

UMCS

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.

WEST CENTRAL ST. ANDREW

PARLIAMENTARY

RECORD

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,

“liberates us from the thralldom of the inflexible majoritarian principle which reduces the law to a sterile numbers game.”

Mr. Robinson further submitted that the consideration of whether there is a substantial distortion or subversion of the process of free and fair election calls for an exercise of qualitative judgment which, following Lord Denning’s first principle in Morgan and Simpson, ante, may well result, as it did in the Hackney case, in an election being voided in circumstances where the irregularities did not affect the result.

At the core of the statutory provisions governing the conduct of Parliamentary or Local Government Elections is the intent of Parliament to ensure that the democratic will of the electors prevail. That the candidate representing the choice of the majority of the electors be returned as the duly elected member. To this end the legislators have prescribed the manner in which that democratic will must be expressed and I am confirmed in the view that under section 37(e) any conduct which has the effect of substantially distorting or subverting the process of free and fair elections is inimical to the intent of the legislators.

The following dictum in Re Tanjong Puteri Johore State Election Petition; Abdul Razak Bin Ahmad v. Datuk MD Yunos Bin Salaimon & Anor (1988) MLJ Lexis 545; (1988) MLJ111 is instructive:

“To my mind; an election does not merely symbolize the citizens’ right to free franchise but entails public participation in selecting the government of their choice through a process which not only guarantees

absolute fairness, secrecy, impartiality and regularity but which also encompasses public trust and confidence in the manner in which the process is carried out. For these reasons, various legal guidelines have been enacted to regulate the formalities of an impartial election. Any serious departures from these procedures will strike at the very foundation of our free and democratic system of political representation and affect public confidence in the impartiality of our election." (emphasis mine)

I shall now examine the grounds on which the applicant seeks to have the taking of the poll declared void.

GROUND 1

That ballot boxes were stolen and/or destroyed and/or tampered with and the number 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 candidate who is not declared the winner. (Section 37(b) Election Petitions Act (EPA)).

Polling Division 49

Beverly Valentine, the duly appointed presiding officer, in a duly sworn affidavit averred that the polling station was opened on time, that voting proceeded without incident. The polls closed at 5.00 p.m. The votes were duly counted and accounted for in accordance with the law. The ballot box was locked and the key handed over to one Royel Mantle to convey the box with the counted ballots, therein, to the counting station.

Mantle was not an election official. He confirms in an affidavit that the box was handed over to him by Beverly Valentine to deliver to the counting station.

This box was found to be empty at the final count. As a result none of the votes which had been polled in that Polling Division was reckoned in declaring the winner.

If Beverly Valentine is believed, and her evidence is uncontradicted, the ballots which she had counted and placed in the box were removed by person or persons unknown.

In addition thereto Mantel who accompanied the box to the counting station is an unauthorised person and therefore unable to perform that function.

Sections 44(10) and 44(10A) of the Representation of the People Act stipulate how ballot boxes are to be conveyed to the counting station, that is by registered mail or delivered to the Returning Officer by a qualified person.

It is clear, on the evidence, that the ballot box has been tampered with and the number of electors on the list of electors, to wit, 312 is more than the difference in the number of votes cast for the candidate who was declared the winner, to wit, 153 votes.

Polling Division 64

At the final count 128 of the ballots in this polling station were found to be disfigured. The preliminary statement of poll recorded 186 votes for Warren

Blake, 6 votes for Andrew Holness and 0 for Steve Daley. As a result of the disfigured ballots the results of the final count showed:

Warren Blake	59 votes
Andrew Holness	5 votes
Steve Daley	0 vote

Joan Alexander, Presiding Officer, swore that when she counted the votes and enclosed them in the ballot box there was no disfigured ballot.

Joan Alexander's uncontradicted evidence leads to the irresistible conclusion that the ballot box was tampered with.

Also the number of voters on the list 192 exceeds the difference in the number of votes cast for the winning and the losing candidates.

Polling Division 71

In respect of this polling division the Court is asked to conclude that the ballots in the hands of an unidentified person is a tampering in law. The affidavit evidence of Alicia Smith, Assistant Returning Officer for West Central St. Andrew, is that the identity of the person who collected the ballot box is unascertainable.

I am of the view that the evidence adduced does not amount to tampering. The irregularity would, to my mind, be more appropriately considered under Ground 3.

Polling Division 72

Marjorie McKie, the duly appointed presiding officer for the abovenamed Polling Division, states on oath that she counted the ballots in the presence of former U.S. President, Jimmy Carter and his wife. Having done so she placed the ballots in the box and was escorted to the counting station by the police where she handed over the box to the Returning Officer, Mr. Thomas. Mr. Thomas verifies the receipt of the box with a preliminary statement of poll signed by Marjorie McKie which showed:

Warren Blake	338
Andrew Holness	7
Steve Daley	<u>1</u>
	346

There are 353 electors in this polling division.

On the 22nd December during the final count this box was found to be empty. These ballots were not reckoned in deciding the outcome of the poll.

Again, the irresistible conclusion is that the ballots were tampered with.

GROUND 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 (section 37(d) Election Petitions Act).

Polling Division 23

The constituted Authority moves the Court to say that doubt has been cast on the integrity of the votes counted for the candidate declared elected on two bases.

1. That a large number of votes were cast between 2.15 p.m. and 5.30 p.m. which indicates that the proper procedure could not have been followed. It is alleged that 370 voters voted in approximately 3 hours, i.e. 180 minutes.

Ancel Thomas the Returning Officer has deposed that it takes at least two (2) minutes for an elector to cast a vote. The implication is that approximately twelve (12) hours would have been required for 370 voters to cast their votes. I am not convinced that this evidence leads inexorably to the conclusion that the integrity of the votes counted for the candidate declared elected, is compromised, or to use the language of the statute, that doubt has been cast on the integrity of the votes counted for the candidate declared elected.

In areas where the voters are known to all and sundry, small communities, the process is much quicker. A lot of the questions which are required to be put to the elector become unnecessary because the elector is well known by the presiding officer, the poll clerk and the indoor agents.

2. That some voters refused to dip their fingers in the ink after voting and their votes were deposited in the ballot box and taken into account in deciding the winner.

There is unchallenged evidence that this did in fact take place in a number of instances.

Section 38(2) of the Representation of the People Act requires the presiding officer to destroy the ballot paper where an elector refused to immerse the appropriate digit or any other digit in the electoral ink.

The purpose of the ink is to prevent a voter from voting more than once. Failure to observe this requirement facilitates multiple voting by an elector and where it is wide spread it could cast doubt on the integrity of the votes counted for the candidate declared elected. It also compromises the principle of free and fair elections.

Polling Division 56

The complaints in respect of this polling division are:

- (i) that a substitute presiding officer officiated and was never given an official electoral list of electors
- (ii) that a number of persons voted without satisfying the presiding officers as to their identity;
- (iii) that a number of persons who were not bona fide electors voted;
- (iv) that there was multiple voting by a number of persons.

Section 32(1)(f) requires the returning officer to furnish each presiding officer with an official list of electors for use at the polling station.

Section 34(1) requires the official list to be consulted to ascertain if the person applying for a ballot is a qualified elector.

Again, the uncontroverted evidence is that there was no official list issued. In the circumstances, it would have been impossible to ascertain that the persons applying for ballots were qualified to vote. There was no way of ensuring that voters were not being impersonated.

Fundamental to the concept of free and fair election is the principle of one man one vote, same man same vote.

