In the Supreme Court

Before: Smith, C.J., Parnell and Malcolm, JJ.

Suit No. M 62 of 1980

R. v. The Resident Magistrate for the parish of Saint Andrew
Ex parte Owen Harcourt Pike Stephenson.

R.N.A. Henriques for the Applicant

Hugh Small, John Junor and Jacqueline Lynch for
Dudley Thompson (a person desiring to be heard in
opposition)

R.G. Langrin and Christine McDonald for the Attorney General
as amicus curiae

1980. December 15 and 16.

SMITH, C.J.

This is an application by Mr. Owen Harcourt Pike Stephenson for an order of prohibition to issue from this court to the Resident Magistrate for the parish of St. Andrew in respect of proceedings now before that learned Judge on an application made by Mr. Dudley Thompson under s. 47(1) of the Representation of the People Act for a recount of the votes polled on October 30 last during the general elections in the constituency of Western St. Andrew. Mr. Stephenson and Mr. Thompson, among others, were candidates in that constituency.

The issue raised in this application is the extent of the powers of the learned Resident Magistrate to call witnesses and hear evidence on the application that is before him. S. 48 of the Act sets out the procedure to be followed by a Resident Magistrate on an application made under s. 47, and it is agreed that the only powers which a Resident Magistrate has to hear evidence are contained in sub.s. 2 of s. 48.

The Representation of the People Act sets out in detail the procedure to be followed after the close of the poll during an election, and subsequent to polling day, for the purpose of ascertaining the will of the electorate in each of the polling divisions in a

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constituency and in the constituency as a whole. The provisions are set out in ss. 44 to 48 (inclusive) of the Act. S. 44 sets out step by step the procedure to be followed by the presiding officer in a polling division after the close of the poll. Ss. 45 and 46 set out the procedure to be followed by the returning officer on the final count of the votes polled in the constituency. Ss. 47 and 48 are applicable when an application is made by a candidate for a recount of the votes awarded by the returning officer.

For the purposes of the issue raised in these proceedings it is necessary for me to examine in detail the powers of the returning officer on a final count of votes. S. 45 contains provisions regarding his primary duties and powers on a final count; that is: actually to count the votes cast for each candidate in each polling division in the presence of the candidates or their representatives; count the votes rejected by the presiding officer and decide whether they were validly rejected or not and, if not, to award them as directed in the statute; to add up the total number of votes and make and sign the necessary amendments to the statement of poll. There are other provisions in the section in respect of the final count.

S. 46, however, gives directions and additional powers to the returning officer in the particular circumstances set out in that section. The provisions of the section are as follows :

> " 46. - (1) If the ballot boxes are not returned to the returning officer by the time specified in the election notice under section 22, the returning officer shall adjourn the proceedings to a subsequent day, which shall not be more than a week later than polling day.
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> (2) In case the statement of the poll cannot be found and the number of votes polled for the several candidates cannot be ascertained, or if, for any other cause, the returning officer cannot, at the day and hour appointed by him for that purpose, ascertain the exact number of votes given for each candidate, he may thereupon adjourn to a future day and hour the final count of the votes given for each candidate, not being more than seventy-two hours after the time specified in the election notice under section 22.

" (3) At the time to which the proceedings are adjourned in accordance with the provisions of sub-section (2), the returning officer shall ascertain by such evidence as he is able to obtain the total number of votes cast for each candidate and shall declare elected the candidate appearing to him to have the largest number of votes.

(4) For the purposes of this section the returning officer shall have all the powers of and be deemed to be a commissioner appointed under the Commissions of Enquiry Act and the provisions of section 11 of the Commissions of Enquiry Act shall apply to all persons required by the returning officer to give evidence or to produce any documents before him as they apply to persons summoned to attend and give evidence or to produce documents before a commission of enquiry under the Commissions of Enquiry Act. "

Sub-s. (1) relates to a situation where ballot boxes are not returned to the returning officer at the time and place specified in the election notice. This, of course, means ballot boxes and their contents. Sub-s. (2) is a very important sub-section, in my opinion. It is somewhat difficult to relate it to sub-s. (1) in view of the difference in the length of the adjournment which is set out in that sub-section; but dealing with sub-s. (2), it states circumstances in which the returning officer is empowered to adjourn his final count to a future date and time for the purpose of ascertaining the number of votes polled for the several candidates.

