27/13; [2013] WASC 72

SUPREME COURT OF WESTERN AUSTRALIA

HORN v AUSTRALIAN ELECTORAL COMMISSION

Hall J

1, 7 March 2013

CRIMINAL LAW – FAILURE TO VOTE IN FEDERAL ELECTION – WHETHER OBJECTION TO FORM OF VOTING BOOTHS A VALID AND SUFFICIENT REASON – QUESTION OF LAW DETERMINED PREVIOUSLY: *COMMONWEALTH ELECTORAL ACT* 1918 (CTH), SS206, 233, 245.

H. was charged with failing to vote at a Federal election without having a valid and sufficient reason for such failure. H. claimed that the polling booths provided at the election did not comply with the *Commonwealth Electoral Act* 1918 (Cth). H. contended that the polling booths were not constructed and arranged in such a manner as to screen voters from observation while marking their ballot papers. His view was that the voter be completely concealed from view. The Magistrate found the charge proved and imposed a fine on H. Upon appeal—

HELD: Appeal dismissed.

1. In relation to the issue of whether the voting alcoves used in the 2010 election complied with s206 and s233 of the *Commonwealth Electoral Act*, the evidence before the magistrate was that these screens were in the same form as those used in previous years and, in particular, in 2007. The claim by H. that these types of screens did not comply with the *Commonwealth Electoral Act* had been raised and rejected on previous occasions. His interpretation of the *Commonwealth Electoral Act* as requiring that each voter be in a separate compartment with a closed door which completely screens them from view had been previously rejected. The magistrate was correct to conclude that she was bound by those previous decisions.

2. H. never clearly articulated the reasons for his feelings of intimidation. If it was a morbid fear of electoral alcoves, then his behaviour would appear to be inconsistent. But his explanations for those feelings appeared to relate entirely to his view that the alcoves did not comply with the law and that he was not adequately screened from view when casting a vote. When seen in this light the findings of credibility were unimportant because such views could not possibly have provided a valid and sufficient reason for not voting.

HALL J:

Introduction

1. Mr Dieter Horn, the appellant in this case, could never be accused of lacking consistency. He has, over many years, tenaciously maintained the view that the polling booths provided at Federal elections do not comply with the *Commonwealth Electoral Act* 1918 (Cth).

2. True to his beliefs Mr Horn has refused to vote at a number of Federal elections, including that which occurred on 21 August 2010. He has been prosecuted for his failure to vote. On conviction he has pursued appeals. This appeal is the most recent instance of proceedings of this type.

3. Mr Horn has adhered to his views about the polling booths despite adverse decisions of the Federal Court and this court. He doggedly maintains he is right and the courts are wrong. Unfortunately for Mr Horn, it is the court's view of the law that matters.

Earlier proceedings

4. In November 2007 Mr Horn sought a declaration from the Federal Court that the Australian Electoral Commission had failed to provide polling booths for use by voters that complied with s206 and s233 of the *Commonwealth Electoral Act*. He contended that the polling booths were not constructed and arranged in such a manner as to screen voters from observation while marking their ballot papers. His argument was that it was not sufficient that the booths concealed the actions of a voter in marking the ballot paper, rather his view was that what was required was that the voter be completely concealed from view.

5. Section 206 and s233 of the *Commonwealth Electoral Act* provide as follows:

> 206. Polling booths shall have separate voting compartments, constructed so as to screen the voters from observation while they are marking their ballot papers, and each voting compartment shall be furnished with a pencil for the use of voters. ...
>
> 233. Vote to be marked in private
> (1) Except as otherwise prescribed the voter upon receipt of the ballot paper shall without delay:
> (a) retire alone to some unoccupied compartment of the booth, and there, in private, mark his or her vote on the ballot paper;
> (b) fold the ballot paper so as to conceal his or her vote and:
> (i) if the voter is not an absent voter—deposit it in the ballot-box; or
> (ii) if the voter is an absent voter—return it to the presiding officer; and
> (c) quit the booth.
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> (2) A presiding officer shall enclose each ballot paper of an absent voter returned to the presiding officer under subsection (1) in the envelope bearing the declaration made by the voter under subsection 222(1) or (1A), securely fasten the envelope and place it in the ballot-box.