The evidence adduced as to the circumstances under which the election was conducted in this polling division undoubtedly undermines that fundamental principle.

Polling Division 57

Constable Richard Johnson, a member of the Jamaica Constabulary Force assigned to this polling station on election duty had the amazing experience of witnessing an indoor agent of the Jamaica Labour Party voting openly and on behalf of electors whom he had sent away from the Polling Station.

This contravenes section 93 of the Representation of the People Act which enacts that no person shall apply for a ballot paper in the name of another person.

GROUND 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 substantial distortion or subversion of the process of free and fair election.”

Mr. Robinson did not pursue the “upsurge of violence” as a basis for voiding the polling. There was no evidence to support such an allegation. The sporadic influence of violence would not have been such as to cause substantial distortion or subversion of the process of free and fair election.

A number of irregularities have been established on the evidence, to wit,

1. Late opening of poll contrary to section 33(1) of the Representation of the People Act.
 - (a) P.D. 23 opened at 2.15 p.m. instead of 7.00 a.m.
 - (b) P.D. 56 - opened at 5.15 p.m.
 - (c) P.D. 58 - opened at authorised location at approximately 4.55 p.m.
2. Poll conducted at unauthorised locations contrary to sections 28 and 29 of the Representation of the People Act.
 - (a) P.D. 56 - removed from the officially designated location at Robin Road and Woodpecker Avenue to 65 Waltham Park Road.
 - (b) P.D. 57 - Removal from designated location at Robin Road and Woodpecker Avenue to St. Stephen's Basis School at 53 Olympic Way.
 - (c) P.D. 58 - Removal from designated location at Robin Road and Woodpecker Avenue to 65 Waltham Park Road.

- (d) P.D. 72 - Removal from St. Stephen's Basic School, the officially designated location to 10 Olympic Way.
- 3. OPEN VOTING - contrary to section 35 of the representation of the People Act.
 - (a) P.D. 56
 - (b) P.D. 58
 - (c) P.D. 71
- 4. Voting conducted in crowded and disorderly circumstances contrary to section 77(1) of the Representation of the People Act.
 - (a) P.D. 56
 - (b) P.D. 57
 - (c) P.D. 71

These are some of the major irregularities complained of in addition to those mentioned in grounds one and two.

In respect of open voting contrary to section 33(1), I am of the view that this kind of irregularity is not such as ought to be regarded as substantially distorting or subverting the process of free and fair election.

Sections 35 and 99 of the Representation of the People Act address the question of secret ballot. A keen look at the statutory provisions indicates that legislators were concerned with ensuring that election officials do not interfere with the voter whilst he is casting his vote or become privy to how the elector has voted. The elector has the right to insist that he be allowed to cast his vote in

secret. It is a right in my view which the voter can waive. An elector, if he so chooses, can make known to anyone for whom he has voted. He can make his mark in view of anyone in the polling station. The provisions are aimed against the election officials and not against the electors. Section 99(4) which makes any breaches of the provisions of that section a criminal offence is aimed at election officials and other persons but not the elector who chooses to exercise his franchise openly.

If every elector is permitted to cast his vote for the candidate of his choice and does so, without observing the provisions of secrecy, it cannot, in my view, be argued that the process of free and fair election has been substantially distorted or subverted.

The other regularities adverted to, which I hold to have been satisfactorily established, singly or cumulatively constitute a substantial distortion or subversion of the process of free and fair election both in the respective Polling Divisions in which they occurred as well as in the Constituency as a whole.

It is for these reasons that I concurred with my Learned brothers in declaring:

1. 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, 64, 71, 72 in the constituency of West Central St. Andrew.

2. 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 the constituency of West Central St. Andrew.

WALKER J.

This Court is sitting for the first time. In this sense, therefore, it creates legal history in Jamaica. It was established pursuant to section 15 of the Election Petitions (Amendment) Act, 1997 (section 35 of the principal Act). Simultaneously with the promulgation of this piece of legislation the Representation of the People (Amendment) Act, 1997 was passed. It provides for the establishment of a special body of persons to be known as the Constituted Authority. Section 7 of that amending Act (section 52 A of the principal Act) gives to the Constituted Authority certain powers with respect to the voiding of a poll. Clearly, the primary objective of this amending legislation is to provide for an effective safeguard against the twin spectres of violence and corruption by which our elections have been bedevilled over many years. On December 18, 1997 a general election to elect members of the House of Representatives was held. It resulted in an overwhelming victory for the People's National party. In the process sixty men and women were elected to represent an equal number of constituencies throughout the island. It is the poll that was taken in one of these constituencies, namely the constituency of West Central St. Andrew, that gives rise to the present proceedings. On a magisterial recount of the ballots cast therein Mr. Andrew Holness, the candidate for the Jamaica Labour Party was declared the winner (8,653 votes) over Dr. Warren Blake, the candidate for the People's National Party (8,499 votes) and Mr. Steve Daley, the candidate for the National Democratic Movement (43 votes). The official margin of victory was declared to be 154 votes. Before this court by way of originating motion the Constituted Authority sought declarations as follows :-

“(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 and 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 the constituency of West Central St. Andrew.”

The motion was presented and argued on the following grounds, namely :-

“(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.”

On March 5, 1998, in a judgment announced by Wolfe C.J. we granted the declarations sought, save for the declaration sought in respect of polling division No. 60, and promised to put our reasons for so doing in writing at a later date. What follows are my own reasons for concurring with this judgment.

At the outset of these proceedings counsel for the successful candidate, Andrew Holness, took a preliminary objection the grounds of which were stated as follows:-

"1. That Andrew Holness was on the 17th day of February 1998 the member elected for the constituency of West Central Saint Andrew, as having received the majority of votes lawfully given and has been sworn as member of parliament of that constituency.

2. That section 4(d) of the election petition act has not been complied with in 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.

(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 illconsidered, 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 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.”

The first of these grounds was, as stated, virtually a non-ground. It was, on any view, no more than a bald statement of fact. The second ground overlooked the fact that the amending Acts of 1997 effected structural changes to the principal Acts in creating a new regime and a new procedure for voiding the taking of a poll at an election. It is this new procedure which is now being followed by the Constituted Authority. It is wholly different from the procedure to be adopted upon the presentation of an election petition. As such it is not subject to the provisions of section 4 (d) of the Election Petitions Act which prescribes the payment of security for costs as a pre-requisite for prosecuting an election petition. The third ground was wholly misconceived. It was replete with irrelevancies and completely missed the whole character and intent of the exercise upon which this court was embarked. So, inevitably, the preliminary objection failed.

Thereafter, Mr. Robinson for the applicant pointed the court to affidavit evidence which revealed events that occurred at polling divisions Nos. 23, 49, 56, 57, 58, 64, 71

and 72. He submitted that these events, considered either singly or cumulatively, constituted irregularities and breaches of the law which warranted a voiding of the poll taken for each of these polling divisions and, ultimately, for the constituency as a whole. On that evidence, which was uncontradicted by any other evidence, the revelations of irregularities were legion. Below is a litany of them with references to the relevant sections of the Representation of the People Act.