It is to be observed, firstly, that the sub-section says that the returning officer has this power in case the statement of the poll cannot be found and the number of votes polled for the several candidates cannot be ascertained. So that it is not sufficient that the statement of poll cannot be found; the circumstances must be such that, in addition, the number of votes polled for the several candidates cannot be ascertained. Secondly, and this in my view applies whether or not a statement of poll is found, the returning officer is empowered to adjourn the proceedings to a future date and time if "for any other cause" he cannot at the date and hour appointed by him for that purpose ascertain "the exact number of votes given for each candidate".

Mr. Small submitted that the sub-section covers all circumstances in which a returning officer cannot ascertain the number

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of votes cast for each candidate and I respectfully agree with that submission. In my judgment, the words "any other cause" give a returning officer very wide powers to adjourn the proceedings if he is unable at the time to ascertain the exact number of votes given for each candidate; not given by a presiding officer, but validly given by the electors.

Sub-s. (3) states his powers when he resumes the count after the adjournment. The sub-section states that on that occasion "the returning officer shall ascertain by such evidence as he is able to obtain the total number of votes cast for each candidate". Mr. Henriques submitted that the powers of the returning officer to hear evidence, as given by this sub-section, are limited to finding out the number of votes, and that is so. But the sub-section is not to be read in isolation. It must be read in conjunction with the circumstances set out in sub-s. (2). In my opinion, a returning officer may enquire on an adjournment into the circumstances which prevented him on the day of the final count preceding from ascertaining the will of the electorate. And it is to be observed that the purpose of calling evidence at all is, as stated, "to ascertain the total number of votes cast for each candidate". Here again, it is not to ascertain the number of votes awarded by a presiding officer, but the number of votes validly cast by the electors at the election.

I turn now to the powers of the Resident Magistrate under s. 48 of the Act on an application made to him under s. 47 for a recount of votes. Sub-s. (1) and the first part of sub-s. (2) of s. 48 relate to what has been described as an arithmetical or a mechanical count of the votes; and he is required to recount the votes according to the directions in the Act set forth for presiding officers at the close of the poll. Sub-s. (2), in addition, confers a power of review. It enables a Resident Magistrate to review, first of all, the decision of the returning officer with respect to the rejection of any ballot

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paper. Secondly, he is empowered to review the decision of the returning officer with respect to "the number of votes given for a candidate at any polling place where the ballot box used was not forthcoming when the returning officer made his decision, or when the proper statements of the poll were not found therein". It is quite clear, in my view, that this power of review is in respect of powers which may be exercised by a returning officer under s. 46 of the Act. In my judgment, the power may only be exercised where a returning officer has exercised his powers under that section.

Sub-s. (2) of 48 gives power to the Resident Magistrate to hear evidence "for the purpose of arriving at the facts as to such missing box and the statements of the poll"; and it gives him "all the powers of a returning officer with regard to the attendance and examination of witnesses". This power to hear evidence is to be contrasted with the powers given to the returning officer under section 46(3), where his power to hear evidence is for the purpose of ascertaining the total number of votes cast for each candidate. It is plain, in my judgment, that the power of a Resident Magistrate to hear evidence is limited, as expressly stated in the subsection, as he is exercising a power of review only. As Mr. Henriques contended, and I agree, the power is to enable the Resident Magistrate to satisfy himself that the returning officer had a factual basis for the exercise of the authority given by s. 46.

Turning now to the facts of this case, it is common ground that the returning officer did not exercise his powers under s. 46. It was stated by Mr. Small during the argument that he attempted, apparently, to exercise his powers but was advised that he had no authority to hear any evidence. As I have indicated, he had such a power to be exercised in the circumstances set out in s. 46.

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In view of the allegations which have been made and which have been drawn to our attention in the affidavits, and by counsel in these proceedings, the returning officer would, in my opinion, have been acting within his powers to hear evidence in cases in which there were missing ballots, where it is alleged that gunmen invaded a station and "polled" votes which they were not entitled to poll, or where there were clear cases before the returning officer of tampering with votes, or ballot boxes. The fact is that he did not exercise those powers and so, as I have held, the Resident Magistrate in those circumstances had no jurisdiction to call any evidence in respect of these irregularities or at all.

