KRISHNA PRASAD v RUPENI NACEWA and 2 Ors

HIGH COURT — CIVIL JURISDICTION

5 GATES J

15–17 January, 8 February 2002

[2002] FJHC 8

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Constitutional law — Fiji — election petition — declaration of winner — ballot papers incorrectly ruled invalid and therefore not counted — 2013 Constitution ss 36, 50, 51(1)(b), 52, 54(1), 54(2), 73(2), 73(3)(a), 73(3)(b), 73(7) 79(2)(b)(i), 169 — Electoral Act 1998 Pt 7 ss 47, 55(2), 57(1), 73(2)(b), 75(1), 75(1)(a), 75(1)(b), 79(1), 106(2), 106(3) 113(6), 116(1), 116(3), 116(3)(b)(ii), 116(3)(d), 116(3)(e), 118, 145, 147, 15 **148(1)(c), 148(5), 153(2) 160(2) — Electoral (Amendment) Act 1999 — High Court Rules 1988 O 9.**

Petitioner sought an election petition to declare her as the duly elected representative for the Nadi Open constituency seat. She alleged that the ballot papers were incorrectly ruled 20 invalid and therefore not counted. Respondents opposed and sought a declaration that Prem Singh, the 3rd Respondent, had indeed been duly elected

Held — The ticks below the line should have been accepted and counted as a valid vote and the failure to count those particular votes affected the result of the election. The Petitioner was the duly elected member in place of the 3rd Respondent.

25 Petition allowed.

Cases referred to

Attorney-General (Cth); Ex rel McKinlay v Commonwealth (1975) 135 CLR 1; *Devan Nair v Yong Kuan Teik* [1967] 2 AC 31; *Greidinger v Davis* (1993) 988 F 2d 1344; *Maan Singh v Town Clerk of Suva and Anor* (unreported) Civil Appeal No 23/1984; *McKenzie v Commonwealth* (1984) 59 ALJR 190; *Rakha v Returning* 30 *Officer* (unreported) Civil Action No 289/1985; *Reynolds v Sims* (1964) 377 US 533; *Theberge v Laudry* (1876) 2 App Cas 102; *Wesberry v Sanders* (1964) 376 US 1; [1964] USSC 31; 84 S ct 526, considered.

Cameron v Fysh (1904) 1 CLR 314; *Cokanauto v Sausauwai and Anor* Civil Action No HBC0256/1999S; *Ditchburn v Australian Electoral Officer* [1999] HCA 40; 35 *Esther Perreira v Chief Election Officer* (unreported) Guyana High Court, Demerara No 36-P/1998; *Josefa Rusaqoli v Attorney-General and Anor* (unreported) Civil Action No 0149/1994S; *Strickland (Lord) v Grima* [1930] AC 285; *McBride v Graham* (unreported) Supreme Court of New South Wales No 14251/1991, 11 December 1991; *Munro v Balfour* [1893] 1 QB 113; *Osborne v* 40 *Shepherd and Ors* [1981] 2 NSWLR 277; *Ruffle v Rogers* [1982] 3 WLR 143; *Senanayake v Navaratne* [1954] AC 640; *Stowe v Jolliffe* (1874) LR 9 CP 446; *Woodward v Sarsons* (1875) LR10CP 733, cited.

V. Mishra for the Petitioner

45 *S. Kumar* for the 1st and 2nd Respondents

S. Krishna and *R. Singh* for the 3rd Respondent

Judgment

Gates J. This case concerns the conduct of the parliamentary elections for the 50 seat of Nadi Open. The constituency was contested in a general election held over several days from 25th August to 1st September 2001. The Petitioner Krishna

Prasad claims he should have been returned as member, and not the person who was declared member, namely, Prem Singh, the 3rd Respondent. Prem Singh was subsequently appointed by the President as leader of the opposition. On 5th September 2001 the returning officer, declared Prem Singh to be the winner. This result was reached under Fiji's preferential system of voting after six rounds of counting. Only two candidates remained at the sixth count, the Petitioner and the 3rd Respondent. The 3rd Respondent won by 82 votes. 1734 votes were declared invalid, that is a little over 10% of all of the votes cast, a total of 16,340 votes.

On 17th September 2001 through his solicitors the Petitioner filed an election petition with this court, as a Court of Disputed Returns. The Petitioner verified his petition by affidavit. The petition recited the history of the various counts in the counting process. There are four main areas of complaint. Ground 4A alleges that the ballot papers had been incorrectly printed with the party symbols of parties who had not put up candidates for this constituency. This resulted; it was said, in over 400 votes being cast for a party rather than for a candidate. Second, grounds 4B and C allege that the verification process for postal votes was unsatisfactory. Specific allegations were set out in the petition, chief of which was that verification took place for the most part without the presence of the Petitioner or his counting agents.

