

CHUJI G. CHUTARO, Appellant
v.
ELECTION COMMISSIONER OF THE MARSHALL ISLANDS
and ALEE ALIK, Appellees
Civil Appeal No. 347
Appellate Division of the High Court
Marshall Islands District
October 9, 1981

Appeal from holding of Trial Division that it did not have jurisdiction over an action to have an election declared null and void. The Trial Division of the High Court, Gianotti, Associate Justice, held that the courts have jurisdiction to hear such election matters, and since the illegal votes exceeded the margin of the winner of the election, and there was no way to distinguish the illegal from the legal votes, the case was remanded to the Trial Court with direction to enter a ruling holding the election invalid and ordering a new election.

1. Elections—Powers of Court

The courts have jurisdiction to hear matters arising out of disputes over election contests.

2. Elections—Irregularities—Remedies

When it is determined that illegal votes are cast in an election, the first effort that should be made is to purge the poll by proving which ballots are illegal and rejecting them.

3. Elections—Powers of Court

While the legislature should have power to decide how and when its members are elected, when the legislative power denies to the electorate their right to vote, the courts should be allowed to look into the cause of the denial in an effort to correct the problem.

4. Elections—Powers of Court

Holdings of *Liberal Party v. Election Commissioner*, 3 T.T.R. 293 (1967), and *Basilus v. Election Commissioner*, 5 T.T.R. 290 (1970), that election contests were beyond the control of the judicial power, are overruled.

5. Elections—Irregularities—Right To Contest

Fact that candidate did not have poll watchers at each polling place did not mean he waived his right to contest the election on the basis of illegal votes cast. (43 TTC §§ 406, 407)

6. Elections—Irregularities—Remedies

In an election where illegal votes were cast which were not distinguishable from the legal votes, remedy of a recount by the Election Commissioner was inadequate, since a recount would only verify the count, and solve no problem as far as the illegal votes were concerned.

7. Elections—Irregularities—Remedies

Where in an election where illegal votes exceeded the margin between the winner and second-place finisher, and there was no way to distinguish the illegal from the legal votes, the proper remedy was to hold the election invalid and order a new election to be held immediately.

8. Elections—Irregularities—Remedies

Where election held two years previously was ruled invalid and a new election was ordered, candidate who had served two years in the legislature could be considered a de facto member and was therefore entitled to retain any salary paid to him as a member.

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Before GIANOTTI, *Associate Justice*, LAURETA, *Des-
ignated Judge*, HEFNER, *Designated Judge*

GIANOTTI, *Associate Justice*

A general election for membership in the Nitijela, Marshall Islands, was held April 10, 1979, and we note this was the first election held in the newly formed country of the Marshall Islands. The parties above-named were candidates for that election, representing Mili Atoll. After the votes had been counted, it was discovered 21 votes were cast by persons not registered in the Mili precinct.

The record reveals that 192 votes were cast for three candidates—the appellant, the appellee and one other person. The appellant was defeated by the appellee by six votes.

Twenty-one of the votes were cast by persons not registered to vote at the Mili precinct. The 21 votes were not distinguishable nor could they be retrieved and purged from the ballot box. The Election Commissioner, after a recount including the 21 votes, declared appellee Alik the winner of the election and Alik has represented Mili Atoll since the election as a duly elected member of the Nitijela. Thereafter, appellant Chutaro brought an action to have the election declared null and void. The matter was heard before the Trial Division of the High Court which held the court did not have jurisdiction over the subject matter. From that ruling, appellant Chutaro appealed, raising in his notice of appeal three grounds. However, the briefs of the parties were confined largely to the third ground while the oral argument raised at the hearing on appeal confined itself strictly to this third ground of appeal, namely, "whether the dismissal order incorrectly declined jurisdiction over this matter." Therefore, we will confine our opinion to this question.

Do the courts have jurisdiction to hear matters arising out of disputes over election contests?

