

HIGH COURT. Apia. 1957. 13, 19, December. MARSACK C.J.

Petition to avoid election - irregularity in commencing polling - failure to give notice of polling place.

The evidence having established that polling on Election day did not commence at 9 a.m. as required by Regulation 48 of the Western Samoa Legislative Assembly Regulations 1957, but some time later, and that at least one person had failed to record a vote for the petitioner on account of this; and further that there was no public notice of the polling place as required by Regulation 41 of the said Regulations; and the successful candidate having a majority of only 2 votes -

Held: that there was a reasonable probability that breaches of the said Regulations affected the result of the election and accordingly the election was declared void.

Akaroa Election Petition 10 N.Z.L.R. 158; and Woodward v. Sarsons 10 L.R.C.P. 733 applied.

Phillips, for petitioners.
Clare, Returning Officer, in person.
Respondent, in person.

Cur. adv. vult.

MARSACK C.J.: This is a petition by Tuilagi Simi, an unsuccessful candidate, and five electors of the constituency known as Fa'asaleleaga No. 2, that the election conducted on the 15th November 1957 wherein Papali'i Pesamino received the highest number of votes and was duly elected be declared void. The grounds upon which the petition is founded are that polling did not commence at 9 o'clock as provided in Regulation 48 of the Western Samoa Legislative Assembly Regulations 1957, and that public notice of the polling place was not given as required by Regulation 41. It is further contended in the petition that the result of the election was affected by these irregularities.

The facts are not seriously in dispute. There were three candidates for Fa'asaleleaga No. 2. There were 146 electors on the roll of whom 112 voted. The official result of the polling was as follows:

Papali'i Pesamino	38
Tuilagi Simi	36
Alaalatoa Tuitama Forise	34
Informal	4
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Total	112
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When the Returning Officer gave public notice, pursuant to Regulation 41, of the names of candidates and the date upon which the poll was to be taken, he did not appoint polling places as required by that Regulation; he intimated that the polling places would be publicly notified at a later date. On the 6th November public notice was given by the Returning Officer appointing the Laoa of the Fulenu'u Tuilagi Pa'ō at Fatausi as the polling place for Fa'asaleleaga No. 2. On the 7th November an objection was raised by certain electors to this polling place on the ground that the Fulenu'u held the same title as one of the candidates, Tuilagi Simi. The Supervising Deputy Returning Officer, Papali'i Poumau, Administrative Officer, Tuasivi, recommended that the house of the Pastor should be used as a polling booth in lieu of the Laoa of Tuilagi Pa'ō and this recommendation was accepted by the Returning Officer. No steps, however, were taken to give public notice of the change of polling place. Nothing at all, in fact, was done until the

afternoon of the 13th November when Papali'i Poumau came through to Fatausi and gave instructions for the removal of certain fittings which had been installed for purposes of the election, from the house of Tuilagi Pa'o to that of the Pastor. The Pule'u was, however, not officially advised of the change of polling place and accordingly he did not call the Ali'i and Faipule together to inform them of the alteration. Notice boards were erected by the Deputy Returning Officer, Mr Uhrle, in front of the Pastor's fale, advertising the fact that that was to be used as the polling booth; and it was in fact so used on election day. As no public notice had at any time been given appointing the fale of the Pastor as the official polling place for the taking of the poll, it is clear that a breach of Regulation 41 was committed.

The poll at the election commenced not at 9 o'clock, but in fact at approximately 10.45 a.m. on the 15th November. The delay in opening the polling was due to an excess of caution on the part of the Deputy Returning Officer, Mr Uhrle. By 9 o'clock he had received only one nomination in writing of a scrutineer as provided by Regulation 46, namely, the scrutineer for Alaalatoa Tuitama. Mr Uhrle was anxious that the voting should not commence until all scrutineers were present and he advised both Tuilagi Simi and Papali'i Pesamine that they should give written authorities for their respective scrutineers to act. As soon as possible after the completion of these authorities Mr Uhrle opened the poll. It was then, as has been stated, approximately 10.45 a.m. This was clearly a breach of Regulation 48. It was the duty of the Deputy Returning Officer to open the poll at 9 o'clock and if there were no scrutineers for some of the candidates he should have proceeded in their absence. Mr Uhrle can perhaps not be blamed for the faulty exercise of his discretion in the matter as he was obviously acting in what he regarded as the interests of complete fairness to all candidates.