6. In *Horn v Australian Electoral Commission* [2007] FCA 1827; (2007) 163 FCR 585; (2007) 243 ALR 190 McKerracher J did not accept Mr Horn's argument. His Honour said, 'in my view s206 is not intended to prevent the voter from being observed in all the ancillary and preparatory steps to marking the ballot' [67]. His Honour went on to say:

> [T]hat 'in private' where referred to in s233(1)(a) relates to concealing the way in which the voter has voted on the ballot paper as also referred to in s233(1)(b). Consistently with this, in my view the screening of voters from observation referred to in s206 is intended to ensure privacy of the way in which voters have marked the ballot-paper [68].

7. McKerracher J also made findings of fact about whether the voting compartments which were described to him afforded the necessary privacy. His Honour dismissed Mr Horn's application for a declaration.

8. The application to the Federal Court had been made shortly prior to the Federal election which was held on 24 November 2007. Mr Horn failed to vote in that election and was prosecuted for that failure pursuant to s245(15) of the Act. He sought to argue that he had a valid and sufficient reason for not voting being that when he attended at the polling place the booths provided did not screen him from observation whilst he was marking his ballot papers and that he was unable to 'retire alone' to an unoccupied voting compartment to mark his ballot paper in private. These reasons, which were clearly identical to those that had been rejected by McKerracher J, were not accepted by the Divisional Returning Officer. Mr Horn refused to pay the nominal fine and elected to have the matter dealt with by a court.

9. Undeterred, Mr Horn maintained his argument before the Magistrates' Court, on appeal to a single judge (*Horn v Butcher* [2009] WASC 267) and on a further appeal to the Court of Appeal (*Horn v Butcher* [2010] WASCA 67).

10. In its judgment the Court of Appeal said:

> As mentioned above, the appellant holds a view that s206 and s233 of the *Commonwealth Electoral Act* are not being complied with. The view the appellant holds is contrary to law and contrary to the reasons of McKerracher J, who spelled out for the appellant why his view is wrong. There was no attempt made to argue that McKerracher J's decision was wrong and no appeal has been instituted by the appellant against that decision.
>
> The appellant's wrong view of the law affords no valid reason for not voting. The appellant's view about the statutory provisions is unsound, not well-founded, has no force, weight or cogency, lacks authority and is not sustainable in law. In effect, the appellant makes 'open challenge to the very essence of the enactment' which Isaacs J in *Judd* said was not a valid reason. The magistrate was therefore correct to find that there was no valid or sufficient reason for failing to vote. This ground has no reasonable prospect of success [33] - [34].

The present proceedings

11. On 21 August 2010 a Federal election was held. Mr Horn again failed to vote. On that day he presented himself at a polling place in Guildford. He provided a letter stating that he was 'unable to vote because I feel intimidated in the open-ended voting structure'. A $20 penalty notice issued and Mr Horn again elected to have the matter dealt with by a court. A hearing of the charge occurred in the Magistrates' Court at Albany on 9 July 2012.

12. The charge was that being an elector within the meaning of the *Commonwealth Electoral Act* Mr Horn failed to vote at the election held on 21 August 2010 without having a valid and sufficient reason for such failure. The charge was pursuant to s245 of the *Commonwealth Electoral Act*. The prosecution accepted that it bore the burden of proving that the appellant had failed to vote and that any reason given for not voting was not valid or sufficient.

13. The prosecution called one witness, Ms Ruth Clark, the Divisional Returning Officer for the federal electorate of O'Connor. She gave evidence that Mr Horn was enrolled to vote at the relevant time, had not voted and had provided the reasons referred to. She also gave evidence that on the day of the election 16 large voting screens were in place at the Guildford Polling Place. There was also a disabled screen and one table top screen. She confirmed that the screens were the same as those used in previous elections, in particular in 2001, 2004 and 2007.