May I just make a comment. If I am right in the views that I have expressed as to the powers of a returning officer in the case of the type of irregularities to which reference has been made, then it is proper, in respect of those ballot boxes which are in dispute, to adjourn his decision on those boxes, as section 46 directs, and on the adjournment to hear evidence in respect of the irregularities. From what has been said by learned Counsel for Mr. Thompson, it is a blot on the integrity of our electoral system that a returning officer has to conduct a final count in the circumstances described by Counsel. No proper count can take place in circumstances where there is confusion, where a returning officer is driven by the prevailing circumstances to bundle electoral documents into a bag in order to secure them, rather than place them, as the statute requires, in the ballot boxes from which they were taken. If sets of circumstances like those are allowed to prevail, no returning officer would be able properly to perform his duties and powers under s. 46 to hear evidence in respect of irregularities. It is to be hoped that returning officers in the future will be allowed to conduct these very important proceedings in an atmosphere where they feel free to perform their duties impartially, and in accordance with the very detailed provisions of the statute which governs those proceedings.

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To revert to the circumstances of the case before us, in view of what I have said, I would grant the application and propose that an order be made in these terms: that the Resident Magistrate for the parish of St. Andrew, His Honour, Geoffery Ramsay, Esq., in the proceedings now before him for the recount of the votes polled in the general elections held on October 30, 1980 in the constituency of Western St. Andrew, is hereby prohibited from hearing any evidence for the purpose of certifying the result of the recount to the returning officer for the said constituency, and is further prohibited from making any finding for this purpose based upon evidence already heard by him.

Parnell, J:

I agree with the order which has been proposed by the Chief Justice. As the matter is one of great importance and some urgency, I have decided that I should add a few words of my own.

First of all, I would like to commend all the Counsel who have taken part in the debate before us, or I should say, who have made submissions before us. Industry, clarity and preparation were shown. In particular, I commend Mr. Small in the way that he put his arguments, also his stand yesterday when he did not take the point that his client was not served with a copy of the motion and of the relevant documents, he being an interested party. The non-service of the documents on his client was a breach of the rules. He should have been served. If Mr. Small had, as the Chief Justice said yesterday, taken that point, and had requested an adjournment in the circumstances, then we would have been forced to grant the adjournment. But, as he pointed out, it would have been at the expense of certain issues, one of them being the importance of the case and the urgency attendant to it.

The other comment I would like to make before I say anything further, is that what has been disclosed in the affidavits, several affidavits before us, is a shocking state of events. I thought that all appropriate arrangements had been made, and Parliament had gone out of its way to amend the Representation of the Peoples Act so as to curtail anything of the nature that was told us, for instance gunmen going to the polling stations to hold up the place, and to use threats towards the officers engaged in this important exercise. But as we were told, an election petition has been filed. I shall therefore restrain myself from making any further comments lest it may be thought that I would be saying anything prejudicial to any hearing that may be put on the merits in the future.

What is before us, in my view, is a very simple matter, though it has taken hours of debate. The question is: what is the extent of the powers of the Resident Magistrate pursuant to section 48, sub-section 2 of the Representation of the Peoples Act, when he is carrying out a magisterial recount. And I start off by referring briefly to the definition

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of re-count which Mr. Henriques adverted to yesterday morning. It includes either or both -

(a) adding again the votes given for each candidate as recorded in the statements of the polls returned by the several presiding officers;

(b) examining and counting the used and counted, the unused, the rejected and the spoiled ballot papers in accordance with the provisions of section 48;

Now in counting the votes, section 44(2) of the Act shows what is to be done -

"The presiding officers shall reject all ballot papers-

(a) which have not been supplied by him; or

(b) which have not been marked for any candidate; or

(c) on which votes have been given for more than one candidate; or

(d) upon which there is any writing or mark by which the voter could be identified, other than the numbering by the presiding officer in the cases hereinbefore referred to, but no ballot paper shall be rejected on account of any writing, number or mark placed thereon by any presiding officer."