THE SITUATION AT POLLING DIVISION NO. 23

1. Taking of poll commenced at approximately 2.15 p.m. instead of at 7 a.m. contrary to section 33 (1).
2. Ballots accepted and counted from electors who refused to immerse the appropriate digit (finger) in the electoral ink contrary to section 38 (2).
3. Ballots were cast in two separate ballot boxes, the first of which was issued to a presiding officer who failed to take up her duties at the appointed time and the second of which was issued to the duly appointed substitute presiding officer for the same polling division.
4. Poll closed shortly after 5.30 p.m. after which a total of 370 ballots contained in a substitute ballot box were counted for the 3 candidates who offered themselves for election. In the circumstances 370 electors would have voted within a time span of approximately 3 hours 15

minutes (195 minutes). This would have been a physical impossibility given the uncontroverted evidence that a minimum time of 2 minutes was required for the proper registration of the vote of a single voter. The irresistible inference to be drawn from these facts is that votes were polled by persons who were not bona fide electors.

THE SITUATION AT POLLING DIVISION NO. 49

1. Tampering with ballot box : section 98.

Ballot box containing 302 ballots counted by presiding officer after close of poll on election day found to be empty by returning officer at final count: see sections 77 and 98. Ballots when counted by presiding officer had produced the following result :-

Warren Blake	300
Andrew Holness	1
Steve Daley	<u>1</u>
Total	302

These ballots were not included in the final count.

2. Delivery of ballot box to returning officer not done in conformity with the provisions of section 44 (10A). No evidence to show that arrangements made for persons delivering ballot box to counting centre to be accompanied by an agent or representative of each of the candidates.

THE SITUATION AT POLLING DIVISION NO. 56

1. Ballot box delivered to presiding officer without a proper lock and key and non-compliance with section 43 (1).
2. Polling division improperly removed from officially designated location at Robin Road and Woodpecker Avenue to 65 Waltham Park Road followed by voting at unauthorized location: sections 28 and 29.
3. Presiding Officer threatened in the lawful exercise of her duties: section 88A (a).
4. No official list of electors given to substitute presiding officer: sections 32, 34 and 43.
5. Late opening of poll at about 5 p.m.: section 33 (1).
6. Ballot papers unfolded : section 35.
7. Electors given ballots and permitted to vote in contravention of section 34 (5).
8. Open voting in contravention of section 33 (1)
9. Ballots accepted and counted from electors who failed to immerse the appropriate digit (finger) in the electoral ink contrary to section 38 (2).

10. Multiple voting and voting by persons who were not bona fide electors contrary to section 34 (4).
11. Voting conducted simultaneously at two different locations, namely 65 Waltham Park Road and the Pentecostal Church located at the corner of Robin Road and Woodpecker Avenue. The consequence of this was that an elector voting at the former location was effectively disenfranchised as votes cast at that location were not counted by the Returning Officer.
12. Voting conducted in crowded and disorderly circumstances: section 77 (1).
13. Premature closure of polling station resulting in disenfranchisement of waiting electors: section 35 (6).
14. Counting of numbers of voters, ballot papers and votes after close of poll done at a place other than the polling station and in the presence of unauthorised persons: section 44.
15. Interference with poll book by persons unknown and in contravention of section 43. The evidence of the presiding officer was as follows :-

“I went into a classroom at the school and counted the ballots. I prepared the preliminary Statement of Poll and placed it on the outside of the ballot box. I remained in the classroom for a long time sitting on a

chair with my head resting on a table because I was tired and not feeling well. When I finally got up and looked at the Poll Book, I discovered that it had been written up in sections that had not been filled out. I had completed the oath as well as the Statement of the Poll in the Poll Book.”

THE SITUATION AT POLLING DIVISION NO. 57

1. Premature closure of polling division at officially designated location at the Pentecostal Church at Robin Road and Woodpecker Avenue and improper removal of the said polling division to St. Stephens Basic School at 53 Olympic Way. The returning officer said in evidence :-

“On the 18th day of December, 1997 at approximately 8.00 a.m. I toured polling division 57 in the constituency. Voting was in progress at the polling station in this polling division, which was being supervised by the presiding officer, Sandra Bailey. I saw at least one Constable in uniform. I visited again at approximately 10.00 a.m. and I saw a Constable and a woman Constable. In the afternoon of the said day I received certain information as a consequence of which I went to polling division 57 and observed that the polling station was not in operation and the presiding officer and the poll clerk were not on the premises.

I received further information in the afternoon of the said day and consequently at approximately 2.00 p.m. I went to St. Stephens Basic School which is located at 53 Olympic Way, Kingston 11 in the parish of St. Andrew. This was a cluster of several polling divisions in the constituency, not including polling division 57. I stopped in the yard to speak to a large crowd. The

crowd was hostile and were asking about the non arrival of the presiding officer for polling division 72. Whilst speaking to those persons Sandra Bailey came out of the building housing the polling division and spoke with me. Having spoken to her I confirmed that polling division 57 was relocated to St. Stephens Basic School. I had not entered the building because of the hostility of the crowd. I had given no authorisation for the relocation of this polling division."

2. Influencing electors contrary to section 78.

Constable Richard Robinson swore as follows :-

"The indoor agent, who declared that he was associated with the J.L.P., instructed the electors for polling divisions 56 and 58 to vote in polling division 57. I told him that that should not be done. He replied saying that Miss Brown the J.L.P co-ordinator for West Central St. Andrew had spoken to the Returning Officer and "it can go on". I saw the said agent collecting the voters guide from the electors and telling them "oonu go home, me know where to put the 'x' because me a shower man". About 15 - 20 persons handed over their cards and left the premises. There were approximately 65 persons still in the queue when I approached him and ask him to desist. He complied.

The said agent told the presiding officer to look on the voters list for the names on the cards which he had collected from the electors. He then took some ballot papers from the desk, marked them, folded them and placed them in the ballot box. This was done in the presence of the presiding officer, the poll clerk and some electors who had forced their way into the hall. I did not interfere because it was my understanding that I should not interfere with anything

concerning balloting unless the presiding officer requested assistance.”

3. Personation of electors contrary to section 93.

THE SITUATION AT POLLING DIVISION NO. 58

1. Electoral officials (presiding officer and poll clerk) threatened in the lawful exercise of their duties: section 88A (a).
2. Polling division improperly removed from officially designated location at Robin Road and Woodpecker Avenue to 65 Waltham Park Road followed by voting at unauthorized location: sections 28 and 29. The presiding officer gave evidence as follows :-

“Shortly after we had finished preparing the place and before voting commenced, I heard people shouting “shower! shower! shower rule the world!” Then about eight to ten men entered the polling station. They had green cloth tied around their heads and I saw three of the men with guns in their waists. They said they did not want any screen. They wanted open voting. They said they wanted the ballots so that they could put the ‘X’ at the bell. They then said that they were leaving to return and when they returned they wanted to see the ‘X’ at the bell. They then said that they were leaving to return and when they returned they wanted to see the ‘X’ beside the bell. They left the premises in two cars.

Immediately after the said men left the premises Amy, Maxine Williams and I gathered all the election material and ran from the building. It was then approximately

7.30 a.m. I stopped a passing motorist and asked him to take us to Rosalee Church, 65 Waltham Park Road where the counting centre was located. When the men entered the polling station the police officer on duty was in the Church yard. However when I ran from the building I did not see him.

When I arrived at the counting centre I saw a man who was driving a car marked with an "electoral sign". I asked him to contact the Councillor for the area where the counting centre was located with a view to getting permission to relocate the polling division. The man returned in about ten minutes and told me that the Councillor had given permission for polling division 58 to be relocated at the counting centre. There were three to four polling divisions operating in a room at the counting centre. I went inside the room where I saw a table and chair. I made the necessary preparation for voting. I did not have a screen so I used the screen for another polling division.