14. Ms Clark also gave evidence that in certain circumstances an elector is permitted to vote using a postal vote. She said that if an elector applied for a postal vote and presented a doctor's note saying that the elector felt genuinely intimidated in the voting booths she would approve the application. She said that Mr Horn had never applied for a postal vote.

15. Mr Horn disputed that he would be eligible for a postal vote. He denied being ill and did not consider that his claim to feeling intimidated would allow a Divisional Returning Officer to grant him permission to lodge a postal vote. He construed Ms Clark's evidence as an invitation to him to obtain a false doctor's certificate.

16. It was put to Ms Clark in cross-examination that the screens available at the Guildford polling booth did not comply with s206 of the *Commonwealth Electoral Act*. Ms Clark disagreed. She said that the arrangements screened people when they went to vote, that they had been in existence for many years and many other electors voted in the same compartments with no complaints.

17. A set of the voting booths was in place during the hearing in the Magistrates' Court. In cross-examination Mr Horn stood at one of the booths and put the following questions to Ms Clark:

> HORN, MR: Thank you. Ms Clark, you have said a few minutes ago that the voters are screened when standing like that when filling in their ballot papers. Do you think I am screened from observation when I am standing in front of this voting alcove and being expected to mark my ballot? Am I screened from observation standing like that? Yes or no.
> HER HONOUR: For the transcript, Mr Horn has approached the voting booths that have been set up in the court and standing approximately 50 centimetres from the voting booth.
> HORN, MR: Am I screened from observation, yes or no?---I believe if you stand a little closer you would be more screened.
> Am I screened from observation, yes or no?---Yes, unless somebody was standing right beside you over your shoulder.
> Do you mean to say that I am screened from observation like this?
> HER HONOUR: The witness has answered, Mr Horn. That is fine.
> HORN, MR: What did she answer?
> HER HONOUR: She said, yes, you were screened unless somebody is standing right next to you and overlooking your shoulder?---Which they would not be because there are scrutineers in that polling both observing that nobody is just looking over your shoulder.
> HORN, MR: Your Honour, I stand here, I am not screened. I can look into that voting compartment, into that voting alcove, I should say, and I can look there. I can stand while I'm here. I am seeing this part here, this white part of the neighbouring voting alcove, the (indistinct) collector has no way of seeing when I swivel my eyeballs like I am doing now (ts 09.07.12, page 23).

18. Mr Horn gave evidence in his defence. He agreed that he had not voted in the 21 August 2010

election. He maintained that the reason for this was that he felt intimidated by being expected to mark his ballot paper while standing in front of an open voting alcove. He said he had felt this way from the time he had first voted as an Australian citizen in 2001. He said that when he attended the Guildford polling place he was disappointed to see that the open-ended voting alcoves were being used again. He then wrote a note explaining why he would not vote. He completed the note while standing in front of one of the voting alcoves. He said that as he was writing the note one of the scrutineers tapped him on the shoulder and told him that a senior officer was available to speak to if he wished. He said that the fact that the scrutineer could approach him from behind showed that he was not screened from observation. Mr Horn then spoke to the senior officer, provided his driver's licence as identification and the note that he had written. He then left.

19. In cross-examination Mr Horn accepted that the sole issue was whether he had a valid and sufficient reason for not voting. He accepted that he was aware of the election prior to the date on which it was held. He was also aware of the existence of postal votes and had read pamphlets from the Australian Electoral Commission on that option. He formed the view that he did not qualify for a postal vote based upon the information in the pamphlets. He accepted that when he wrote the note at the Guildford polling place he asked to use one of the alcoves to do so and that the person who tapped him on the shoulder knew that he was not voting. He was also asked whether he had requested the officer in charge of the Guildford polling place to make special arrangements for him given his feelings of intimidation. Mr Horn said he did not ask and did not feel that it would be appropriate to do so because 'there is a flow of voters there waiting to be, to be able to vote there and I would not have accepted it'. It is not entirely clear what he meant.