It has thus been proved that the election was attended by two irregularities in the form of definite breaches of Regulation 41 and of Regulation 48.

Under Regulation 100(2) however, it is provided that an election shall not be declared invalid by reason of any irregularity if it appears to the Judge that the election was conducted in accordance with the principles laid down in the Regulations and that the irregularity did not affect the result of the election. It therefore becomes necessary to examine the question as to what was the effect of these irregularities. The general principle to be applied by the Court in determining whether or not an election should be declared void on the grounds of irregularities is set out in Halsbury's Laws of England, 3rd Edition, Volume 14, page 150. This principle may be summarised thus: If the tribunal is satisfied that the effect of the irregularities proved was such that the election was not conducted in accordance with the law pertaining to elections and was such as to raise a reasonable doubt as to whether the result may not have been affected - that is to say, a reasonable doubt as to whether the declared result in fact represents the wishes of the majority of the electors - then the tribunal is bound to declare the election void. A somewhat similar provision to that in the Western Samoan Regulations was considered by the New Zealand Supreme Court in the Akaroa Election Petition 10 N.Z.L.R. 158. At page 161 Williams J. quotes with approval a statement of the law set out in Woodward v. Sarsons L.R.10, C.P.733, in the course of which it is held that an election should be declared void

"if.....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."

In Woodward v. Sarsons the question was whether the poll was closed before the proper time or not, and, if so, whether enough electors were precluded from exercising their vote to affect the result of the election. In this case a similar question arises, namely as to whether

the poll was open during the statutory times of the day; and, if not, whether the result of the election may have been affected.

The majority in favour of the successful candidate was two votes. It has been proved to the satisfaction of the Court that one elector, Muliaga Lene, who had come from Vaiola to Fatausi for the purpose of recording his vote in favour of Tuilagi Simi, returned without doing so because the polling place was not open at the hour of 9 o'clock specified by the Regulation. The Court finds, therefore, that the breach of Regulation 48 has been proved to have been responsible for the loss of one vote to Tuilagi Simi. That one vote would have reduced the majority in favour of the successful candidate to one. In order therefore to find that there was a reasonable chance of the election being affected by the breaches proved, it is only necessary to show that one more elector may have been prevented from exercising his vote in favour of Tuilagi Simi by the delay in opening the poll or by the lack of public notice as to polling place.

It is noted that 34 matais out of 146 failed to exercise their votes and the Returning Officer concedes that this is a high percentage. It is also shown that a number of these electors reside in Upolu. It is possible that one or more may have decided to follow the course which was adopted by Tuilagi Simi, Fepulca'i and others, of crossing from Malifanua to Salolologa by the 7.30 boat, recording their vote and then returning to Upolu by the boat at 10 o'clock.

It has not been proved that any of the 34 matais who failed to vote, with the exception of Muliaga Lene, failed to exercise his vote on account either of inability to be at the polling booth after 10.30 in the morning, or by the fact that he could not vote at the advertised polling place to wit the Laqa of Tuilagi Pa'o. The Court, however, considers that there is a reasonable probability that at least one person may have failed to record a vote for Tuilagi Simi on account of one of these reasons. That being so the Court is bound to hold that there is a reasonable probability that the breaches which were committed of Regulations 44 and 48 did affect the result of the election.

There will accordingly be an order declaring void the election for the constituency of Fa'asaleleaga No. 2 and the election of Papali'i Pesamino at such election.

After payment thereof of Court costs £4 the balance of the £10 deposit will be returned to petitioners. There will be no other order as to costs.

Election declared void.