I asked the said man who had contacted the Councillor, to notify the voters where polling division 58 was relocated. Voting commenced before 8.30 a.m. and proceeded smoothly until polling closed shortly after 5.00 p.m. There were 201 electors on the list. They all voted."

3. Late opening of poll at authorized location at approximately 4.55 p.m.: section 33 (1).
4. Open voting in contravention of section 33 (1).
5. No use of electoral ink: section 38 (2).
6. Premature closure of polling station resulting in disenfranchisement of waiting electors: section 35 (6). The

8. Voting by persons who were not bona fide electors
contrary to section 34 (4).

Detective Sergeant Fairweather had this to say :-

“At about 5.45 p.m. on the 18th day of December, 1997 we were on patrol along Woodpecker Avenue when I saw a large crowd assembled on Robin Road and Woodpecker Avenue in front of the premises where the polling divisions were located. I saw people in the church yard and inside the building. People were moving to and from the building.

Corporal Faulkner parked the vehicle on the road in front of the church. We alighted from the vehicle. I went inside the building accompanied by Constable Barnett. Corporal Faulkner remained in the church yard. On entering the building I observed two women seated around a table. They identified themselves as Lena Edwards and Maureen Lawrence. I saw one of two ballot boxes on the table. There were no screens in the room. It was a large open room. There were about 30 people gathered around the table. I saw Lena Edwards and Maureen Lawrence signing ballot papers which were then given to persons who were standing around the table. Some of those persons marked the ballot paper at the table while others went elsewhere in the room to a man who was seated at a desk and gave their ballots to him. He marked the ballots and returned them to the people who took the ballots to the presiding officer who in turn dropped them in the box. Those who marked their ballots at the table gave them to the presiding officer who then dropped them in the box. I did not see the presiding officer checking any list for names. I did not see anyone who appeared to be a poll clerk. I do

substitute presiding officer said :-

“Voting was in progress up to 5.45 p.m. when four police officers arrived at the polling station and spoke with me. One of the police officers asked me what was my name and position. I told him. He then enquired why the polling station was still opened at that time. I told him that at 4.30 p.m. the Returning Officer asked me to work at that polling division and that I arrived there at 4.40 p.m. That the building was opened at 4.45 p.m. and that voting commenced at 4.55 p.m. The police officer said that he was not sure that I was speaking the truth and that I should stop working.

The voters who were in the polling station were in a position to hear the discussion I had with the police officer. They were very upset and insisted that they wanted to vote. The police officers said that it was not their fault and that voting should have stopped from 5.00 p.m. except for persons who were inside the polling station. They also said that since the door of the polling station was opened when they arrived at 5.45 p.m. voting should stop and we should pack up and leave.

I therefore counted the ballots, placed everything in the box, closed it and left the premises at approximately 6.00 p.m. at that time there were about 90 persons who were waiting to vote. I took the ballot box to the counting centre and delivered it to the Returning Officer at approximately 7.00 p.m.”

7. Voting conducted in crowded and disorderly circumstances contrary to section 77 (1).

not remember seeing any ink but I certainly saw no one dipping his finger in any ink.”

9. Voting conducted simultaneously at two different locations, namely 65 Waltham Park Road and the Pentecostal Church located at the corner of Robin Road and Woodpecker Avenue.

10. Nine ballots unaccounted for in final count done by returning officer.

THE SITUATION AT POLLING STATION NO. 64

1. Tampering with ballot box: section 98.

Preliminary statement of poll disclosed valid ballots cast as follows :-

Warren Blake	186
Andrew Holness	6
Steve Daley	<u>0</u>
Total	192

At the final count a total of 128 ballots were found to be disfigured which led to a final result as follows :-

Warren Blake	59
Andrew Holness	5
Steve Daley	0
Rejected ballots	<u>128</u>
Total	192

Three (3) ballots were unaccounted for. Relative to this phenomenon the returning officer said :-

“On the 22nd day of December, 1997 during the final count of ballots one of my assistants brought the ballot box for polling station 64 in polling division 64 to the counting table. When the box was opened I observed that 128 ballots were disfigured, that is, there were marks for more than one candidate. I summoned the presiding officer to the counting centre and she came on the 23rd day of December, 1997. I told her of the condition in which I found the ballots and that they were tampered with. She appeared surprised. She told me that when the preliminary count was done none of the ballots was disfigured. I rejected the 128 ballots that were disfigured and they were not considered in declaring the winner.”

THE SITUATION AT POLLING DIVISION NO. 71

1. Polling conducted by person not duly appointed for the purpose: section 98.
2. Open voting contrary to section 33 (1).
3. Voting conducted in crowded and disorderly circumstances: section 77 (1). Pastor Burchell McPherson described the scene thus:

“When I arrived at St. Stephen’s School I saw no security personnel there. I saw three polling divisions operating in a small room which was approximately 20 feet x 12 feet. There was one polling station in each polling division and at each polling station there was a small table on which stood a ballot box. A presiding officer was seated around each table. There were about 30 persons in the

room some of whom were standing around the tables. Some of the men in the room had green cloth tied around their heads. The voting procedure at the three polling stations was the same. I saw the presiding officer passing ballots to the voters who entered the room and identified themselves. There was no screen and the voters marked their 'Xs' at the table where the presiding officer was seated. The voters passed the marked ballots to the men who had the green cloth tied around their heads. Those men examined the ballots and then placed them in the ballot box on the table. These men appeared to be supporters of Andrew Holness, one of the candidates in the election in West Central St. Andrew constituency. I saw no persons appearing to be supporters for the other parties. In the yard outside the polling stations there were about 170 persons who were dressed in green and were ringing bells. I know that green is the colour used by J.L.P. and that the bell is the symbol for that party. I know that orange is the colour used by the P.N.P. and that the clenched fist is the symbol for that party. I also know that blue is the colour used by the N.D.M. After observing the proceedings I left the premises."

4. Ballots cast in these circumstances were wrongfully included in the final count.

THE SITUATION AT POLLING DIVISION NO. 72

1. Polling division improperly removed from officially designated location at St. Stephen's Basic School at 53 Olympic Way to Dupont Primary School at 10 Olympic Way.

2. Voting at unauthorised location interrupted between the hours of 11.30 a.m. and approximately 1.00 p.m. as described by the presiding officer in this way:-

"Voting was progressing smoothly until 11.30 a.m. when I heard several cars entering the premises. There was a lot of noise as they entered. Shortly thereafter Andrew Holness entered the polling station. He was accompanied by 10 -12 persons including his body guard who was wearing a vest marked 'police. On entering the room Andrew Holness lifted the ballot box and said "P.D. 72 must be at St. Stephen's. Oonu tiefing gal, oonu know that the box must be at St. Stephen's and oonu thief it and bring it down here". As he spoke Father McPherson entered the room and said "no Mr. Holness I am the one that cause the box to be here". Andrew Holness said "I don't want to hear anything from you, all of you are thieves". He then told Father McPherson a lot of indecent language. Father McPherson sat on a chair and said "tell me all that you want to tell me. I will listen". At that stage one of the men who had accompanied Andrew Holness into the room said to the indoor agent "Hey gal me a go kill you". Andrew Holness then said to the indoor agent "I soon box you in your face". He raised his hand as if he were about to box her. The men who accompanied Andrew Holness to the polling station were behaving boisterously, and were shouting "come go up to St. Stephen's, a up there the box fe work".

