JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 99/07

BEFORE: **THE HON MR. JUSTICE SMITH, J. A.**
THE HON. MR. JUSTICE HARRISON, J. A.
THE HON. MISS JUSTICE G. SMITH, J. A. (Ag.)

BETWEEN	**BARRINGTON GRAY**	**APPELLANT**
AND	**THE RESIDENT MAGISTRATE FOR THE PARISH OF HANOVER**	**RESPONDENT**

R.N.A. Henriques Q.C. instructed by Kent Gammon of DunnCox for appellant

Nicole Foster Pusey, Karen Hill and Simone Pearson instructed by Director of State Proceedings

Abraham Dabdoub, Gayle Nelson, Huntley Watson and Winston Taylor instructed by Watson & Watson for Dr. D.K. Duncan (interested party)

ORAL JUDGMENT

September 27, 2007

SMITH, J.A.:

This is an appeal from an order made by the learned judge Mrs. Marva McIntosh, J. The background:

The magisterial recount for the constituency of Hanover (Eastern) began before His Honour Mr. George Burton, Resident Magistrate for the parish of Hanover on Friday September 21, 2007. It is alleged that during the re-count the learned Resident Magistrate rejected certain ballots on the basis that the official marks were not on these ballots.

On the 25th September, 2007, a fixed date claim form was filed in the Supreme Court on behalf of the claimant Mr. Barrington Gray. This claim was brought against the Resident Magistrate for the parish of Hanover.

The reliefs sought were that:

> "1. The Resident Magistrate for the parish of Hanover be prohibited from re-counting the ballot papers in the general election of the 03rd day of September 2007 in the constituency of Eastern Hanover.
>
> 2. The Resident Magistrate for the parish of Hanover be mandated to count all the ballot papers in the general election of the 3rd day of September 2007 in the constituency of Eastern Hanover.
>
> 3. Further or other relief as this Honourable court may deem just and expedient."

On the 25th September, 2007 a Notice of Application was filed. The grounds for seeking the orders were:

> "1. The Resident Magistrate counted on Friday, the 21st day of September 2007 the ballot papers that did not have the counterfoil attached but then refused to count ballot papers on Monday, the 24th day of September 2007 that did not have the counterfoil attached.
>
> 2. The Resident Magistrate has acted ultra vires to the powers given to him, namely Sections 44 (2) and 48 (3), of the Representation of the People Act.
>
> 3. The Resident Magistrate gave as his reason for refusing to count ballot papers quote (sic.)

> 'The reason for rejecting the ballot is that the official mark was not on the ballot because of the tearing off of the top portion of the ballot" unquote.
>
> 4. Pursuant to Sections 44 (2) and 48 (3) of the Representation of the People Act.
>
> 5. The Resident Magistrate for the parish of Hanover is seeking to deprive the electors in the parish of Eastern Hanover to have their ballot papers with the proper mark counted.
>
> 6. The Resident Magistrate for the parish of Hanover is seeking to deprive the declared Member of Parliament for the parish of Eastern Hanover of ballot papers marked for him.
>
> 7. ....."

Also filed on the same date was a Notice of Intention to rely on the Affidavit of Urgency sworn to by Mr. Harold Brady. Before us, though, is an unsigned and undated 'Affidavit' and this was attached to the Notice of Application. The matter went before Mrs. Marva McIntosh, J. on the 25th September, 2007 and on the same day the learned Judge made the following order:

It is hereby ordered that:

> "1. The Resident Magistrate for the parish of Hanover should not be prohibited from re-counting the ballot papers in the general election of the 03rd of September 2007 in the constituency of Eastern Hanover.
>
> 2. ....."

This order was prepared and filed by the appellant's instructing attorney. Notice of Appeal was filed on the same day. This went before a Judge in Chambers in the late

afternoon of the 25th September 2007. The matter was set for the 26th September 2007. The learned Resident Magistrate was asked not to take further action until the determination of the appeal. On the 26th September 2007, in Chambers, the single judge was asked to direct that the appeal be heard by the court pursuant to Rule 2.4 (5) of the Court of Appeal Rules. On an application of the appellant, the judge in chambers was asked to dispense with the procedural requirements of the rules. Counsel for the respondent did not oppose this application. Accordingly, the application was granted and the matter adjourned to open court for hearing on the 27th September 2007.

In court, it was brought to the attention of learned Queen's Counsel for the appellant that there has not been a strict compliance with Rule 56.3 and that the forms before the learned judge below indicate that the applications before her were for orders of prohibition and mandamus and that it appears that leave to apply for judicial review was not sought. Learned Queen's Counsel stated that leave to apply for judicial review was in fact sought and argued that the fact that the application was made exparte suggests that what was before the court was an application for leave. Learned Queen's Counsel conceded that the grant of leave is a condition precedent to judicial review. He contended that what the learned judge dismissed was an application for leave and that she stated that she had no jurisdiction to grant the application. In the circumstances we proceeded with the appeal as if an application for leave had been made pursuant to Rule 56.3 and had been refused.