And this same subsection 44(2), obliges the returning officer what he is to follow when he is making the final count. Indeed he is bound by it.

It is the action or the exercise carried out by the returning officer which will be the subject of a recount before a Resident Magistrate. It is his action, what he has done, that there is going to be a complaint about. So what I intend to say I have put in a summary form and I will refer to one or two cases as I go along.

Firstly, a Resident Magistrate is a creature of statute and therefore, he enjoys no greater power in the exercise of his duties other than what is expressedly or impliedly granted by statute. Secondly, and this is in relation to a submission made to us by Mr. Small, where an inferior tribunal commits an error as to its jurisdiction or as to a matter within its jurisdiction, but as to the proper exercise of some function within it, prohibition may be applied for and this court in the exercise of its discretion will direct that prohibition should go even where a right of appeal exists. And the authority - there is a recent authority, if authority is required, for that proposition. It is to be found in Regina v.

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Comptroller-General of Patents and Designs. Ex parte Parke, Davis & Company, reported in /1953/ 2 W.L.R. 760. The relevant portion of the judgment which I would like to quote is at page 764. The learned judge was there quoting what was said in several cases -

> "Then those cases seem to establish, and consistency of reasoning requires, that the power of prohibition is in no case taken away by the privilege of appeal. If called upon, we are bound to issue our writ of prohibition, as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, although there may be a possibility of correcting it by appeal. For there is no reason for driving the subject to that expensive process to abide the chance of a repitition of the error."

There is a passage in DeSmith on Judicial Review of Administrative Action, 2nd edition, page 436, which supports that point. The passage reads as follows:

> "The existence of a right of appeal to the courts from a tribunal's decision does not deprive the Courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. Nor is the applicant obliged to have eshausted prescribed administrative means of redress before having recourse to the Courts."

The applicant is entitled as of right to an order of prohibition where, as in this case, there is no right of appeal against the final decision of the tribunal. And in this respect I do not accept the argument of Mr. Small that where a Magistrate on a magisterial recount has completed the recount and given his certificate, his action may be reviewed by way of an election petition. With respect, the argument is unsound. It is a round-about way of putting it. The petition may have reference to what the Resident Magistrate has done, but it is not an appeal against the certificate which he grants at the end of the recount nor is it a challenge to any ruling which he made prior to the granting of the certificate.

The third point is, where the recount of votes by a Resident Magistrate is requested under the Representation of the People Act, the foundation of the power of the Resident Magistrate is the filing within the period allowed by the Act of at least an affidavit by a credible witness alleging that the returning officer in counting the votes improperly counted, or improperly rejected ballot papers, or has made an incorrect addition of the ballots/

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cast for the candidate.

Fourthly, the power of review is given to the Resident Magistrate by section 48 of the Act, and at the review he has the power to call witnesses, but the power of review does not arise in this case, in my view, because the returning officer at the final count did not resort to the power conferred on him by section 46(2) of the Act, which I need not outline - it has been quoted to us - that is where the ballot box is not returned pursuant to section 44(2)(a) of the Act, or a statement of poll cannot be found in the box and which is required to be placed therein by section 49 of the Act.

Fifthly, where a returning officer resorts to his power under section 46 of the Act, he is required to ascertain by such evidence as he is able to obtain the total number of votes cast for each candidate; and it is the decision or adjudication of the returning officer to allocate the number of votes to each candidate with or without the rejection of ballot papers, under the powers conferred by section 46(3), which the Resident Magistrate at the magisterial recount has the power to review. He cannot review anything else.

In this case, as I have already pointed out, the returning officer did not rely on the procedure laid down by section 46(3) in respect of any of the polling divisions when he was making the final count, and as a result the occasion did not arise for the Resident Magistrate to call any witnesses since there was nothing to review within the meaning of section 48(2) of the Act.

The evidence disclosed at a magisterial recount may establish, as this case has disclosed, that there is strong evidence fit to be enquired into by an election court. But in such a case the Resident Magistrate must be careful. He has no power to trespass into an area which is not covered by his jurisdiction, and he should decline to do so however attractive or persuasive the invitation may be. I shall stress a point. It may involve a repetition of what has been already stated but in a matter of this kind a judge should be prepared to bear the censure of being repetitive if by so doing, he makes himself clear. There should be no

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room for doubt.