A brief review of the history of election contests in the Trust Territory might be in order. The question arose in two printed trial court decisions. In both cases the courts held they did not have jurisdiction. First, the case of *Liberal Party v. Election Commissioner*, 3 T.T.R. 293 (1967), where the then-Chief Justice Furber held that election contests were beyond the control of the judicial power except to the extent that responsibility therefor has been especially given the judiciary by legislation. He then went on to relate that at common law there was a court remedy by quo warranto. He did not explain the contradiction of no remedy as opposed to common law remedies. Also, the facts of that case would indicate that the alleged irregularities in the election were difficult to determine, intimating there were

not sufficient allegations to bring the matter before the courts. The second case was *Basilus v. Election Commissioner*, 5 T.T.R. 290 (1970), where Associate Justice Brown followed the ruling in the *Liberal Party* case and held that the court did not have jurisdiction to hear the matter. Judge Brown did, however, admit that there was limited jurisdiction granted to the district courts for election appeals under the Trust Territory Code. This limited jurisdiction can be found in 43 TTC § 453.

We must also note that the election for Nitijela occurred prior to the adoption of the Marshall Islands Constitution; however, the provision for the election was made by Marshall Islands Public Law No. 26-12-1, and § 9 of that act provided the election should be conducted in accord with the election law in effect, i.e., Title 43 Trust Territory Code.

Although all parties involved in this matter rely heavily on the *Liberal Party* and *Basilus* cases, they were Trial Division cases and hence not binding on the Appellate Division. There have been any number of decisions rendered in the Supreme Court and appellate courts of the United States, and various state courts, holding in fact the courts do have jurisdiction in election cases. Also, the Trial Division of the High Court in 1978 held there was jurisdiction in the court when the franchise rights of citizens of the Trust Territory have been denied. See *Buliche v. Winkel*, Truk Civil Action 73-78 (1978), where irregularities in the election occurred in the Mortlocks, Truk District, and the court took jurisdiction, suspending the tabulation of votes until the irregularities were corrected.

Secretarial Order 2918, enacted on March 24, 1976, granted unto citizens of the Trust Territory the right of franchise (§ 7, Secretarial Order). Section 8 of said order regarding elections held:

All elections shall be held in accordance with such procedures as this document and the law of the Trust Territory may prescribe.

1 TTC § 101 provides secretarial orders are to remain in effect as long as the Trust Territory Code remains in effect. This being the case, then the right of franchise was a fundamental basic right available to the citizens of Mili Atoll at the time of the 1979 election.

An essential feature of our form of government is the right of the citizens to participate in the governmental process The right to a voice in the selection of officers of the government on the part of all citizens is important, not only as a means of insuring that government shall have the strength of popular support, but also as a means of securing to the individual citizen proper consideration of his rights by those in power. *Rice v. Elmore*, 165 F.2d 387, 173 ALR 473.

The right to vote is perhaps the most basic and fundamental of all the rights granted by our democratic form of government. Implicit in that right is the right to have one's vote count and the right to have as nearly perfect an election proceeding as can be provided *The courts alone are the sort of neutral and detached body which ought to consider and to decide election contests. Aki-zaki v. Fong*, 51 Haw. 354, 461 P.2d 221, 224. (Emphasis added.)

[1] We concur with the holding of these cases and hold that as long as a citizen of the Trust Territory has the right to vote, his vote should count. If for some reason that vote does not count and the reason is not corrected by properly constituted parties, then the logical place to look for recourse has to be in the courts.

[2] Also, when it is determined that illegal votes are cast in an election, the first effort that should be made is to purge the poll by proving which ballots are illegal and reject them. 26 Am. Jur. 2d Elections § 292, page 115.

However, if the problem arises (as here) when the illegal votes have been cast at an election and it is not known or ascertainable for whom they were cast, four solutions are generally proposed: (1) the election is declared void; (2) if only a precinct is involved, that precinct's votes are dis-

carded; (3) a pro rata deduction is made; or (4) ignore the illegality. 155 ALR 677.