Third; in ground 4F the Petitioner complains that the returning officer erred in not having a recount, this being an election in which the difference in votes between the two final contestants was only 0.561 per cent. Fourth, in ground 14D it is said ballot papers having a single tick below the line for the Petitioner were wrongly ruled invalid. There was a fifth ground, ground 4E, which complained that "numerous votes had an upside down tick at the bottom of the ballot paper next to the Fiji Labour Party symbol and these were wrongly declared invalid". As it happened after discovery had taken place and all parties had inspected this category of ballot papers the number of such votes was very small. Ticks for the Petitioner ruled invalid whether upside down ticks or disputed ticks, only amounted to 49 in all.

The Petitioner seeks the following reliefs:

> (a) *A declaration and/or determination that the Third Respondent Prem Singh the person who was returned as elected representative of the Nadi Open Constituency Seat was not duly elected.*
> (b) *A declaration and/or determination that the Petitioner Krishna Prasad was the duly elected representative for the Nadi Open Constituency Seat.*
> (c) *Alternatively a declaration that the said election for the Nadi Open Constituency Seat is absolutely void and that there be a fresh ballot for the third seat.*
> (d) *The Respondents do pay the Petitioner the Costs of this Petition.*

As a result of subsequent summonses issued by the Petitioner and by the 3rd Respondent, an order was made by consent for a discovery limited to the invalid votes cast. This was a power exercised pursuant to s 148(1)(c) of the Electoral Act. However the section incorporated into statute law what had long been regarded as an inherent right to inspect tendered ballot papers Petersford case *Stowe v Joliffe* (1874) LR 9 CP 446. An orderly discovery therefore took place on 6th December 2001. This was a laborious process in which the parties their solicitors and counsel, the returning officer, the Commissioner Western and his staff, with the assistance of High Court registry staff, and the police as custodians of the ballot boxes, worked painstakingly throughout the day

from 9.30 am to past 7.30 at night. Fortunately the parties kept within the limits of the order, and a permissive rummaging did not develop which might have endangered the secrecy of the ballot in a way that had drawn Rooney J's adverse comments, in *Rakha v Returning Officer (Lautoka Indian constituency)* Civil Action No 289 of 1985, 31st May 1985 (unreported). Out of the discovery, in the case before me, was derived a helpful analysis of invalid votes cast, prepared by counsel and later exhibited in the course of evidence, categorised into below the line ticks, upside down ticks, disputed ticks and non-disputed invalid votes. Invalid votes not disputed came to 349 votes. Without prejudice to their respective arguments, counsel agreed that the total number of invalid votes cast was 1733 (a figure subsequently thought to be 1730 votes) and that the total number of valid vote cast was 14,607 votes. The Petitioner by his petition did not accept of course that all of these invalid votes should have been ruled invalid.

To that petition the 1st Respondent filed an answer. The 1st Respondent's answer was in the form of an affidavit deposed to by Tevita Momoedonu, now the district officer, Nadarivatu, which was sworn on 12th November 2001. The deponent had been an assistant returning officer for this constituency, and he was the officer in charge of the counting of votes. His 10-page affidavit went into appropriate detail about the conduct of the elections for this constituency. His evidence was largely unchallenged, and the deponent was not required by the Petitioner's counsel to attend for cross-examination upon his affidavit. The 3rd Respondent filed an affidavit in answer to the petition, denying its contents. It exhibited a circular that had been sent out by the supervisor of elections. I shall revert to that later.

In opposition to the petition, the Respondents sought declarations that Prem Singh the 3rd Respondent, had indeed been duly elected, and conversely that the Petitioner had not been duly elected, and lastly that the elections for the Nadi Open constituency had been conducted in a free and fair manner and in accordance with the Electoral Act 1998.

The trial was heard over 3 days from 15th to 17th January 2002. The Petitioner himself gave evidence and he was supported by one witness, his agent Krishna Chetty. One witness was called for the Respondents; that was Tomasi Tui the Divisional Planning Officer Western, perhaps the most senior of the assistant returning officers who personally assisted the returning officer in all of his tasks as required by the supervisor of elections. The supervisor of elections generously and fairly, through counsel offered to answer any questions the court might have. This was a wholly proper and independent stance adopted aid manifested by the supervisor as a constitutional office holder under s 169 of the Constitution, and in Fiji's difficult constitutional times. One especially to be noted and imitated.

Elections to the House of Representatives

Fiji's lower house, the House of Representatives consists 71 members. Under the Constitution a single member is to be returned for each constituency (s 50). Twenty-five of those constituencies are open seats like Nadi Open, and a member is returned by the votes of persons who are registered on an open electoral roll (s 51(1)(b)). Members are elected under the preferential system of voting known as the alternative vote (s 54(1)). The Constitution has empowered parliament to make laws relating to elections for the House of Representatives (s 54(2)).

Under this power parliament enacted the 1998 Electoral Act. This Act commenced on 27th July 1998. There have been two general elections to date held under the 1998 Act.

The Court of Disputed Returns

By virtue of s 73(1) the Constitution provides that the High Court is to be the Court of Disputed Returns and that it has original jurisdiction to near and determine:

(a) a question whether a person has been validly elected as a member of the House of Representatives; and

(b) an application for a declaration that the place of a member of the House of Representatives or the Senate has become vacant.

