## ELECTION PETITION RE A'ANA NORTH NO. 3 CONSTITUENCY

SUPREME COURT. 1964. 3, July; 29, October. MOLINEAUX C.J.

Election petition - petitioners misled by polling booth official - whether or not conduct of official affected result of election. Informal votes - principles applicable in rejecting such votes.

An election will be held void where the Court is satisfied that there has been no real electing as a result of a majority of the electors being prevented from voting effectively through some fault on the part of the machinery supplied for voting - as in this case where 18 of the electors, and possibly others, were misled by an official (a Police Constable on duty at one of the polling booths), to vote informally - and thus affecting the result of the election.

Woodward v. Sarsons 44 L.J.C. P. 293 followed.

Gloucester (County) Cirencester Division Lawson v. Chester-master (1893) 9 L.T.R. 255 20 Dig. 110 f. 890; and Raglan Election Petition No. 4 /1948/ N.Z.L.R. 65 referred to.

Election declared void.

PETITION to declare result of election void.

Phillips, for Petitioners.
Frapwell, Attorney-General, for First and Second Respondents.

Cur. adv. vult.

MOLINEAUX C.J.: The Territorial Constituency of A'ana North No. 3 was contested by three candidates at the General Election for Members of Parliament of Western Samoa held on the 4th April 1964. The result of the poll was very close, only two votes separating the two leading candidates. The Chief Returning Officer declared the final result for this Constituency as follows:-

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| (1) | Vaili Tatupu | - | 70 Votes (elected) |
| (2) | Afamasaga Maua | - | 68 Votes |
| (3) | Tago Alapati | - | 6 Votes |

There were 23 informal votes.

The petition now seeks to avoid the election of Vaili upon the grounds that eight of the petitioners were misled by an official at the polling booth to vote informally. They allege that if they had not been misled their eight votes would have been valid votes for the candidate of their choice Afamasaga, and that he not Vaili would have been elected - by a majority of 76 votes (68 plus 8) as against 70. Counsel were agreed that a Police Constable on duty at polling booth No. 6 had given advice to the said petitioners and to other voters also as to the manner in which they might record their votes. Apparently he told them that they could write their own names alongside the name of the candidate they wished to vote for instead of putting a cross in the appropriate column as directed by the instructions to voters endorsed at the foot of the ballot paper. The eight petitioners, acting in good faith, followed the advice of the Constable and subsequently their votes were rejected by the Chief Returning Officer as informal.

This does not in itself pose a very difficult problem but the matter was complicated by a development that became manifest during the hearing. Following a recount it was disclosed that not only had the eight petitioners voted in the way described but that ten other electors had done likewise except that they had voted for Vaili and not Afamasaga. The petitioners quite

naturally were not aware that others as well as themselves had followed the advice of the Constable, but be that as it may if these ten votes for Vaili had been correctly given as well as the eight votes of the petitioners for Afamasaga, it is at once apparent that far from moving Afamasaga into the lead there is no change in the final result of the election. On the contrary, Vaili's majority is increased by two and the result of the poll as between these two candidates would then be Afamasaga 76, Vaili 80. If this were the only matter for determination it is apparent that the petitioners would be in some difficulty for although they can point to an irregularity in the breach of duty on the part of the Constable they would be unable demonstrably to show that the final result of the election had been affected.

Section 116(d) of the Electoral Act 1963 provides that:

> "No election shall be declared void by reason of (inter alia) any breach of duty on the part of an official whether before, during or after the polling if the Court is satisfied that the election was so conducted as to be substantially in compliance with the laws as to elections, and that the breach did not affect the final result of the election."