During the submissions of Mr. Henriques, a member of the Court asked him a question to this effect:

> Q: Suppose the Resident Magistrate at a recount should take the view that the returning officer should have exercised his power to call witnesses in respect of a polling division in order to obtain as accurately as possible, the total number of votes cast for each candidate, may the Resident Magistrate himself call the witnesses?

In reply, Mr. Henriques vigorously contended that the Resident Magistrate may only call witnesses by way of review. And where the returning officer did not exercise the power on him conferred to summon witnesses, the Resident Magistrate is unable to do so. This powerful argument captivated me.

The relevant portion of section 48(2) of the Act states as follows:

> "and he shall also, if necessary or required, review the decision of the returning officer with respect to the rejection of any ballot papers or to the number of votes given for a candidate at any given place where the ballot box used was not forthcoming when the returning officer made his decision, or when the proper statements of the poll were not found therein, and for the purpose of arriving at the facts as to such missing box and the statements of the poll, the Resident Magistrate shall have all the powers of a returning officer with regard to the attendance and examination of witnesses."

Summary

In my view, a careful examination of sections 46 and 48 shows the following state of affairs. At the final count, the returning officer may encounter a situation where:

(1) The ballot box of a particular polling station is not available; or

(2) The ballot box is available, that is to say, the box used is produced but the contents are missing; or

(3) The ballot box is available with some or all of the ballots but a proper statement of the poll, that is to say, a statement which substantially complies with Form 19 of the Second Schedule to the Act, is not found in

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the ballot box; or

(4) The returning officer is not in a position to ascertain the exact number of votes secured by each candidate on polling day.

In any of the four situations outlined above, the returning officer is empowered to call witnesses as if he is a Commissioner of Enquiry with a view to his determining how many votes should be allocated to each candidate. And where returning officer does exercise his right to call witnesses, what is reviewable by the Resident Magistrate is the decision of the returning officer in rejecting ballots and generally the method employed in arriving at the total number of votes secured by each candidate. In the exercise of the power of review, the Resident Magistrate may call the witnesses whom he considers are able to assist him.

To put it succinctly; the Resident Magistrate is empowered to review a decision or judgment made by the returning officer when witnesses were called by him. He is not empowered to review the non-exercise of a statutory discretion given to the returning officer even if he takes the view, that on the facts as shown on the physical examination of the ballots or the boxes, the discretion should have been exercised.

Section 48(2) of the Act is a re-enactment of section 41(2) of the Parent Legislation, that is, the Representation of the People Law of 1944 (Law 44 of 1944). As far as my knowledge and my research go, this is the first case since 1944 where at a magisterial recount, witnesses are called to assist the Resident Magistrate on the question of alleged irregularities or malpractices occurring after the close of poll and before the final count.

Parliament, in its wisdom, has delimited the power of a Resident Magistrate to call witnesses at a recount. If this were not done, then there would be the opportunity to invite the Resident Magistrate with an acceptance of the entreaty - to probe areas, make rulings and otherwise to intermeddle in questions which are to be argued in and determined by an Election Court. Where such a hazard rears its head, - as shown in this case - the duty of this court is to put a stop to the threatened intrusion.

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In this case it is clear that the Resident Magistrate has stepped outside his boundaries and he is heading into a troubled area. He should be halted by this court and should be directed that no ruling should be given by him on the effect of the evidence so far given by the witnesses already called. In other respects, he should resume the recount in accordance with section 48 of the Act.

MALCOLM, J.

I preface my short remarks by saying that this is not a dissenting judgment.

The learned Chief Justice and my learned brother Parnell have succintly and clearly recited the facts of this matter and the law relating to it. They have highlighted the salient points of the arguments and submissions made. I entirely agree with their views expressed, their interpretation of the law applicable to this matter and the comments they have made. I too agree that prohibition should go, and I concur with the order proposed.

In conclusion, I wish specially to endorse the comments made about the presentation and conduct of the case by all the attorneys involved.

SMITH, C.J.

There will be an order in the terms that I proposed.