The Constitution provides that election disputes are to be brought by petition, and only to the Court of Disputed Returns, and not in any other way (s 73(2)). As a person who was a candidate in the election concerned, the Petitioner qualified as a person who could bring this petition (s 73(3)(a)) and he brought it within the requisite 6 weeks from date of declaration of the poll (s 73(3)(b)). The Petitioner also complied with the provisions generally of O 9 of the High Court Rules and s 160(2) of the Electoral Act with regard to the contents of his petition. I understand that the requirement for payment into court of security for costs of $500 pursuant to s 145 has been complied with by the Petitioner. The petition could not have proceeded further without such compliance [s 147].

In conducting its inquiry into the election, the court must keep the Petitioner to the matters particularised in his petition *Munro v Balfour* [1893] 1 QB 113 at p 116 per Lord Coleridge CJ. In *Cameron v Fysh* (1904) 1 CLR 314, Griffith CJ reused leave to amend particulars in a petition giving as reasons that this raised a substantially new ground of objection, and to do so would be to extend the time for presenting the petition. The need for swift disposal and the structures of our laws, s 73(3)(b) Constitution and s 144(e) of the Electoral Act are mandatory when requiring petitions not alleging corrupt practices to be brought within 6 weeks of the declaration of the poll: *Cokanauto v Sausauwai and Anor* Suva High Court Civil Action No HBC0256 of 1999S, 11th June 1999 (unreported) where Shameem J cited both cases with approval.

It is clear that the Court of Disputed Returns exercises a special jurisdiction allowed by the Constitution and under the Electoral Act which legislation is in, the nature of a code *Osborne v Shepherd and Ors* [1981] 2 NSWLR 277 at 280G; *Josefa Rusaqoli v Attorney-General and Anor* Suva High Court Civil Action No 0149 of 1994S, 6th June 1994 at 6 (unreported); both cited with approval by Shameem J in *Cokanauto* (above).

As it was, the Respondents' counsel as indeed the court, did not allow Mr Mishra to stray outside the confines of his client's petition, when questions were being put to the witnesses.

The court may exercise all or any of its powers under s 148 of the Electoral Act "on such grounds as the court in its discretion thinks just and sufficient" (s 148(5)). The burden of proof lies on the Petitioner: *Esther Perreira v Chief Election Officer* Guyana High Court, Demerara No 36-P of 1998, January 15th 2001 at 11 (unreported), to the standard, that the court must be "satisfied" of the irregularity or that the failure affected the result of the election (ss 150 and 151). In *Pereira* (above) the standard of proof was held to be on a preponderance of probability.

The Constitution provides that there is to be no appeal from a determination by the High Court, sitting as a Court of Disputed Returns (s 73(7) Constitution and s 153(2) of the Electoral Act). In contrast to the position existing then in the Privy Council case of *Devan Nair v Yuan Kuan Teik* [1967] 2 AC 31 where a more detailed section in Malaysia's election offences ordinance appeared to allow a

limited right of appeal from interlocutory decisions, the position in Fiji would appear not to permit such interlocutory appeals in election petition proceedings: see too *Strickland (Lord) v Grima* [1930] AC 285; *Senanayake v Navaratne* [1954] AC 640. Section 73(7) of the Constitution does no more than follow the common law principle that it is in the public interest that election disputes should be put to rest swiftly. In delivering the opinion of the Privy Council in *Devan Nair* (above) Lord Upjohn said at 38F:

> *… It was essential that such matters should be determined as quickly as possible, so that the assembly itself and the electors of the representatives thereto should know their rights at the earliest possible moment.*

This followed a much earlier decision of the Privy Council in *Theberge v Laudry* (1876) 2 App Cas 102 in which Her Majesty's Council advised that there was no right to seek prerogative review of the decision of the Superior Court for the Province of Quebec, Canada on an election petition. Lord Cairns LC said at 106:

> *A jurisdiction of that kind is extremely special, and one of the obvious incidents or consequences of such a jurisdiction must be that the jurisdiction, by whomsoever it is to be exercised, should be exercised in a way that should as soon as possible become conclusive, and enable the constitution of the Legislative Assembly to be distinctly and speedily known.*

Section 118 of the Electoral Act, though stating that the decision of a returning officer on a question arising on any, ballot paper is final, makes such decision subject to review on an election petition under Pt 7, that is by the Court of Disputed Returns. But the finality of the decision means that an even heavier burden than that in ordinary litigation is cast upon the court to exercise the greatest care and fairness in arriving at its decision. Lastly it is the supervisor of elections as the Constitutional office holder who has been entrusted by parliament, through the Constitution, with the overall task of conducting the elections of members of the House of Representatives (s 79(2)(b)(i)).

Ground 4A: Ballot papers incorrectly printed

This is the ground alleging that the ballot papers had been printed to include the party symbols of parties which had not put up candidates for this constituency. There were 10 such parties. It is said this inclusion was unlawful.