There were, however, 23 informal votes upon which the Court was asked to rule. One was of a dual nature and did not affect the position either way and 22 remain for consideration. These fall conveniently into three distinct groups:

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| Group I | - | 1 ballot paper from Booth No. 5 |
| Group II | - | 3 ballot papers from Booth No. 6 |
| Group III | - | 18 ballot papers from Booth No. 6 |

These 22 ballot papers were rejected by the Chief Returning Officer for the same reason, namely, that they had something written on them whereby the electors can be identified. He was applying the provisions of section 79(2)(iii) of the Electoral Act under which it is mandatory for him "to reject as informal any ballot paper that has anything not authorised by the Act written or marked thereon by which the elector or voter can be identified provided that no ballot paper shall be rejected as informal by reason only of some informality in the manner in which it has been dealt with by the elector or voter if it is otherwise regular, and if in the opinion of the Chief Returning Officer the intention of the elector or voter in voting is clearly indicated". For the sake of comparison the corresponding sections of an English and a New Zealand statute are also set out in which the same words, in similar contexts, have called for interpretation in two reported cases to which reference will be made. In the English Statute section 2 of the Ballot Act 1872, inter alia, provides:

> "Any ballot paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked by which the voter can be identified shall be void and not counted".

And section 149(2)(a)(ii) of the Electoral Act 1927 (New Zealand) reads as follows:-

> "He, (the Returning Officer) shall reject as informal...any ballot paper whereon anything not authorised by this Act is written or marked by which the voter can be identified"... -

then follows a proviso similar to the proviso contained in section 79 of the Electoral Act 1963.

Applying the statutory ground of rejection relied on by the Chief Returning Officer to the three groups in turn the position is as follows:-

GROUP I - On this ballot paper the elector has put two marks or indications of his intention:

(1) A cross in pencil level with the printed name Afamasaga Maua on the ballot paper but a little to the right of the parallel lines containing the name of that candidate; and

(2) What appears to be the first four letters of the name Afamasaga in pencil to the left of the cross.

Whether or not an elector or voter can be identified from a writing or mark made by him on a ballot paper is in each case a question of fact. The question here is - can the elector be identified by either one or both of these marks? The first mark complies with the instructions to voters endorsed on the ballot papers and had it stood alone would no doubt have constituted a valid vote for Afamasaga. On its own it cannot be said to identify the voter and the question then becomes whether the second mark is sufficient in itself to invalidate the vote. In my opinion it is not. The first and the fourth letters of the partly written name Afamasaga are so imperfectly executed that reliance has to be placed on the second and the third letters which in themselves are insufficient to make identification certain. In the opinion of the Chief Returning Officer this ballot paper was a borderline case. It is clear that the elector intended to vote for Afamasaga as both marks appear alongside the name Afamasaga Maua on the ballot paper. As the intention is clear this vote is, I think, saved by the proviso to section 71 which states:

> "that no ballot paper shall be rejected as informal that clearly indicates the candidate or candidates for whom the elector or voter intended to vote whether that indication is made in the manner prescribed by this Act or otherwise".

For these reasons I would be prepared to restore this vote to Afamasaga making his total 69 (68 plus 1).

GROUP II - Three ballot papers upon which the name Afamasaga is written in pencil alongside the printed name Afamasaga Maua on the ballot paper.

The Chief Returning Officer rejected these votes upon the grounds that these electors also can be identified by their handwriting. He relied on the English case of Woodward v. Sarsons 44 L.J.C. P. 293 in which two ballot papers Nos. 844 and 889 bore the name of Sarsons opposite the name of the respondent Sarsons printed upon such ballot papers and which were held by the Court to be bad, but it is to be noted somewhat reluctantly so. Section 2 of the Ballot Act 1872 speaks of any mark or writing from which the voters can be identified (supra):

> "We, with some hesitation, disallow Nos. 844 and 889. There is no cross at all and we yield to the suggested rule that the writing by the voter of the name of the candidate may give too much facility by reason of the handwriting to identify the voter" - says the judgment at p. 304.