The poll clerk had by then left the room with the Poll Book but the indoor agent remained with me. I was afraid. Two soldiers then entered the room and one of them asked me what was happening. I told him that Andrew Holness wanted to take the ballot box up to

St. Stephen's School. The soldier said that the box was not leaving Dupont School. Andrew Holness started to shout at the soldier who said that he did not care what Andrew Holness wanted to say but the box was not leaving Dupont School until 5.00 p.m. Andrew Holness and his supporters then left the room and went on to the corridor. About seven electors who were in the room when Andrew Holness arrived ran downstairs.

While they were on the corridor a police officer came and told Andrew Holness that he should leave because he was there for more than 35 minutes. Andrew Holness said that he would leave but he would return in five minutes. He then went downstairs followed by his supporters. While they were on their way downstairs one of the men said "a dead oonu dead now". The soldier who was present spoke on his radio and shortly thereafter I saw several police officers and soldiers drive quickly onto the premises.

Andrew Holness and his supporters were standing in the school yard when the police and soldiers arrived. The security officers jumped from their vehicles and started to search the men who had accompanied Andrew Holness. I saw the man who drove the car in which Andrew Holness arrived, passing a gun to Andrew Holness but he walked away from it. The said man then placed the gun in the trunk of the car that he drove. One of the soldiers searched the said man and the soldier who was on the corridor went downstairs and removed the gun from the trunk of the car. The driver and another man were arrested. After the men were led away Andrew Holness and his supporters left the premises.

Voting had stopped during the disturbance but restarted at about 1.00 p.m."

3. Tampering with ballot box: section 98. Ballot box containing 346 ballots counted by presiding officer after close of poll on election day subsequently found to be empty by returning officer at final count: sections 77 and 98. Ballots when counted by the presiding officer had produced the following result :-

Warren Blake	338
Andrew Holness	7
Steve Daley	<u>1</u>
Total	346

These ballots were not included in the final count.

As regards Polling Division No. 60 counsel for the applicant conceded that no evidence was adduced to support the voiding of the poll taken at that place.

How then, if at all, do these breaches of the law and other irregularities, as undoubtedly they are, affect the result of this election. Section 37 of the Election Petitions Act provides as follows:

“37. 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.”

First, it must be abundantly clear that the poll in respect of polling divisions Nos. 49, 64 and 72 was taken in each case in circumstances envisaged by the provisions of section 37

(b). At polling station No. 49 the number of the electors on the list of electors was 312; at polling station No. 64 that number was 192; at polling station No. 72 it was 353.

These three figures make a total of 857 electors which is more than the difference in the number of votes (154) cast for the candidate declared the winner (Holness) and the candidate who was not declared the winner (Blake). Indeed, taken singly, the number of electors at these 3 polling stations exceeded the winning margin of 154 votes. So, on the basis of this evidence alone the poll taken at each of these 3 polling stations should be voided. But as I have already indicated there were other irregularities affecting polling

stations Nos. 49 and 72. Of these irregularities I regard as particularly serious the violation of the principle of secret balloting. Section 33 (1) of the Representation of the People Act provides as follows :-

“33.- (1) The poll shall be taken in each polling station by secret ballot in accordance with the provisions of section 35 or of section 36 between the hours of seven o'clock in the forenoon and five o'clock in the afternoon on election day.”

Again the requirement of secrecy is addressed in section 99 of the Act :-

“99.- (1) Every officer, clerk and agent, in attendance at a polling station shall maintain and aid in maintaining the secrecy of the voting in such station, and shall not communicate, except for some purpose authorized by law, before the poll is closed, to any person any information as to the name or number on the register of voters or any voter who has or has not applied for a ballot paper or voted at that station; and no person whosoever shall interfere with or attempt to interfere with a voter when marking his vote, or otherwise attempt to obtain in the polling station any information as to the candidate for whom any voter in such station is about to vote or has voted, or as to the number of the ballot paper given to any voter at such station.

(2) Every officer, clerk and agent, in attendance at the counting of the votes shall maintain and aid in maintaining the secrecy of the voting, and shall not attempt to ascertain at such counting the number of any ballot paper, or communicate any information obtained at such counting as to the candidate for whom any vote is given in any particular ballot paper.

(3) No person shall, directly or indirectly, induce any voter to display his ballot paper, after he has marked it, so as to make known to any person the name of the candidate for or against whom he has so marked his vote.

(4) Every person who acts in contravention of the provisions of this section shall be liable, on summary conviction, to imprisonment for any term not exceeding six months, with or without hard labour.”

In my judgment the provisions of section 33 (1) are mandatory and not directory. They are made in the public interest and are not intended to be personal to any individual elector. The requirement of secrecy is intended to be observed by all without reservation. Secrecy is a fundamental element of the electoral process, non-observance or denial of which must, at the very least, necessarily amount to an irregularity. Indeed, so seriously is the duty of secrecy taken that a breach of that duty by any person named in section 99 is by virtue of section 99 (4) made a criminal offence punishable on summary conviction by imprisonment for a term not exceeding six months, with or without hard labour.

Second, I am of the opinion that the events which occurred at polling divisions Nos. 23, 56, 57 and 58 clearly substantiate section 37 (d) of the Election Petitions Act and, in themselves, support ground 2 of this present application.

Third, I agree with the submission of counsel for the applicant that on a proper construction of section 37 (e) of the Election Petitions Act the process of free and fair elections is substantially distorted or subverted when it is open to a tribunal to conclude that irregularities, either singly or collectively in the form of departures from the required procedure, have affected essential guarantees of fairness, impartiality, secrecy, regularity and public trust, whether such irregularities have also affected the result of an election, or not. So construed section 37 (e) reflects the English common law which prescribes that if an 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: see *Morgan v Simpson* (1974) 3 All E.R. 722 per Lord Denning M.R. at page 728. In my judgment, therefore, the decision of Smith C.J. in *Keith Webster v Derrick*

Smith and Veril Brown (1984) 21 J.L.R. 388 should, hereafter, be read against a background of section 37 (e). Here it must be observed that Webster followed the decision in *Woodward v Sarsons* L.R. 10 C.P. 733; (1874-80) A.E.R. Rep.262, but took no account of Morgan's case which, from all appearances, was not cited before the learned Chief Justice. In argument before this court counsel for the applicant relied heavily on the Malay/Brunei case of *Re Tangjong Puteri Johore State Election Petition; Abdul Razak Bin Ahmad v Datuk MD Yunos Bin Sulaiman & Anor* 1988 *MLJ Lebis* 545; 1988 -2 *MLJ III* decided January 24, 1988. The headnote to that case reads as follows :-

"At an election held in a certain constituency, the first respondent emerged as the winning candidate. The petitioner (sic) who stood as a candidate in that constituency polled less votes. He took out the present petition claiming that the election was not properly conducted and that the election should be declared void.

Held: (1) the numerous errors, mistakes or irregularities and the unforeseen and improper movement of the ballot boxes, when considered collectively, constitute sufficient proof to the satisfaction of this court that the election had not been conducted substantially in accordance with the election laws;

(2) the election was void and the first respondent ought not to have been elected;

(3) a certificate under s 36 of the Election Offences Act 1954 would be issued."