At the outset it is clear the illegal votes exceed the margin between the appellee and appellant; hence, this is not a situation where the illegal votes can be ignored nor is it one in which a pro rata deduction can solve the problem. The count and recount of votes was on a general basis and not on a precinct basis. Therefore, the remaining remedy is to declare the election void. *Akizaki v. Fong*, supra.

What power, then, does the court have to void these election contests?

On whether the court has the power to void an election and to hold a new one, it was held in *Bell v. Southwell*, 376 F.2d 659, 665,

If affirmative relief is essential, the court has the power and should employ it.

And in *Hamer v. Campbell*, 358 F.2d 205, 221, 222, the court stated:

There can be no question that a district court has the power to enjoin the holding of an election. . . . Relief, if it is to be had, must perforce come from the court, or the voters must simply be told to wait four more years. That denial of this fundamental right cannot be justified in the name of equity.

Rice v. Elmore, supra, held:

There can be no question therefore, as to the jurisdiction of the court to grant injunctive relief whether the suit be viewed as one . . . to protect rights granted by the constitution or . . . to protect the rights of citizens of the United States to vote.

[3] In the immediate case, illegal votes were cast when 21 voters not properly registered on Mili Atoll voted. The Election Commissioner admitted these illegal votes were allowed and yet did nothing to correct this inequity. If the citizens of Micronesia are to be secure in a democratic form of government, such activities cannot be allowed to stand. It would constitute a denial of the basic rights that have

been granted to the citizens of the new countries now forming in Micronesia. Granted, the legislature should have power to decide how and when its members are elected. But when their powers or the exercise thereof deny to the electorate one of the basic fundamental rights granted under a democratic form of government, the courts should be allowed to look into the cause of this denial in an effort to correct the problem.

In the case of *Powell v. McCormack*, 89 S. Ct. 1944, the Court on page 1956 stated:

As was said in *Kilbourne* [*Kilbourne v. Thompson*, 103 U.S. 168, 26 L. Ed. 377], in language which time has not dimmed:

“Especially is it competent and proper for this court to consider whether its [the legislature’s] proceedings are in conformity with the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.” 103 U.S. at 199.

[4] We hold that the High Court Trial Division cases cited, i.e., the *Liberal Party* and *Basilius* cases, are not in conformity with the majority rulings of the courts.

Under the general equity powers, the court would have the right to look into election irregularities where a basic, fundamental democratic right has been violated. The court should not interfere with impunity; however, obviously the immediate case required some judicial determination or, as was said in the *Hamer* case, *supra*,

The voters must simply be told to wait four more years. That denial of the fundamental right cannot be justified in the name of equity.

And for the citizens of Mili Atoll to be told to wait four more years cannot be condoned by this court.

[5] Appellee argues that appellant is entitled to no relief because the latter should have had two poll watchers pursuant to 43 TTC § 406 and should have challenged the illegal votes before being cast. 43 TTC § 407. To follow such reasoning would place any candidate at his own political peril should he not have poll watchers at each polling place. Certainly, the election law does not provide that if a candidate does not have poll watchers, he waives any right to contest the election.

[6] It is also argued by the appellee that all the appellant was entitled to was a recount by the Election Commissioner. Since the 21 illegal votes were not distinguishable, a recount would only verify the count or correct a mistake in the tally. It solves no problem in so far as the 21 illegal votes are concerned.

[7, 8] We, therefore, remand this matter to the Trial Court with direction that it enter its ruling holding the 1979 election on Mili Atoll invalid and to order a new election for Mili to be held immediately. Until such election, defendant Alik will not be entitled to remain in the seat on the Nitijela. However, defendant has served on the Nitijela for the prior two years since the election and can be considered a de facto member of the Nitijela, therefore entitling him to retain any salary paid to him as a member. (See *Campbell v. Santa Clara County*, 93 P. 1061, 26 Am. Jur. 2d Election Section 357 at page 173, re entitlement to office until election.)