Mr. Henriques, Q.C., forcefully argued that the Supreme Court judge has jurisdiction to issue orders of prohibition in electoral matters and can do so when necessary, where a Resident Magistrate doing a re-count is acting ultra vires the Representation of the People Act. In support, the learned Queen's Counsel cited the case of the **Queen v the Resident Magistrate for the parish of St. Andrew exparte *Stephenson*** 17 Jamaica Law Reports at page 264. As regards the pleadings, he submitted that the court can do justice to this matter even though there is no strict compliance with the rules for judicial review by looking at the substance rather than the form, and refers to rule 2.15 of the Court of Appeal Rules 2002 and rule 26.9 (2), (3) & (4) of the Civil Procedure Rules, 2002.

As regards the filing of affidavit evidence he agrees that the affidavit was not signed but said that no objection was taken to it. He concluded that the judge had jurisdiction and erred when she declined jurisdiction.

Mr. Dabdoub for the respondent asked rhetorically: What was before the court below? He referred to the fixed date claim form and submitted that the Supreme Court judge had no jurisdiction to stop the Resident Magistrate, who is mandated by law on an application properly before him, from the re-counting of the ballot papers. He also submitted that the question of accepting or rejecting the ballots is a subjective one. Once the Resident Magistrate is within his remit of reviewing and re-counting the ballots, the Supreme Court has no jurisdiction to interfere or to direct the Resident Magistrate as to how he should carry out and exercise his discretion. He referred to

section 44 (2) (a) and (b) of the Representation of the People Act. He further argued that there is a difference between exercising a supervisory role and the interjection of the court in the decision process. He concluded that when the judge below decided that she had no jurisdiction based on the material before her she had applied her judicial mind correctly to the issue.

We have given, as usual, very careful consideration to the submissions made by both counsel. We have examined the record of the court below and of this court and we agree with learned Queen's Counsel, that in a proper case, such as ***exparte Stephenson***, the Supreme Court has jurisdiction to issue an order of prohibition in electoral matters where a Magistrate during a re-count is acting **ultra vires** the Act. We are not of the view, however, that in the circumstances of this case, the learned judge erred in declining jurisdiction and we give the following reasons:

1. The application was not supported by affidavit evidence verifying the facts relied on – See rule 56.3 (4) of the CPR. The unsigned and undated document of Mr. Brady may not be received as affidavit evidence – See rule 30.4 (1) of the said Rules.

2. Prohibition will not lie unless something remains to be done that a court can prohibit. Even if the "affidavit" of Mr. Brady were treated as if it were in proper form it does not clearly state that the re-counting exercise had not been completed. At paragraph 13 Mr. Brady states:

> "The Magistrate adjourned the court for the lunch break and said he would rule on the resumption and continue the re-count further. Upon resumption the Magistrate ruled that he would reject all ballots with the badly detached counterfoils and given (sic) as his reasons which I recorded as follows:
>
> *'The reason for rejecting the ballots is that the official mark was not on these ballots because the tearing off of the top portion of the ballot.'*

The affidavit evidence of Dr. Duncan which was filed in this court indicates that the recounting was completed. At para. 47 Dr. Duncan states:

> "...the re-examination of all 85 boxes, which were previously counted, was completed and the votes in the four categories – those cast for Duncan and Gray and those that were rejected and spoilt – were tabulated."

We are of the view that the "affidavit evidence" of Mr. Brady is not sufficient in this regard.

3. The claimant sought the following orders:

   (i) that the Magistrate be prohibited from re-counting the ballot papers

   (ii) that the Magistrate be mandated to count all the ballot papers

There is merit in Mr. Dabdoub's contention that the orders sought seem to be in conflict with each other. We cannot accept the submissions of Mr. Henriques, Q.C. that the grounds indicate that the claimant was not seeking to

prohibit the Magistrate generally from re-counting or to mandate him to count all the ballots without regard to exceptions.

In our view the order referred to at (i) above clearly seeks to prohibit the Magistrate from re-counting any of the ballot papers. The order referred to at (ii) admit of no equivocation.

The grounds on which the claimant seeks the orders make it abundantly clear that the claimant wishes to remove the Magistrate completely from the re-counting process. Ground 5 alleges that the Magistrate is seeking to deprive the electors of their constitutional right to vote. Ground 6 claims that the Magistrate is seeking to deprive the claimant "of ballot papers marked for him." These allegations are made without any evidential basis whatsoever.

The learned judge of the Supreme Court was asked to grant leave to apply for the order of prohibition to prevent the Magistrate from carrying out his statutory duties.

4. We should add that any complaint of error on the part of the Magistrate in the carrying out of the re-counting process may be the subject of an Election Petition.

Before leaving this matter, we must mention the submissions of Mr. Henriques, Q.C., as regards the general power of the court to rectify matters where there

has been a procedural error. Learned Queen's Counsel submitted that by virtue of Rule 26-9 (2) (3) and (4) the court could rectify such procedural errors as exist in the instant case. We agree with Mr. Dabdoub that subsections (2) (3) and (4) of Rule 26.9 must be read in light of subsection (1) which states:

> "This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order."

Rule 26.9 clearly contemplates situations where there are no sanctions specified for non compliance with any rule etc. On the other hand Rule 26.8 deals with relief from sanctions imposed for non-compliance. To hold otherwise these two (2) rules would not harmonise.

Conclusion

The appeal is dismissed for the reasons given.

Harrison, J.A.: I agree

G. Smith, J.A.(Ag.): I agree

Smith, J.A.:

ORDER:

The appeal is dismissed.