the constituency, defeating the P.N.P's Warren Blake by 153 votes.

The Constituted Authority, established pursuant to section 44(A)(1) of the Representation of the People (Amendment) Act 1997, on the 2nd day of January, 1998, filed a Notice of Motion in the Supreme Court seeking to have declared void, the taking of the poll in the constituency of West Central St. Andrew.

Section 44 (A)(1) enacts as follows:

"There shall be established on the issuing of an election notice by a returning officer under section 22(1), a body to be known as the Constituted Authority which shall continue in force for a period ending six months after the day referred to in section 22(2)(b)"

Section 52 A (1) of the said act stipulates:

"Where after the taking of a poll the Constituted Authority or a candidate is of the opinion that during the taking of the polling circumstances existed which could constitute grounds as specified in section 37 of the Election Petitions Act, the Constituted Authority may, on its own motion or at the request of the candidate, make an application under that section to the Election Court to have the taking of the poll declared void.

Section 37 of the Election Petitions Act states:

"The Constituted Authority may, subject to section 38, apply to the Election Court for the voiding of the taking of a poll on one or more of the following grounds -

- (a) that the total number of votes cast in a constituency or electoral division exceeds the number of electors on the official list for that constituency or electoral division;
- (b) that ballot boxes have been stolen or destroyed or have in any manner been tampered with and the number of electors on the list of electors for the polling stations is more than the difference in the number of votes cast for

the candidate declared the winner and the candidate who is not declared the winner;

- (c) that a presiding officer has, under duress, signed ballots and that the number of ballots so signed is sufficient to cast doubt on the majority of votes counted for, the candidate declared elected;
- (d) that votes have been polled by persons who are not bona fide electors thereby casting doubt on the integrity of the votes counted for the candidate declared elected;
- (e) that there is an upsurge in violence or any irregularity during election day in one or more polling stations or polling divisions or in any electoral division or constituency which would lead to a substantial distortion or subversion of the process of free and fair election."

Section 38 of the said Act stipulates the time within which an application must be made pursuant to section 37.

"Where under section 37 the Constituted Authority makes an application to the Election Court, the application shall be made within fourteen (14) days of the taking of the poll."

The Notice of Motion seeks the following declarations:

- (A) That the taking of the poll in the general election of members of the House of Representatives held on the 18th day of December, 1997, is void in respect of polling divisions 23, 49, 56, 57, 58, 60, 64, 71, 72 in the constituency of West Central St. Andrew.

- (B) That the taking of the poll in the general election of members of the House of Representatives held on the 18th day of December, 1997, is void in respect of West Central St. Andrew.

The grounds on which the declarations are sought are set out below:

- (1) That ballot boxes were stolen and/or destroyed and/or tampered with and the number of electors on the list of electors for the polling stations in polling divisions 49, 64, 71 and 72 is more than the difference in the number of votes cast for the candidate declared the winner and the candidates who were not declared the winner.
- (2) That votes were polled by persons who were not bona fide electors thereby casting doubt on the integrity of the votes counted for the candidate declared elected.
- (3) That there was an upsurge of violence and/or irregularities during election day in one or more polling divisions in the constituency and/or in the constituency which led to a substantial distortion or subversion of the process of free and fair election.

An affidavit by Owen Dustin Marsh, retired Judge of the Supreme Court and Chairman of the Constituted Authority, at paragraph 7 thereof states:

"That the Constituted Authority has pursuant to section 52A(1) of the representation of the People Act determined on its own motion that an application ought to be made to the Election Court to have the taking of the poll in polling divisions 23, 47, 56, 57, 58, 60, 64, 71 and 72 and in the Constituency of West Central St. Andrew declared void."

The notice of motion is supported by some eighteen (18) affidavits and by Dr. Warren Blake of the P.N.P., one of the unsuccessful candidates in the election of December 18, 1997.

Andrew Holness of the J.L.P., the declared winner, on the 27th day of February, 1998, filed a notice of motion to dismiss the application of the Constituted Authority. The grounds to dismiss are:

1. That Andrew Holness was on the 17th day of February, 1998, the member elected for the constituency of West Central St. Andrew, as having received the majority of votes lawfully given and has been sworn as a member of parliament of that constituency.
2. That section 4(d) of the election petition act has not been complied within (sic) that security for the payment of all costs, charges, and expenses that may become payable has not been given nor notice thereof served on behalf of the applicant and that the provisions of the section is mandatory, and;
  - (i) That the Constituted Authority as established is not exempt by this section;
  - (sic) (iii) Therefore non-compliance is fatal and no further proceedings may be held on the application.
3. That the composition of the Constituted Authority is ill considered, inoperative and unworkable by the inclusion by law of the three selected members of the Electoral Advisory Committee clothed with the power to

decide whether or not to refer an application to the Election Court to void an election in a particular constituency on the grounds;

- (i) The Electoral Advisory Committee is an integral component of the Electoral process and charged with the responsibility to put machinery in place to prevent any malpractices such as the Constituted Authority complains of;
- (ii) that the Electoral Advisory Committee were active participants in the election process on election day;
- (iii) that the Electoral Advisory Committee must take responsibility for their contribution which intended or not facilitated any (sic) irregularities on election day;
- (iv) that the Electoral Advisory Committee including its Director of Elections has by its confusion and incompetence contravened virtually all statutory duties imposed on them by the Representation of the People Act and the Constitution of Jamaica in the exercise of their functions which as a consequence has adversely affected the conduct of Elections in every constituency, hence their position on the Constituted Authority is hereby challenged and is subject to Judicial Review;
- (v) that the Electoral Advisory Committee reports to Parliament and is paid from the Consolidated Fund so that their position on the

Constituted Authority is open to challenge and hence Judicial Review.