Section 57(1) of the Elections Act 1998 provides:

> *57 (1) The votes in a poll must be taken by ballot and the ballot of each voter must consist of a paper prepared in accordance with this Act.*

This ballot papers must be printed as follows:

> *57 (3) Opposite each candidate's name on a ballot paper and opposite the name of each registered political party or independent candidate, if any, which or who has recorded a list of preferences, as provided for by s 61, a square must appear for the marking of votes by voters.*
>
> *(4) …*
>
> *(5) Where one or more registered political parties or independent candidates has lodged a list of preferences in respect of a constituency, the ballot papers for that constituency must, so far as practicable, be in the form set out in Part II of the Schedule and will be known as "Part II Ballot Papers".*

Having completed initial polling station procedures with the presiding officer or a polling clerk, the voter must in compliance with s 73(2)(b):

> *Privately mark his or her vote on the paper to the way prescribed by s 75.*

Since this was a constituency in which one of more registered political parties or independent candidates had lodged a list of preferences in respect of the constituency, the ballot papers had to comply with the form as set out in Pt II of Sch to the Act. Part II was set out in the following way:

Part II

Form of a ballot paper in an election where preferences have been lodged under s 61 by a registered political party or by an independent candidate.

HOUSE OF REPRESENTATIVES … CONSTITUENCY

UVW XYZ etc.	You may vote in one of two ways. EITHER, place are tick in *one* of these boxes to indicate which party's or candidate's preference you wish to adopt as your vote.
D	OR number the boxes from 1 — in your order of preference. In this case number Every box to make your vote count.
	Do *not* do both.

The voter who is handed a Pt II ballot paper can vote in one of two ways. Either he or she can vote below the line by writing in the squares to the right of the candidates' names in the order of the voter's preference, the numbers 1–4 etc till there are no more candidates to number. Alternatively, the voter can, place a tick in one of the boxes at the top of the ballot paper (which has been referred to as "above the line") opposite the name of a registered party or independent candidate. This is the direction on how to vote in a Pt II ballot paper contained in s 75(2). Apart from what is permitted by s 116(3) which I shall revert to later, the voter cannot do both.

Parliament subsequently passed the Electoral (Amendment) Act 1999. It was assented to on 19th March 1999. It possessed only two sections and must have a fair claim to being pronounced the shortest Act on Fiji's statute book. Primarily it amended s 61 of the Electoral Act 1998 which had dealt with the listing of party preferences. The amending Act did away with the need for a registered political party to endorse a candidate for the constituency where the party wished to lodge with the supervisor its list of candidates in its chosen order of preference.

In the objects and reasons accompanying the Bill it was said (at 1.01) that the amendment would mean that the voters:

> *Can place a tick in a box 'above the line' which will relate to a political party. The tick will be counted as a vote for candidates in the order of preference previously lodged by that party.*

Another reason given was that (at 1.03):

> *The Legal Select Committee on Constitutional Consequential Legislation considers that this could inhibit the entering into agreements between parties before an election, and might thus discourage the formation of multi-party governments.*

The radical nature of the change lay first, in the extension of the grant to political parties of the right to play a role in the preferential contest for a seat in a constituency, to include even constituencies *where the parry had not fielded a candidate*. Second, the amendment appeared to change the democratic system of voting from a vote cast for a candidate to a vote cast for a party. This amendment might have suited the party machines of Trade Union dominated parties or of those parties which were similarly well organised, but it diminished the concept

of the voter voting for his personal choice of candidate. There could be some distaste too for the parallels to be drawn with the voting systems of totalitarian regimes, where the voter had little independence from the overbearing party machine and whose vote might not in those circumstances be described as "free and fair". The Amendment Bill was apparently passed without dissent. The 3rd Respondent has referred me to an extract from Hansard covering the debate on the Bill in which the Hon Mahendra Chaudhary (the leader of the Fiji Labour Party) appeared not to speak against the Bill. To be fair to Mr Chaudhary, he did however query whether such a provision was ethical. Later on in his speech at Hansard, p 4278, 4th February 1999 he is recorded as saying:

> *We feel that perhaps it is not right, that if you have no candidate in particular constituency, you have no business listing your symbol and your party name on the ballot paper for that constituency.*

These no doubt are matters which parliament will weigh after being able to observe the workings of the amendment over a period of time.

It is said that there are no national constituencies in Fiji; where all of the electorate can vote for common candidates. Voting is confined to certain defined constituencies. Not everyone can vote in a particular constituency. A voter must be registered for a particular constituency, whose extent and boundaries are determined by the Constituency Boundaries Commission pursuant to s 52 of the Constitution.

In Fiji this amendment has been applied in two general elections and produced little public dissent. The preferential system enacted by parliament has already provided for the involvement and influence of the political parties. In that sense neither of the two main candidates in this constituency can properly complain of it.