In the course of his judgment Wau Yahya J. said this :-

"To my mind, an election does not merely symbolize the citizens' right to free franchise but entails public participation in selecting the government of their choice through a process which not only guarantees absolute fairness, secrecy, impartiality and regularity but which also

encompasses public trust and confidence in the manner in which the process is carried out. For these reasons, various legal guidelines have been enacted to regulate the formalities of an impartial election. Any serious departures from these procedures will strike at the very foundation of our free and democratic system of political representation and affect public confidence in [* 23] the impartiality of our election.”

I respectfully agree with these observations of the learned judge and I consider that they apply with equal force to the Jamaican situation. With regard to the instant case I am in no doubt but that, taken cumulatively, the numerous instances of irregularities and electoral malpractices occurring at polling stations Nos. 23, 49, 56, 57, 58, 64, 71 and 72 dictate that the taking of the poll in the constituency of West Central St. Andrew as a whole should be voided. In my judgment these irregularities led to a substantial distortion or subversion of the process of a free and fair election in the constituency.

In any democracy, moreso in this country where because of past bitter experience there is a deep and abiding mistrust of the integrity of the electoral system, it is imperative not only that elections should, in fact, be conducted in a manner that is free and fair and free from fear, but also that elections should manifestly be seen to be so conducted. In all of this the public perception is of critical importance. It is one thing for a political party to win a general election and then proceed to form a government. It is quite another thing to attempt afterwards to govern a people, a sizeable majority of whom do not accept the legitimacy of that government. People will resist governmental authority if they perceive that it was gained through corruption or subversion of the electoral process. A country is more easily governed and good governance is made more likely when, after an election, the losers accept that they have fairly lost. Ultimately, it is the duty of Government to

ensure that elections, whether for membership of the House of Representatives, the Kingston and St. Andrew Corporation or the Parish Councils, are conducted in a manner that is free and fair and free from fear, and with due regard to the over-riding principle of one man, one vote; same man, same vote.

LANGRIN, J.

This is an application by the Constituted Authority pursuant to Section 52A(1) of the Representation of the People Act in which the Constituted Authority determined on its own motion that an application ought to be made to the Election Court to have the taking of the Poll in the Constituency of West Central St. Andrew declared void.

A General Election of Members of the House of Representatives was held on the 18th day of December, 1997. On that same day a poll was taken in the Constituency of West Central St. Andrew for the election of a member of the House of Representatives.

The election was contested by Dr. Warren Blake, Andrew Holness and Steve Daley while the Returning Officer for the Constituency was Mr. Ansel Thomas. The final count of ballots for the Constituency was as follows:

Andrew Holness	8649
Warren Blake	8496
Steve Daley	39
Rejected Ballots	234
	<hr/>
	17418

The total number of electors in the Constituency is 19,445.

The name of the candidate declared the winner is Andrew Holness with a difference of 153 between the candidate declared the winner and the candidate who is not declared the winner.

In the Magisterial Recount the result was as follows:

Warren Blake	8499
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Andrew Holness

8654

Steve Daley

43

The difference between winner and loser is 154.

The following declarations are sought:

- (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 and 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 the constituency of West Central St. Andrew.

Mrs. Walcott Learned Counsel on behalf of Mr. Holness raised a preliminary objection to the hearing of the application, the burden of which was that Section 4(d) of the Election Petitions Act has not been complied with. The reason being 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 are mandatory and:

- (1) That the Constituted Authority as established is not exempt by this section
- (2) Therefore non-compliance is fatal and no further proceedings may be held on the application.

For the applicant in answer to the preliminary objection it was submitted by Mr. Robinson that the Election Petitions (Amendment) Act, 1977 which provides for the institution of the Election Court to hear appli-

cations establishes a wholly new, distinct, special and sui generis system which is wholly self-contained and wholly different from the existing procedures in election petitions set out in the same Act.

The new regime does not have any requirements for payment of costs and the Constituted Authority is not required to give Security for costs. Further Section 52A(6) of the Representation of the People (Amentment) Act 1997 provides that a request by a candidate relating to the voiding of a poll shall be without prejudice to any right enjoyed by that candidate under Section 3(b) of the Election Petitions Act which provides that an Election Petition may be presented to the Supreme Court by the Attorney General or by any other person. Under the new procedure it is only the Constituted Authority which can make an application to the Election Court.

In my judgment the preliminary objection was misconceived and should be overruled.

The grounds upon which the relief is sought are as follows:

- (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 bonafide 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.

Let me turn to the only vital question:

Should the Taking of the Poll in the Constituency of West Central St. Andrew be declared void?

In examining this question the Court had to interpret the provisions of Section 37(b) (d) and (e) of the Election Petitions (Amendment) Act 1997 which is conveniently set out as under:-

- "(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;
- (d) that votes have been polled by persons who are not bonafide 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."

The principles which are applicable to the voidance of Parliamentary Elections are those established at common law over 100 years ago and conveniently stated in Woodward v. Sarsons (1875) LR. 10 CP. 733. Lord Coleridge C.J. who read the judgment of the Court of Common Pleas which was prepared by Brett J. stated the common law rule as follows:

First, where the tribunal is satisfied that there was no real electing at all such as:

- (a) "if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preferences" or
- (b) "if there was reasonable ground to believe that a majority of the electors may have been prevented from electing the candidate they preferred."

It is clear from the judgment that irregularities will not entitle a tribunal to declare an election void by common law unless they affect the majority by which a candidate was elected.

Second, "where the election was not really conducted under the subsisting election laws. The question is whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as a matter of fact that the election was not an election under the existing law." The example given would be a case where the law calls for election by voting, but a candidate was selected by tossing a coin or by the result of a horse race.

However, the Court went on to say that "if the election was substantially an election by ballot, then no mistakes or misconduct, however great in the use of the machinery of the statute governing elections would justify the tribunal in declaring an election void by the common law or Parliament.

The decision in Woodward v. Sarsons was criticized in the judgment of the Court of Appeal in Morgan and Others vs. Simpson & Another (1974) 3 ALL ER p.722. The criticism focused on two areas of the judgment:

- (a) The decision that an election will not be voided by an irregularity unless that irregularity affected the result and
- (b) the dictum that once an election was substantially an election by ballots no irregularity however great could void it.

This case concerns a local government election in which 44 ballots were rejected because they were unstamped. If they had been counted, the petitioner, candidate would have won the election by 7 votes. As it was the respondent was declared the winner by 11 votes.

Lord Denning, in delivering the leading judgment in the case examined the history of elections as well as the case law and concluded as under:

- (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.

- (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 it did not affect the result of the elections.
- (3) 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 a mistake at the polls and it did affect the results, then the election is vitiated.

The case of Keith Webster v. Derrick Smith & Veril Brown (1984) 21 JLR. 388 came before the Supreme Court by Election Petition praying that the election be voided on the basis of numerous irregularities relating to over voting or alternatively because the election was not conducted substantially in accordance with the provisions of the Representation of the People Act.

The case of Woodward v. Sarsons (supra) was followed, but significantly there is no mention in the judgment of the later case of Morgan v. Simpson which disapproved of Woodward v. Sarsons. The Court followed strictly the principle enunciated in the first limb of the rule in Woodward v. Sarsons. There the first respondent was elected by 4426 votes as against 49 for his opponent. The discounting of all the votes in the polling divisions affected by irregularities would have resulted in 2406 votes for the respondent and 19 for his opponent. Counsel for the petitioner conceded that the petition failed on that ground.