It is doubtful, however, whether this is still the law in England in view of the new statutory provision contained in Rule 48(2) of the Parliamentary Election Rules, a provision which in the opinion of the learned author of Schofield on Parliamentary Election 3rd Edition: "seems to throw the onus of the person challenging the ballot paper to prove that a person can be identified, and if no such proof is forthcoming it would seem that the Returning Officer is under no duty to seek it out but to count the vote as a good vote in the absence of contrary proof." (ibid. 362,). Where the mark concerned is handwriting the difficulty seems to lie in the fact that identification depends not only upon the writing itself but also

upon the attitude and experience of the person who seeks to identify it. That a person may change his handwriting with the passage of the years as his style develops is seldom disputed. Handwriting may also be affected by the state of one's health, the type of pen used, the writing position adopted and other factors. Few would deny that those who write a lot develop their own particular styles which by virtue of their individuality lend themselves readily to identification, whereas those who write but little seldom develop sufficient character in their writing to make identification feasible. Facility of identification seems to march hand in hand with the sophistication of the writing and each problem of identification presents its own intrinsic difficulties. Nor does it follow that because one person can be identified by his handwriting that another can. "Evidence as to handwriting is subject to many sources of fallacy and error", state the learned editors of the 7th Edition of Wills on Circumstantial Evidence, at p. 251. It must be difficult even for an expert to say with confidence after examining a single name written in pencil on a ballot paper that he can identify the writer from a perusal of that one word. There must be some extrinsic evidence, some opportunity for comparison to enable one to move from the realm of conjecture towards the field of certainty. Yet "the mark must be a mark by which the voter can (not might possibly) be identified" said Hawkins J. in the Cirencester case. Gloucester (County) Cirencester Division Lawson v. Chester-master (1893) 9 L.T.R. 255 20 Dig. 110 f. 820. The Election Court in New Zealand has formulated a test to be complied with before it would accept that a person can be identified by his handwriting:

> "We think that to come within the provision (which was section 149(2) of the Electoral Act 1927 (New Zealand)) either a name or initials which would lead to identification must be written or the writing must be so unusual or remarkable or have such outstanding characteristics that it could be said without doubt that it was the handwriting of a particular person." per O'Leary C.J. in giving the judgment of the Court in re: Raglan Election Petition No. 4 /1943/ N Z.L.R. 65, 78.

With respect I find myself in agreement with this approach as satisfactorily extracting the meaning of the words "can be identified" used by the Legislature as distinct from the meaning of "could or might possibly be identified" that is sometimes sought to be given to them in this context. In the case referred to one voter had written the words "For Labour" and another voter "who else would I vote for?" both votes had been rejected by the Magistrate as informal on the grounds that the writing had sufficient character to enable the voter to be identified. The Election Court was satisfied from an inspection of the writing that the possibility of the voters being identified was extremely remote. There was nothing unusual in the handwriting and they felt that if an allegation were made that it was the handwriting of a particular person and he declined that allegation that it would be practically impossible to prove it. There is certainly nothing remarkable or unusual about the handwritings in the present case nor of course any name or initials from which the writers could be identified. I have carefully examined each of the ballot papers and I am satisfied that in each case the clear intention was to vote for Afamasaga Maua. I am also satisfied that there is no evidence to suggest that what was written was done in pursuance of any deceit or pre-arranged agreement intended to lead to identification. There was no evidence of any official or scrutineer present at the counting of the votes having expressed any view as to the identification of the three electors concerned notwithstanding the proximity of their physical contact with the ballot papers. I am satisfied that the real thing that each of these electors tried to do was to record his vote for Afamasaga Maua and this he did by writing the name Afamasaga on the ballot paper in the place where he should have put a cross. There was nothing remarkable or unusual about their handwriting, nor are there any characteristics so outstanding as to enable one to say without doubt that it was the handwriting of a particular person. The possibility of identification in each case is I think extremely unlikely especially when one has regard for the infrequency

of opportunity for observing handwriting that exists in the normal everyday life of a Samoan village. The intention in each case is clear and on the balance of decided authority, I consider that these three votes ought to be counted for Afamasaga as coming within the proviso to section 71, making his total now 72 (69 plus 3).