Indeed; other jurisdiction: have applied a similar electoral law. It is effectively a method of indirect choice of candidates by the voters: see *Ditchburn v Australian Electoral Officer* [1999] HCA 40. Gibbs CJ in *McKenzie v Commonwealth* (1984) 59 ALJR 190 said of a similar provision in Australia:

> *In my opinion, it cannot be said that any disadvantage caused by the sections … now in question to candidates who are not members of parties or groups so offends democratic principles as to render the sections beyond the power of the Parliament to enact.*

This seems to be the position here in Fiji also. I can find no section of the Constitution that the amendment offends. Fiji, like almost every other modern state claiming to be a democracy, has neither the time nor the resources to operate a classical democracy alone the lines of ancient Greece.

It is for parliament to decide while keeping within the democratic spirit of the Constitution what form of electoral laws the state should have. The Amendment Act does not affront the principles of a free and democratic society; nor does it conflict with the right to a secret ballot (s 36 Constitution) and that section's implied right for those qualified, to "vote in an election of a member of the House of Representatives". In *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, Stephen J said at 57–8:

> *Having entrusted to these elected legislatures rather than to this Court these wide powers of shaping as they see fit the details of this nation's electoral system it is not for this Court to intervene so long as what is enacted is consistent with the existence of representative democracy as the chosen mode of government and is within the power conferred by s 51. (xxxvi)*

The preferential system or the alternative vote was already allowed for in the Constitution (s 54). The amendment simply allowed the preference to operate without the party running a candidate for that constituency. In effect a voter is thus able to cast a vote for a party of his or her choice, and not be deprived of his chance to influence the final outcome for that constituency. The amendment appears to grant an extra right to the voter, rather than to derogate from the voter's right to vote. This could hardly be considered undemocratic. Nor does it seem likely that the floodgates will thereby be opened by parties intending to clutter up the preferences without endorsing candidates. Only from amongst those persons nominated as candidates (s 47 Electoral Act) can a member be returned to sit in parliament. While there is no express provision for the inclusion on the Pt II ballot paper of a symbol for a registered political party which is not indorsing a candidate, there seems no impediment to such an inclusion. By the amendment to s 61 the voter is not restricted to voting only for a candidate. I do not find the supervisor to have acted in breach of the Act in including such parties on the ballot papers.

Accordingly this ground fails.

Failure to allow satisfactory verification of postal votes

The petition sets out the complaint under this head (grounds 4B & 4C) and claims that 295 postal rotes out of a total of 416 postal votes were not verified in a satisfactory manner. It was said that two postal boxes were not verified in the presence of the Petitioner or his agent. The Petitioner or his agents were not informed of the adjournment dates and times for verification after the first such day 2nd September 2001, nor were they informed how many ballot papers were declared invalid from the 2nd and 3rd boxes. It is the process of verification that provides the candidates and their agents with the occasion to learn this latter piece of information. The issue therefore turns on whether the Petitioner or his agents were given an opportunity to be present at the verification.

In giving evidence for the Petitioner, one of his election agents, Krishna Chetty said that he was not present for the verification of postal ballots. He was however available at the counting most of the time. Counting took place over 4 days. Verification was on the Sunday, (2nd September 2001). He had objected at the inclusion of the postal ballots at which he said "we were not present". He raised objection at the counting room at Natabua; where he was keeping a contemporaneous note of what was occurring. He said the Petitioner had been present at the verification of one of the boxes. He made complaint to who he thought was an assistant returning officer who in turn told him that verification had been done properly, "and that was it".

The witness accepted that there had been an advertisement in the Saturday papers stating the verification times. The first verification was done late at night on the Sunday at which the Petitioner himself had been present. Earlier there had been a briefing at the Nadi Sangam School just after polling, and this was how he got to know of the verification. The advertisement in the *Fiji Times* issued by the returning officer for the Western Division had announced that verification of postal ballot papers would begin at 10 am on Sunday 2nd September 2001 at Natabua High School. The advertisements also stated:

> *Candidates who are contesting constituencies under my jurisdiction are advised that they or their agents may attend the verification of postal ballots.*

There were in fact 24 constituencies within the returning officer's jurisdiction.

Mr Chetty, said he could not attend on the Sunday, but that it had been agreed that the Petitioner and two other agents would attend instead.

Mr Chetty said he knew of the public address system for notifying the counting agents. He said he was not present for any verification, nor was he aware of any taking place on the Monday, nor did he hear any announcement that such was going to take place. He said he was only two or three rooms away. Because the postal votes, if accepted; are mixed up with the other counted votes it was impossible to say in what ratios they were votes for either the Petitioner or the 3rd Respondent. But I shall return to this point later when dealing with what Tevita Momoedonu had to say.

He said there were five agents for the Petitioner in all. They took breaks. Mr Chetty was not there throughout.

The Petitioner gave evidence. He said he signed the petition. He agreed he was present on the Sunday when one ballot box was opened for verification. He maintained he was not told of the occasions when verification would be conducted on the other postal boxes. He was not told verification would continue on the Monday. He had been present on the Sunday from 8 in the morning till 11 at night. He too was not present for all of the counting process. When he was not there his agents told him what had happened. He later learnt that verification had been completed. He said there was no notice board announcing when verification would take place.