In relation to the second limb of the rule in Woodward v. Sarsons, it was alleged that there was widespread impersonation, voting by persons not entitled to vote, voting without being sworn or thumb printed and who produced no proper identification cards, appearance in poll books of persons who had voted in names of persons who did not in fact vote. It was argued that the irregularities were so serious and substantial that the Court could conclude that the proceedings were not in compliance with the scheme for electing. Further that if the petitioner can prove that departures from the scheme are substantial he need not show that they have affected the outcome of the election.

The Court, however, held that the election was conducted under the provisions of the Statute and that the case did not fall within the second limb of the rule in Woodward v. Sarsons. The Court, in the Keith Webster case "doubted very much whether an election petition brought in reliance on the second part of the common law rule can ever succeed in modern Jamaica." The Petition was dismissed.

The question is whether, had the case of Morgan v. Simpson been cited the decision would have been different. Would it have fallen within the first principle enunciated by Lord Denning or not? In answering this question it is safe to say that the Webster case was decided per incuriam. However, the common law appears to be, and I accept Mr. Robinson's submission, that at common law the irregularities had to be substantial to render an election invalid if as in Woodward v. Sarsons (supra) the irregularities did not affect the result. This accords with common sense.

Turning now to the construction of Section 37 of the Act the Court must always bear in mind four important principles:

Firstly, the principle enunciated by Viscount Simon L.C. in Bernard v. Gorman (1943) AC. 378 at 384:

"Our duty is to take the statutory words as they stand and to give them their true construction, having regard to the language of the whole section and as far as relevant of the whole Act, always preferring the natural meaning of the words involved, but nonetheless always giving the words its appropriate construction according to the context."

Secondly, there is a presumption against alteration in the common law. It is presumed that the Legislature does not intend to make any change in the existing law beyond that which is expressly stated in or follows by necessary implication from the language of the statute in question.

Thirdly, the purposive approach to construction should be applied: A quote from Hansard - 4.11.97 - Dr. Phillips, Leader of Government Business in introducing the Bills had this to say: "It is also provided for, Mr. Speaker - and this is really perhaps the more far-reaching aspect of the amendments that are before us, that it provides for the voiding of elections on an entirely new procedure. And what is significant about it, is that it recognises that the interest in ensuring that elections in any Constituency or any Parish Council Division were free and fair is fundamentally the interest of the public; while it is true that the candidates who ran and who may have lost have an interest; but that if there is an overriding public interest in ensuring that all elections are free and fair and that to that extent there needs to be some Authority that can act on behalf of the public and on behalf of the public interest to ensure that where elections were found to be not free

and fair there could be an expeditious hearing by the Court that the matter would be brought before the Court at public expense and that it would be dealt with speedily."

The case of Pepper v. Hart (1993) 1 ALL ER 42 H.L. permits Courts to refer to the Parliamentary debates reported in Hansard in order to ascertain the meaning of an Act of Parliament.

Fourthly, to say that it is only when the irregularities affect the majority of the votes cast for the person declared the winner, an election would be declared void would defeat the whole purport of Section 37(e) of the Election Petitions (Amendment) Act. To permit substantial distortion or subversion of the process of free and fair elections by significant irregularities which did not affect the result without resort to avoidance would contradict the long standing maxim of statutory interpretation: *ut res magis valeat quam pereat* - the interpretation of a statute should serve to further its goal, not to frustrate it.

In applying the principles deduced from the common law to the interpretation of the statute and particularly Section 37(e) I am of the view that:

It would be a rather serious matter if, after an election has gone through the stress of a contest of the kind characterized by elections in Jamaica, (that) some trifling irregularity on the part of an officer which may be innocent and which in all probability has not the slightest effect upon the result should be held to undo what has been done.

The irregularity to achieve the effect of avoidance must be one that would lead to a substantial distortion or subversion of the process of free and fair elections. To establish this ground the evidence need not affect the majority obtained by the winner.

It would be sufficient to show that the process of free and fair elections would be substantially distorted or subverted by the irregularity. An election is not to be upset for an informality or for a triviality. The irregularity must be something substantial which is calculated to affect the result of the election even though it may not actually affect it. The Court must look to the substance of the case and to ascertain whether the irregularity is of such a nature as to be fairly calculated to produce a substantial effect upon the election.

However, a failure to observe statutory requirements for the conduct of the poll must be met by stiffer penalties. No matter how trivial an irregularity may be, it must never be condoned as a mere irregularity. The punishment provided in the Act must be sufficient to act as a deterrent.

In my judgment, a proper construction of Section 37(e) of the Election Petitions (Amendment) Act 1977, is that any irregularity which would lead to a substantial distortion or subversion of the process of free and fair elections whether it affects the result of a majority or not would be void both at common law and under the statute.

I now turn to the application of these principles of law to the facts in this case. The applicant has placed 18 affidavits before the Court dealing with 50 irregularities relating to 8 Polling Divisions. These Polling Divisions are PD.23, PD.49, PD.56, PD.57, PD.58, PD.64, PD.71 & PD.72.

The evidence before the Court adduced by the Constituted Authority is uncontradicted. No evidence has been put forward to

contradict the affidavit evidence offered by the Authority.

Mr. Patrick Robinson submitted on behalf of the Authority first that the election should be declared void on the first ground and secondly that all the evidence of breaches, mishaps, mistakes and irregularities which have been adduced to substantiate Grounds 1, 2 & 3 for the voiding of Polling Divisions when taken cumulatively will also substantiate the voiding of the taking of poll in the constituency as a whole.

Further, the evidence of all the irregularities which support each specific ground in respect of voiding of polling divisions will either cumulatively or in some cases by itself substantiate the voiding of the taking of the Poll in the constituency. He cited a number of authorities to support his submissions.

Mrs. Walcott on behalf of Mr. Andrew Holness submitted that the affidavits filed by the Constituted Authority in support of the application emanate from Presiding Officers and Poll Clerks who are employees of the Electoral Office of Jamaica which forms part of the Constituted Authority and therefore lack credibility. The irregularities relate to various sections of the Representation of the People Act which provide for their own penalty for such breaches and should not form the basis for voiding an election. No independent elector has complained that he is disenfranchised because of the breaches and irregularities under the Act. She further submitted that no weight should therefore be attached to the evidence. I find that these submissions are misconceived and cannot withstand any objective analysis. The current legislation

is an entirely new regime with new procedures designed to ensure that elections are for the most part free and fair. What better persons to speak about elections than those who conduct them.

Mr. Dudley Thompson Q.C. on behalf of Dr. Warren Blake in his usual impressive style adopted Mr. Robinson's submissions and went on to underscore some of the more serious irregularities. He concluded his submission by requesting the Court to void the elections.

Mr. Wentworth Charles, Learned Counsel on behalf of Mr. Steve Daley adopted the submissions advanced by Mr. Patrick Robinson.

Ground 1

That ballot boxes were stolen and/or destroyed and/or tampered with and the number of electors for the polling stations in polling divisions 49, 64 and 72 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. See 37(b) Election Petitions (Amendment) Act.

PD.49

The Ballot box was found empty at the final count and so the missing ballots were not considered in declaring the winner. Also the ballot box was accompanied by an unauthorised person.

Section 44(10) and 44(10A) indicate that the box is to be sent by registered mail or delivered to the returning officer by a qualified person. It should where required be accompanied by agents or representatives of candidates.

I find that this ballot box has been tampered with and the number of electors on the list of electors for the polling station (312) is more than the difference in the number of votes cast for the candidate declared the winner (154). The taking of the poll in PD.49 is void.