The magistrate's decision

20. The magistrate reserved her decision until 29 August 2012. On that day, in oral reasons, her Honour said that she found Ms Clark to be a credible witness but did not make the same finding in respect of Mr Horn. She said that she did not accept the veracity of his explanation; that is, that he felt intimidated by the voting alcove. She said that explanation was contradicted by his ability to write a note in the same voting structure. She also noted that 'his demeanour and other minor inconsistencies, his lack of interest in the postal voting system' also led her to conclude that he was not a credible witness.

21. Her Honour then said that even if she accepted Mr Horn's evidence the question was whether the reason given by him was a valid and sufficient one. Her Honour referred to *Judd v McKeon* [1926] HCA 33; (1926) 38 CLR 380; 32 ALR 389. Her Honour quoted from the judgment of Isaacs J who said:

In my opinion, a valid and sufficient reason means some reason which is not excluded by law and is, in the circumstances, a reasonable excuse for not voting. If it be an open challenge to the very essence of the enactment it is excluded by law and not valid (386).

22. As to the issue of whether the structure of the voting booths complied with s206 and s233 of the *Commonwealth Electoral Act*, her Honour said that in her view she was bound by the decisions of McKechnie J in *Horn v Butcher* and McKerracher J in *Horn v The Australian Electoral Commission*. There is no reference to the Court of Appeal decision, though it is of course consistent with those other decisions and was also binding on her Honour.

23. Her Honour then concluded by saying:

> On the evidence before me, I find the evidence of Ruth Clark, as I have said, to be credible, both honest and reliable, and I accept her evidence in its entirety. I find the accused not to be a credible witness. His evidence was inconsistent on a number of aspects and he was clearly defensive and I don't accept that he was suffering anxiety or intimidation when he presented at the polling place on 21 August 2010. He had no issue with asking to utilise a polling both to write a note, which was an important note, at least to him on his version or reason, to the officer in charge, a private note. It is purported to be a personal reason, but he had no issue with this or the privacy that the booth could offer in that respect.
>
> I find that the booth also complied with the legislation and afforded adequate privacy for voters to complete their ballots in private. Further, even if I accepted that he was intimidated and he had made no – he had made no application for a postal vote prior to the election, well knowing the polling

> booths, what they would be like. I therefore am of the view that the lack of privacy was not – the feeling of intimidation was not the reason why Mr Horn failed to vote. In my view, therefore, the prosecution have negatived beyond a reasonable doubt that there was no valid and sufficient reason in this matter. I find that the accused is guilty of the offence (ts29.08.12, pages 8 - 9).

A fine of $25 was imposed.

Extension of time

24. Mr Horn filed an appeal notice on 24 October 2012. An appeal against a decision cannot be commenced later than 28 days after date of the decision unless this court orders otherwise: s10(3) *Criminal Appeals Act* 2004 (WA). The appeal notice was approximately four weeks out of time and accordingly an extension is required.

25. Mr Horn sought to argue that his appeal was not out of time because he did not receive all of the trial transcript until 2 October 2012. He argued that this was the point at which time should run. He is incorrect. Time runs from the date of the decision and an extension is required in this case. However, it is relevant to take into account the delays in obtaining transcript in considering whether an extension should be granted.

26. An appellant who seeks an extension bears the onus of persuading the court that the discretion should be exercised. This will include providing an explanation for the delay.

27. Mr Horn filed an affidavit setting out the dates on which he received transcript and also noting that he had erroneously attempted to file an appeal in the District Court on 5 October 2012.

28. The delay in this case could not be said to have occasioned any prejudice to the respondent. However, it is important to the proper running of the court's business that time limits be generally adhered to. Where a time limit is imposed by statute it should not be considered a mere technical formality.