Tomasi Tui was called by the 1st and 2nd Respondents. He said he had been involved in general elections since 1972. He had been a polling clerk, a polling officer, and in this particular election, an assistant returning officer. He said that as well as the newspaper advertisement the supervisor of elections had sent out a circular stating when and where verification would take place. He said "we prepared the notice and sent it to the Supervisor". He pointed out that the notice stipulated that the verification of postal ballot papers … "will begin at 10 am on Sunday 2nd September 2001...". He said he did check from time to time the progress of verification for Nadi Open constituency. There were six teams working on verification. For Nadi Open he said the process started towards midnight (late on Sunday) and finished early Monday morning. He said "we called out again for 2nd verification after verification for 1st box. I was present all along. The procedure was followed. All of the verification was completed by 3 pm on Tuesday. For Nadi Open there were seven postal boxes in all. Some had arrived late. After verification of seven boxes, the postal votes were placed into 3 new boxes". He recollected that the Petitioner, was sometimes preventing, but not all the time. He said other notices consisted of an advertisement in his office at the counting centre, and public announcements over the loudspeaker. He had made the announcement himself in the absence of another officer. The circular of the supervisor of elections (No 21/2001) sent to all registered officers of all participating registered political parties clearly stated:

> *Returning Officers propose to deal with the verification of postal ballots on Sunday 2 September as this is a time consuming process. This would enable the count proper to commence unimpeded on Monday morning. The 4 Returning Officers propose to deal with this as follows:*

Division	**Place**	**Time**
Western	Natabua High School	10.00 am

On p 2 the supervisor said:

The respective returning officers will produce unopened all envelopes containing postal ballot papers received and these envelopes will be opened in the presence of the candidates or their counting agents if they wish to be present. I would urge you to send counting agents to witness this important process.

In his affidavit Tevita Momoedonu, Assistant Returning Officer and Officer in Charge of the counting of votes for Nadi Open constituency gave detailed evidence of the seven postal ballot boxes. He stated that the last verification for this seat took place at 9.07 am on Tuesday 4th September 2001. He agrees the Petitioner and his agents were not present on the Monday and the Tuesday 17 postal votes were declared invalid and 415 valid. He said he detected no particular trend for, or against, any particular candidate from the postal votes cast.

Section 106(2) of the Electoral Act provides for verification of postal ballot papers whose:

Envelopes must be opened in the presence of the candidates or their counting agents (if any) if they wish to be present.

The counting agent as well as the candidate may be present (s 106(3)).

It is not clear here why the Petitioner or his agents were not aware of the further verification process still to be completed on the Monday and the Tuesday. Perhaps they did not realise that there was more to it than the late night verification which occurred on the Sunday. However I find there is no compelling evidence before me to counter that of Tomasi Tui and Tevita Momoedonu that announcements were made over the public address system that further verifications were to take place for this constituency. Whether it was realised that such announcements referred to this constituency is another matter. I find that the Petitioner and his agents were afforded an opportunity to be present, and that the accountable procedure of verification did take place in the presence of the other candidates and their agents.

This ground must fail also.

Wrongly denied a recount

This is ground 4F. It is said that the difference between the 3rd Respondent's votes and the Petitioner's was only 0.561% of the total of 14,606 valid votes counted. It is said the returning officer erred in not allowing a recount. This ground can be answered shortly. Section 113 (6) of the Electoral Act provides:

(6) If, on the final count, 2 or more candidates have an equal number of votes, any of the candidates, or his or her counting agents, may require the returning officer to have the votes recounted.

Clearly no such situation arose here. The Petitioner relies on the guidance given in the booklet marked "for official use only" and entitled "Instructions for count officials". It is further headed House of Representatives General Election 2001. It states (at p 14):

12 RECOUNT
The Returning Officer must also look at the difference between the number of votes secured by the two candidates. If the difference is considered marginal in light of the total number of valid ballot papers, the Returning Officer must consider recounting the ballot papers before making a declaration.

If the difference between the number of votes secured by the two candidates is equivalent to .5% of the total number of valid votes or less, the votes should be recounted automatically.

> *If the difference is higher than .5% the Returning Officer must exercise his discretion.*
> *The Returning Officer must carefully exercise his discretion when considering whether or not to recount the ballot papers BEFORE making a declaration.*

Whether or not a returning officer felt the need to recount the votes to be sure of accuracy of counting is one thing. That would be a matter for him to decide. But the Act only places a requirement for a recount where there is an equal number of votes.

The supervisor's guidance to returning officers may be no more than a sound practice. It does not confer a legal right to a recount. On the majority difference here, it remains a matter of discretion for the returning officer.

This ground fails.

Ticks below the line besides candidates names wrongly ruled invalid

This is the contention in the petition which forms ground 4D. All seven candidates collected some votes of this type. They were ticks, instead of numbers, on the ballot paper marked below the line in the square or box to the right of the party symbol on the same line as the candidate's name. This concerned Pt II ballot papers.