Mrs. Ruby Walcott, for Mr. Holness, submitted that the motion by the Constituted Authority is an Election Petition and therefore attracts the provisions of section 4 (d) of the Election Petitions Act.

I find the submission untenable. The motion to void an election clearly is not an election petition. The voiding of an election is a new and different regime created by the recent amendment to The Representation of the People (Amendment) Act 1997, section 7. A careful examination of the provisions shows that -"Whereas an election petition may be commenced by a candidate who has contested the election it is only the Constituted Authority that can move the Court to void the taking of a poll in an election".

Further, it must be noted that the recent amendment to the Election Petitions Act as contained in section 15 of the Election Petitions (Amendment) Act, 1997 has created a special court known as "The Election Court" to hear applications by way of originating motion from the Constituted Authority in respect of the voiding of the taking of a poll in an election.

For the above reasons, I hold that section 4(d) of the Election Petitions Act which requires the deposit of security for the payment of all costs, charges and expenses upon the filing of the petition or within three days after the filing is not applicable to an application by the Constituted Authority to void the taking of a poll.



Before embarking upon the consideration of the grounds upon which it is sought to void the taking of the poll in the West Central St. Andrew Constituency, let me examine the principles which ought to exercise the mind of a court in deciding whether there is any basis for declaring a poll void.

Whilst the statute stipulates the grounds upon which a poll may be voided in a constituency or in a polling division, it is the Common Law which has enunciated the principles which appertain to the voidance of Parliamentary Elections. From as far back as the nineteenth century Brett J in Woodward v. Sarsons [1874-80] All ER Rep. 262 defined the parameters by which a court should be guided in voiding the results of an election. At page 266 the Learned Judge said:

“we are of the opinion that the true statement is that an election is to be declared void by the common law applicable to parliamentary elections if it was so conducted that the tribunal, which is asked to avoid it, is satisfied, as a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws. The tribunal should be so satisfied, i.e. that there was no real electing by the constitution at all, if it were proved to its satisfaction that the constituency had not, in fact, had a fair and free opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively, according to their own preference, by general corruption or general intimidation, or by being prevented from voting by want of machinery necessary for so voting, as by polling stations being demolished, or not opened, or by other of the means of voting according to the law not being supplied, or supplied with such errors as to render the voting by means of them void, or by fraudulent counting of votes, or by

false declarations of numbers by a returning officer, or by other such acts or mishaps. We think that the same result should follow if, by reason of any such or similar mishaps the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred. But if the tribunal should only be satisfied that certain of such mishaps had occurred, but should not be satisfied either that a majority had been, or that there was reason to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would entitle the tribunal to declare the election void by the common law of Parliament."

Woodward v. Sarsons (ante) did not meet the approval of Lord Denning in

*Morgan and others v. Simpson and another* [1974] 3 All ER - 722.

Lord Denning commenting on Woodward and Sarsons said at page 727 -

"But, if the errors had affected the result (in other words, if Woodward would have won but for the mistakes of the polling officers), the court, as I read the judgment, would have declared the election void. Whilst I agree with the passage which I have quoted, there are other passages with which I do not agree. Some of them are erroneous, as Stephenson L.J. will point out. Others are not sense as Lawton L.J. will observe. In future the case should be regarded as authority only for what is decided, and not by what is said."

Continuing Lord Denning said:

"Collating all these cases together I suggest the law can be stated in these propositions: (1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the Hackney case where two out of 19 polling stations were closed all day and 5,000

voters were unable to vote. (2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls - provided that it did not affect the result of the election. That is shown by the Islington case where 14 ballot papers were issued after 8.00 p.m. (3) But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or mistake at the polls - and it did affect the result- then the election is vitiated. That is shown by *Gunn v. Sharpe* where the mistake in not stamping 102 ballot papers did affect the result."

*In Keith Webster v. Derrick Smith and Veril Brown (1984) 21 J.L.R. 388,*

Smith C.J. relied on and followed the decision in *Woodward v. Sarsons.*

I feel obliged to adopt the approach of Smith C.J. The decision of the English Court of Appeal is merely persuasive, it does not bind a judge of the Supreme Court of Jamaica.

It must also be noted that Webster's case was concerned with an election petition and must be understood in that context.

In the voiding of an election under Act 29/1997 section 37(e) stipulates that a poll may be voided if -

"there is an upsurge in violence or any irregularity during election day in one or more polling stations or polling divisions or in any electoral division or constituency which would lead to a substantial distortion or subversion of the process of free and fair election." (Emphasis mine)

Mr. Robinson for the applicant submitted that the underlined portion of the statute, above,

































































































