29. A delay occasioned due to not receiving trial transcript will rarely in itself justify an extension of time. It is always possible for a notice of appeal to be submitted within time and the grounds amended if transcript is received subsequently. In this case the issues were very simple and there was no necessity to await transcript before filing a notice of appeal.

30. For these reasons I am not satisfied that the delay in this case is justified. However, an extension can also be granted if to refuse one would occasion a miscarriage of justice: *McLeod v The State of Western Australia* [2009] WASCA 233. This requires a consideration of the merits of the grounds of appeal.

Grounds of appeal

31. The grounds of appeal are long and discursive. They can be summarised as follows, that:

> 1. the magistrate erred by accepting the evidence of Ms Clark in circumstances where she had given false evidence by saying that the appellant was screened from observation when standing at the voting alcove;
> 2. the magistrate erred by not taking into account that Ms Clark had encouraged the appellant to obtain a doctor's certificate on a false basis by suggesting that he could have asked a doctor to certify that he felt intimidated by the voting alcoves;
> 3. the magistrate erred in describing Ms Clark as a credible witness given the matters raised in grounds 1 and 2;
> 4. the magistrate erred by stating that she was bound by the decisions of McKerracher J and McKechnie J;
> 5. the magistrate erred when being guided in her decision by the 'Electoral Backgrounder May 2010: Compulsory Voting';
> 6. the magistrate erred by finding that the voting alcoves complied with the legislation and afforded adequate privacy to voters to complete their ballots in private;
> 7. the magistrate erred when not understanding that 'I will never be able to mark my ballot papers while standing in full view of others in front of one of those open-ended voting alcoves';
> 8. the magistrate erred by comparing the ability to write a note in the alcove with the act of voting; and
> 9. the magistrate's decision represents a miscarriage of justice.

Merits of the appeal

32. As regards the issue of whether the voting alcoves used in the 2010 election complied with s206 and s233 of the *Commonwealth Electoral Act*, the evidence before the magistrate was that these screens were in the same form as those used in previous years and, in particular, in 2007. The claim by the appellant that these types of screens do not comply with the *Commonwealth Electoral Act* had been raised and rejected on previous occasions. His interpretation of the *Commonwealth Electoral Act* as requiring that each voter be in a separate compartment with a closed door which completely screens them from view has been rejected. The magistrate was correct to conclude that she was bound by those previous decisions.

33. Mr Horn has stated that he intends to appeal McKerracher J's decision and the decision of the Court of Appeal. As I pointed out to him at the hearing of the appeal, that is a matter entirely for him but his statement of intent does not invest those decisions with any provisional quality. In any event, I would observe that he is very significantly out of time to appeal either of those decisions.

34. As regards the claim that Ms Clark gave false evidence, this is not a claim that bears scrutiny. It is a claim that entirely depends upon the correctness of Mr Horn's discredited view of what it means for a voter to be screened when casting their vote. When Mr Horn performed his pantomime of standing in front of the voting booths and asking Ms Clark whether he was screened from view, he was obviously endeavouring to make the point that his body could still be seen. It was a trite point and really amounted to nothing more than a reiteration of his arguments about what the *Commonwealth Electoral Act* requires. The real issue was not whether he could be seen, but whether he was 'screened' for the purposes of casting his vote. It was to that question that Ms Clark's answer was correctly directed.

35. As regards the suggestion that Ms Clark had sought to encourage Mr Horn to obtain a false doctor's certificate, there is no suggestion in the evidence that Ms Clark spoke to Mr Horn prior to the date of the election on 21 August 2010. It is clear from the transcript that Ms Clark was simply endeavouring to explain the nature of the discretion that she could exercise in agreeing that a voter could cast a postal vote. She said that if she were to receive a doctor's certificate to the effect that a person felt seriously intimidated by the voting alcoves she would be favourably disposed to granting a postal vote application. As it happens, it would appear that Mr Horn's feelings of intimidation do not arise from any physical or psychological illness but from some very ill-defined question of conscience.