A voter who participates in an election where a list of preferences have not been lodged with the supervisor and is accordingly handed a Pt I ballot paper is given no choice in the manner of marking his vote. Section 79(1) makes it mandatory for him or her to vote in accordance with s 75(1)(a) and (b).

A voter handed a Pt II ballot paper as was the case for the Nadi Open constituency, on the other hand, has a choice. He or she can either mark his or her vote as in s 75(1) that is numbering in the square opposite the name of the candidate, his order of preference from 1 to 7, or he or she can place a tick in a box at the top of the ballot paper (that is, above the line) opposite the name of the registered political party, or if the candidate is an independent candidate, in the box opposite his name. Part II ballot papers contain therefore a choice. The choice must be exercised, and the voter cannot do both. Section 116(3) provides some exceptions, which I shall return to.

Leaving aside for a moment the eight upside down ticks and the 62 disputed ticks, those which the parties agreed were ticks below the line amounted to 1278 in all. Section 75 therefore sets out how the voter under the alternative vote system should mark his or her ballot paper. Elections down the ages no matter how simple the procedure have always had a small percentage of votes in which for various reasons the ballot papers have to be declared invalid.

In the 1971 Electoral Act Cap 4 a voter was to vote in the following manner:

> *34 A voter shall record his vote by making the sign of a tick (✓) in the space provided in the ballot paper alongside the name and symbol of the candidate for whom he wishes to vote.*

In that Act ballot papers were to be declared void in the following circumstances:

> *55 (1) Any ballot paper:*
> *(a) which has not on the back the initials of the presiding officer or the official mark; or*
> *(b) on which votes are given to more candidates than the voter is entitled to vote for; or*
> *(c) on which anything is written or marked by which the voter can be identified; or*
> *(d) which is unmarked or void for uncertainty,*

shall be void and shall not be counted.

(2) Notwithstanding anything contained in reg 34, if a returning officer is satisfied that the intention of a voter ***is clear beyond all reasonable doubt, he may at his discretion accept and count as valid*** *the ballot paper of such voter, and the decision of the returning officer shall be final. (Emphasis added)*

The 1998 Electoral Act did not contain an equivalent provision to s 55(2) whereby the returning officer could accept a ballot paper if he was "satisfied that the intention of a voter is clear beyond all reasonable doubt". The returning officer had a discretion expressly granted in the 1971 Act.

Section 116 of the 1998 Act commences with a mandatory command for the returning officer to adhere to s 75.

Section 116(1) provides:

A ballot paper –

(a) that does not have on its back the initials of the presiding officer or clerk or the official mark referred to (in) s 73(1)(c);

(b) on which anything is written or marked by which, in the opinion of the returning officer, the voter can be identified;

(c) that has no vote indicated on it; or

(d) that does not indicate the votes (sic) first preference for one candidate and the order of his or her preference for all the other candidates in accordance with s 75,

is, subject to this section, or her to vote in accordance with must not be counted.

Section 116 is the code for approaching deviations from the correct method of marking the ballot paper.

Section 116(3)(e) states:

If the voter has not placed numbers as aforesaid and has placed a tick opposite the name of more than one registered political party or independent candidate, the ballot paper is invalid and any votes marked on it must not be counted.

This provision is simple to understand. Clearly a tick against the name of more than one registered political party or independent candidate is a failure to choose or to indicate an order of preference and therefore the ballot paper must be discounted as invalid.

Section 116(3)(d) reads:

If the voter has not placed numbers opposite the names of individual candidates, but has placed a tick as described in paragraph (b)(ii), the provisions of that paragraph apply.

This section envisages a voter failing to mark his or her order of preference below the line. This is not fatal however. The question in this part of the Petitioner's challenge is in what circumstances does the incorrectly marked Pt II type ballot paper still remain a valid vote, which the returning officer can accept and count.

Section 116(3)(b)(ii) to which s 116(3)(d) has referred back for the reader to gain further directions reads:

(b) If the voter has placed numbers as aforesaid and –

(i) —

(ii) There is a tick opposite the name of one, and only one, registered political party or independent candidate which or who has lodged a list of candidates under s 61.

The order of preference shown on that list in respect of individual candidates is to be treated as the voter's order of preference in respect of those candidates:

It has to be said at this point that now we enter the Hampton Court mase; or worse, the world of Alice in Wonderland. Paragraph (b) refers to "if the voter has placed numbers as aforesaid" whereas paragraph (d) says "if the voter has not placed numbers".

5 Paragraph (b) does not dovetail in with (d). Quite apart from the disgraceful lack of simplicity in the drafting of s 116, a code of directions which should have been easy to read for layman and lawyer alike, it is in no readily comprehensible form either for a returning officer to follow in carrying out his important on the spot statutory functions. One must ignore the first line of paragraph (b) 10 completely. But (ii) is clear in permitting a tick against the name of one, and only one registered political party or independent candidate. That is enough to activate the preference and to ensure the vote remains still a valid vote. Apart from the lazy form of drafting, relying on referral back, paragraph (d) would have no effect at all if this construction were not adopted here. Paragraph (e) in going on to say 15 that two ticks would not be valid, limits the extent of the indulgence to be granted.