PD.64

Although the Preliminary Statement of Poll showed Warren Blake 186 Andrew Holness 6 and Steve Daley 0, at the final count 128 ballots were found disfigured. At the final Count it was Warren Blake 59, Andrew Holness 5 and Steve Daley 0. There were 128 rejected ballots. The Presiding officer deponed that no ballots were disfigured at preliminary count and 3 ballots were unaccounted for.

The ballot box has been tampered with and the number of electors on the list of electors for the polling station (192) is more than the difference in the number of votes cast for Andrew Holness as against Warren Blake (153).

The ballot box must have been tampered with either on its way to the counting centre or at the counting centre or sometime between December 18, 1997 and December 22, 1997. The taking of the Poll in PD.64 is void.

PD.72

There was an improper removal of polling division. The evidence disclosed a lack of security at the proper location, a threat of violence against the Presiding officer or Indoor Agent. A firearm was seized on the premises at the polling station and there was intimidating behaviour disrupting the process of elections. At the final count the ballots for the polling division were missing. Consequently they were not included in the final count.

Section 77 of the Representation of the People Act requires the presence of adequate security to ensure the process of free and fair elections. Additionally, it provides that during the poll no person is to have in his possession any weapon which is capable of inflicting injury within 100 metres of any building

in which(it)is situated any polling station.

Section 43(3) provides that a Presiding officer is to ensure electors are not impeded or molested at or about the polling station.

The ballots for this polling division were missing at the final count. The absence of the ballots indicates that the ballot box must at least have been tampered with. The number of electors in polling division 72-(353) is more than the difference in the number of votes cast for Andrew Holness and Warren Blake - 154

The taking of the Poll in PD.72 must be void.

Summary

<u>Polling Divisions</u>	<u>List of Electors</u>
49	312
64	192
72	153

Difference in votes = 154

When these figures are taken collectively it is more than the difference between votes cast for the candidate declared winner and the votes cast for the candidate not declared the winner. In that case there is adequate evidence to void. However, even if the polling divisions are taken individually this ground is substantiated.

Ground 2

That votes were polled by persons who were not bonafide electors thereby casting doubt on the integrity of the votes counted for the candidate declared elected. (Section 37(d)).

The question whether votes have been polled by persons who are not bonafide electors with the result that doubt is cast on the integrity of the votes counted for the candidate declared elected, involves an exercise of qualitative judgment.

I accept Mr. Robinson's submission that the concept of casting doubt on the integrity of the votes must be different from the concept of casting doubt on the majority of votes counted that is reflected in Section 37(d). If there is no difference the language would have been the same for both subsections.

There are many circumstances in which a vote may be polled by a person who is not a bonafide elector. However, in the instant case the evidence will point to persons voting in the names of others, persons casting more than one vote and persons voting at polling stations where their names are not on the official list of electors.

PD.56

The irregularities include a substitute presiding officer who never received an official list of electors. There were persons marking ballots without giving their names and addresses as well as voting by persons who were not bonafide electors. There was multiple voting by the same persons.

Section 32(1)(f) of the Representation of the People Act provides that the Returning officer is to furnish each presiding officer with the official list of electors for use at his polling station.

Section 34(1) of the Representation of the People Act provides - official list to be consulted to ascertain eligibility of persons to vote at polling station.

Section 43(4) provides that it is the duty of the Poll Clerk to consult the official list when an elector declares his name, residence and occupation on entering the voting compartment.

Section 34(5)(7)(8) & (9) provide that no elector is to receive a ballot paper or be permitted to vote unless he produces an identification card to establish his identity or where there is no identification card he takes an oath of identity. Section 34(4) of the The Representation of the People Act provides that no person is to vote more than once.

It is clear that the absence of a list of electors meant that eligible electors could not be identified. There was no way of ensuring that only "bonafide" electors voted. This was aggravated by the absence of electoral ink which is used to ensure that no elector could vote more than once.

PD.57

The Police officer who was present, observed an indoor agent taking ballot papers from the desk of the presiding officer, and after marking them, folded and placed them in the ballot box. All this was done in the presence of the presiding officer, poll clerk and some electors who had forced themselves in the hall. Section 93 of the Representation of the People Act provides that it is an offence to apply for a ballot paper in the name of another person. It is clear that the indoor agent was voting in the names of other persons.

PD.23

There were some voters who refused to dip their fingers

in the ink after voting yet their votes were taken into account.

Section 38(2) of the Representation of the People Act provides that where an elector on being required to do so refuses to immerse his finger in electoral ink the presiding officer is to destroy the ballot paper handed to him by that elector. Section 34(4) of the Representation of the People Act provides that no elector is to vote more than once.

Where electors do not utilize the electoral ink they are able to vote more than once, which casts doubt on the integrity of the votes counted for the winning candidate as well as on the process of free and fair elections.

In light of this widespread impersonation of electors there is some doubt cast on the integrity of the 123 votes counted for Andrew Holness, the candidate declared elected. That ground also succeeds.

Ground 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."

The question raised by this ground appears to be: What irregularity would lead to a substantial distortion or subversion of the process of free and fair election?

Free and fair election is one of the most important guarantees of democracy. Any distortion or subversion of fair election is a severe blow to a democratic society.

'Substantial' irregularity is evident particularly in cases of upsurge of violence, open voting, crowded polling divisions,

personation of electors and tampering with ballot boxes.

The major irregularities under this ground include, uncontrolled and improper voting, late hour voting, open voting, threatening of presiding officer, voting by persons not bonafide electors, accompanying of ballot box by unauthorised persons, interference with electoral material, improper closure of polling division, unauthorised persons completing poll book, detour in returning ballot box and crowded polling stations.

These irregularities relate to all the relevant polling divisions and represent numerous breaches of the Representation of the People Act.

On an examination of the evidence I find that all the irregularities referred to for voiding of the Poll in the Polling Divisions when taken cumulatively have substantiated this ground. All these irregularities constitute a substantial distortion or subversion of of the process of free and fair election in the constituency as a whole. This conclusion is inescapable in light of the overwhelming uncontroverted evidence adduced in this Court. I am fortified in this view in light of the judgment in Re Tarjon Puteri Jahova State Election Petition; Abdul Razak Bin Ahmad v. Datuk MD Yunos Bin Sulaim & Another (1988) MLJ Lexis 111 at p.32. At an election held in a certain Constituency the first Respondent emerged as the winning candidate. The Petitioner who stood as a candidate in that constituency polled less votes. He took out the present petition claiming that the election was not properly conducted and that the election should be declared void. It was held by the Court inter alia that the numerous errors, mistakes or irregularities and the unforeseen and improper movement of the ballot boxes, when considered

collectively, constitute sufficient proof to the satisfaction of this Court that the election had not been conducted substantially in accordance with the election laws. The dictum of the Court in this case is apposite and it may be useful to restate it:

"To my mind, an election does not merely symbolize the citizens' right to free franchise but entails public participation in selecting the government of their choice through a process which not only guarantees absolute fairness, secrecy, impartiality and regularity, but which also encompasses public trust and confidence in the manner in which the process is carried out. For these reasons, various legal guidelines have been enacted to regulate the formalities of an impartial election. Any serious departure from these procedures will strike at the very foundation of a free and democratic system of political representation and affect public confidence in the impartiality of our election."

Accordingly, I would grant the following declarations:

(1) 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, 64, 71, and 72, in the Constituency of West Central St. Andrew.

(2) 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 to the whole constituency of West Central St. Andrew.