> GROUP III - Eighteen ballot papers from Booth No. 6 upon which the electors wrote their own names alongside the name of the candidate they wish to vote for.

It was agreed that of these eight were for Afamasaga and ten for Vaili. It was also agreed that they were properly rejected by the Chief Returning Officer as the electors could be identified from their names which they had written on the ballot papers. It was further agreed that these ballot papers were marked in this way as a result of the advice received from the Constable who was on duty at Booth No. 6.

The question for determination is whether the election should be avoided on this ground. The position is governed by section 116 of the Electoral Act 1963. It was not seriously contended that there was any substantial non-compliance with the law as to elections but it is clear that the breach of duty on the part of the Constable did affect the result of the election. If he had not given this advice and had their votes been properly recorded the position would then have been that the eight votes for Afamasaga would have been added to his total making it 80 (72 plus 8) and the ten votes for Vaili would have been added to his total making it 80 also (70 plus 10). There would thus have been an equality of votes as between these two candidates. That there was a breach of duty on the part of the Constable at Booth No. 6 was conceded. He was on duty at the time, in uniform, and I think an "official" within the meaning of the term used in the section. It is conceivable that the effect of his advice extended beyond the ballot papers in Group III and may have influenced the electors in Group II also. Admittedly he denied giving instructions to any voter to write the name of the candidate alongside the name of the candidate of his choice but he did say that he told them to write a name. In Group II the three electors did just that - they wrote a name, the name Afamasaga, and the possibility that they did so as a result of the Constable's advice cannot be altogether excluded. As against that it is noted that the ballot paper in Group I also bears a name, albeit in abbreviated form, but this irregularity is not attributable to the advice of the Constable as he was on duty at Booth 6 and not at Booth 5. In any event it was agreed that all the votes in Group III were given as a result of the advice received from the Constable. The duty of the Court where there has been no real electing as a result of a majority of the electors being prevented from voting effectively through some fault on the part of the machinery supplied for voting was laid down with authority in 1875 by the Court of Common Pleas in the leading case of Woodward v. Sarsons (supra) in which Lord Coleridge C.J. delivering the judgment of the Court 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 that there was no real electing at all ... and as to that the tribunal should be satisfied if it were proved to its satisfaction that the Constituency had not in fact a fair and free opportunity of electing a candidate which the majority might prefer as would be the case if a majority of the electors were proved to have been prevented from recording their votes effectively (inter alia) by means of voting according to law not being supplied or supplied with such errors as to render the voting by means of them void." (ibid., 300).

The four votes in Groups I and II have been restored to Afamasaga as

the intention to vote for him is plainly apparent on the face of the ballot papers, and although the manner in which they are recorded is otherwise than as prescribed by section 71 nevertheless the votes are saved by the proviso to that section and not, in my view, invalidated by section 79(2), the likelihood of identification being too remote. As to the votes in Group III it seems that what happened here falls within the type of error referred to in Woodward v. Sarsons (supra) and that these eighteen electors were prevented from recording their votes effectively by means of voting according to law being supplied to them through the agency of the Police Constable with such errors as to render their voting by means of them void. The breach of duty of the Constable affected all votes in Group III and possibly some in Group II. It is not unreasonable to assume that in the absence of this advice that these eighteen votes would have been properly recorded and had this been so there would have been an equality of votes as between Afamasaga and Vaili. Can one say therefore that the result of the election was not affected by what the Constable did? I am thus left in a position of doubt as to whether Vaili was in fact truly elected by a majority of electors of this Constituency. Under these circumstances the duty of the Court is clear. Being of opinion that the breach of duty on the part of the Constable affected the result of the election I declare that the election of Vaili Tatupu is void.