I have approached this interpretation on the basis of the Act being a code, and I interpret s 116 to be mandatory rather than directory. I have arrived at a decision that the ballot papers marked with a single tick below the line should not have 20 been discounted as invalid, by looking solely at the mandatory instructions of the Electoral Act 1998.

However one should not assume that the right to have a vote counted when the clear intention can be seen, is something what even parliament can take away. In *Rakha* (above) Rooney J pertinently said at 9:

25

> *Where votes are disputed because the voter has failed to observe instructions as to the manner of voting, the paramount consideration is the intention of the voter. (See Rufle v Rogers* [1982] 3 WLR 143 *and in particular the remarks of Lord Denning, M R, at 146 where he recited with approval the undermentioned passage from Schofield's Local Government Elections(7th ed) at 369):*
>
> 30
>
> > *In all cases which have been before the courts in recent years the judges have all indicated that the voters franchise should not lightly be lost by declaring a vote to be bad if there is a clear intention shown as to what the voter intended to do.*
>
> *Section 1 of the Constitution declares that Fiji shall be a sovereign democratic state. Sections 40 and 41 confer the right to vote on every citizen, subject to narrow* 35 *limitations. No person should be deprived of that right, if he chooses to vote and does so in a manner which, if not formally correct, evinces his clear intention in that regard.*

Rooney J at 14 posed the question:

> *On the other hand, if through ignorance or confusion, a voter placed his mark below,* 40 *rather than to the right of, the sugar cane symbol, is he to be disenfranchised?*

In spite of observation to the contrary in Australia: see *McBride v Graham* Supreme Court of New South Wales No 14251 of 1991, 11th December 1991 (unreported), in Fiji our Court of Appeal has already countenanced a two tier approach to the interpretation of electoral statutes. In *Maan Singh v Town Clerk* 45 *of Suva and Anor* Fiji Court of Appeal Civil Appeal No 23 of 1984, 27th July 1984 (unreported) Speight VP delivering the judgment of the court said at 7:

> *We accept the submission made by Mr Toomey for the appellant, that electoral laws usually have two separate classes of provisions. There are clearly mandatory requirements contained in electoral statutes, providing for such essentials as secrecy of* 50 *ballot; and what have been held by courts as directory provisions (usually contained in regulations) as to the mode of recording a vote. Such an example is Woodward v*

> *Sarsons* (1875) LR10CP 733 *which we have found to be a persuasive early enunciation of the principle that the purpose of an election is to ascertain if possible the will of the electors.*
>
> *In that case it was held that the mandatory enactment must be fulfilled exactly but it is sufficient if directory enactments are fulfilled substantially.*

In *Greidinger v Davis* (1993) 988 F 2d 1344 (4th cir 1993) Hamilton J said:

> *It is axiomatic that no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.*

In *Reynolds v Sims* (1964) 377 US 533 at 1378 Warren CJ said:

> *The right to vote freely, for the candidate of one's choice is of the essence of a democratic society and any restriction on that right strikes at the heart of the representative government and the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.*

The CJ referred to *Wesberry v Sanders* (1964) 376 US 1; [1964] USSC 3184 S ct 526 where the court had said:

> *No right is more precious in a free country than that of having a voice in the selection of those who make the laws under which, as good citizens we must live.*

Though it is not in issue in this case, I doubt whether the omission of the words of s 55(2) from the 1998 Electoral Act will abolish the need always to be most cautious before disenfranchising the citizen.

I shall adjourn for a few minutes to allow the returning officer to report to me the amended results after taking into account the preferences for the 1278 votes for the below the line ticks, now to be included in the count.

Addendum to judgment

The returning officer has now reported back to me with the amended count of the votes. They are:

Prem Singh	7888 votes
Krishna Prasad	7986 votes

I am satisfied that the Petitioner succeeds on ground 4D of his petition that the ballot papers were incorrectly ruled invalid and therefore not counted. I dismiss all other grounds of the petition. The ticks below the line should have been accepted and counted as a valid vote, and I am satisfied that the failure to count those particular votes did affect the result of the election. Accordingly I declare the 3rd Respondent not to be the elected member for the seat of Nadi Open, and instead I declare the Petitioner to be the duly elected member in his place.

I attribute no fault to the authorities for the interpretation that they arrived at with this infelicitously drafted section. However with the dashed hopes of the loser and with costs incurred in responding to the petition, and the costs of bringing this petition for the Petitioner, I feel some costs should be borne by the state. An immense amount of work has been done by lawyers on all sides as is obvious from the papers. Pursuant to s 156 of the Act I award costs against the 1st and 2nd Respondents in their official capacities, summarily assessed of $1500 for the 3rd Respondent and $2500 for the Petitioner.

I order the registry to return to the Petitioner his security for costs of $500.

I order copies of this judgement to be forwarded by the deputy registrar to the Hon Speaker of the House of Representatives, the Attorney-General, and to the Supervisor of Elections.

Orders accordingly.

Petition allowed.