36. As regards the magistrate's findings as to credibility, her Honour was best placed to assess the witnesses. It has not been shown that the magistrate has failed to use or has palpably misused her advantage or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable: *Devries v Australian National Railways Commission* [1993] HCA 78; (1993) 177 CLR 472, 479; (1993) 112 ALR 641; (1993) 67 ALJR 52.

37. In any event, this was not a case which turned on the credibility of Ms Clark. The primary significance of her evidence was to establish that an election had occurred, that the appellant was enrolled to vote and that he had not done so. The question of whether the appellant had a valid and sufficient reason for not voting depended almost entirely upon his own evidence.

38. Her Honour's assessment of the appellant was unfavourable. This was based not only on inconsistencies within his evidence but on his demeanour. As to inconsistencies I would not, for myself, be inclined to place the same emphasis upon the fact that Mr Horn was able to enter a voting alcove for the purpose of writing a note whilst claiming to be too intimidated to cast a vote in the same alcove. I accept that there is a difference between writing a note which is clearly not intended to be private and casting a vote which is intended to be screened from view. However, I can understand why the magistrate thought that this was a significant point because the appellant never clearly articulated the reasons for his feelings of intimidation. If it was a morbid fear of electoral alcoves, then his behaviour would appear to be inconsistent. But his explanations for those feelings appear to relate entirely to his view that the alcoves do not comply with the law and that he is not adequately screened from view when casting a vote. When seen in this light the findings of credibility are unimportant because such views could not possibly provide a valid and sufficient reason for not voting.

39. As regards the document referred to as the 'election background and compulsory voting document', this was produced by Ms Clark in her evidence as an example of the kind of information provided to the public. It includes some information regarding postal voting. It was received as an exhibit at the trial without objection. Mr Horn's argument is that insofar as this document contains reference to the circumstances in which a person can cast a postal vote, he did not fall within any of the recognised categories. However, Ms Clark said that the information on the pamphlet was not exhaustive and that an electoral officer had some discretion as to the circumstances in which a postal vote could be granted. Mr Horn had never made an application for a postal vote. In these circumstances, whether or not he would have qualified was speculative and largely irrelevant. The real issue was whether he had a valid and reasonable excuse for not voting. His claims of intimidation were not accepted as being such an excuse and therefore the offence was proven. The only real relevance of the postal voting option was that Mr Horn's claims of feeling intimidated were undermined by the fact that he had not pursued other options prior to the election.

Conclusion

40. On the hearing of this appeal Mr Horn sought an adjournment because he had only received the respondent's written submissions a few days earlier. I explained to him that as the appellant, he was required to file written submissions first but had failed to do so. Notwithstanding his failure, the respondent had filed submissions and had done so within time. I told him that the appellant did not, without leave, have the right to file written submissions in response to those of the respondent and that the usual course was for any submissions that the appellant wished to make in response to be made at the hearing. For these reasons I refused the adjournment and the hearing proceeded.

41. After hearing submissions, I came to the conclusion that none of Mr Horn's grounds had any merit. In these circumstances, I refused an extension of time and dismissed the appeal.

42. In dismissing the appeal I noted that persistence in raising a legal argument that has been previously raised and ruled upon could constitute an abuse of process. In my view that point has been reached.

43. A stubborn refusal to accept the lawful judgment of the courts cannot be excused on the grounds of fidelity to one's values. Too much time and effort has been spent on an issue which has long ago been determined. It is well nigh time that Mr Horn accepted the judgment of those whose job it is to judge.

Orders

1. Extension of time refused.
2. Appeal dismissed.

APPEARANCES: The appellant Horn appeared in person. For the respondent Australian Electoral Commission: Ms SJ Oliver, counsel. Director of Public Prosecutions (Cth).
