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SUPREME COURT OF VICTORIA

LUBCKE v LITTLE

Crockett J

8, 19 May 1970 — [1970] VicRp 99; [1970] VR 807

ELECTORAL MATTERS – FAILING TO VOTE – VOTER HAD NO PREFERENCE FOR ANY OF THE CANDIDATES AND FOR THAT REASON HE HAD NO VOTE TO REGISTER – CHARGED WITH OFFENCE – CHARGE DISMISSED BY MAGISTRATE – WHETHER MAGISTRATE IN ERROR: *ELECTORAL ACT* 1918-1966 (CTH), S128A(12).

HELD: Orders nisi absolute. Dismissal set aside. Respondent convicted and fine $1.
1. The respondent did not, by his possession of a genuinely held inability to form a preference (if one assumed for this purpose that the evidence justified a finding of fact to this effect) thereby gain immunity from the sanction imposed by s128A(12) if he failed to vote. The voting was certainly preferential (s124), but it did not follow that a subjective incapacity on the part of a voter to determine that he preferred one candidate in an election to another afforded a valid and sufficient reason for failing to vote.

2. In relation to the statutory requirement of compulsory voting, that concept was not concerned with "likes and dislikes". What an elector is told is that he must have A or B—he cannot have both. He is not being asked, "Do you like A or B?"; he is being told, "You must have A or B, and you must make a choice between them". This was a statutory injunction, and it followed that it must be a corollary of that enjoinder that the same statute is not permitting some philosophical or intellectual inability to differentiate between candidates to amount to a valid and sufficient reason for not voting.

CROCKETT J: John David Little was an elector within the meaning of the *Electoral Act* 1918-1966 (Com.). He was on the electoral roll for the electoral division of Hotham. On 25 October 1969 an election for the House of Representatives was held. Mr Little did not vote. As a consequence he was charged with a breach of s128A(12) of the Act. This sub-section provided that:

> "Every elector who—(a) fails to vote at an election without a valid and sufficient reason for such failure...shall be guilty of an offence;...".

The information was preferred by Leonard John Lubcke, the divisional returning officer for the Hotham electoral division. Lubcke did not appear on the adjourned return day of the summons and was not represented. No witnesses were called for the informant. The case relied upon by the informant was said to be established by documents lodged with the court. These were a statutory declaration in accordance with form 45 of the *Electoral and Referendum Regulations*, and a certified extract in accordance with form 46 of those Regulations. Additionally, an authority conferred on the informant to institute proceedings and a certificate of the holding of an election were lodged with the court. No doubt, for the proof of the authenticity of these documents and their contents reliance was placed upon reg 83(1), s4, s4A, and s5 of the *Evidence Act* 1905-1964 (Com.), and s210 of the *Electoral Act*. In any event, it seems that the informant was entitled by virtue of s215 of the *Electoral Act* simply to rely upon the averments contained in the information. That section provides that averments shall be deemed to be proved in the absence of evidence to the contrary.

Mr Little appeared on the hearing of the information and gave evidence. He was unrepresented and conducted his own defence. I was told he was a member of the Bar of Victoria. Mr Little testified that as to the candidates for election (the number of which the evidence left undisclosed) he had no preference, and for this reason he had no vote to register. The Stipendiary Magistrate apparently accepted this evidence. He held that it established for the defendant a valid and sufficient reason for failing to vote. Accordingly, the information was dismissed.

The informant obtained an order nisi to review this decision. The grounds included complaints that the evidence given did not warrant the finding made, and that the Stipendiary

Magistrate misdirected himself in relation to the approach to be made in determining whether or not a valid and sufficient excuse for failing to vote had been established. However, the principal ground (although stated in the order nisi in various ways) relied upon in the attack made upon the magistrate's decision was that a stated inability to form a preference among candidates even if assumed to be authentic could not on the true construction of relevant statutory provisions amount to a valid and sufficient reason for failing to vote.

On the return of the order nisi, Mr Little again appeared personally to show cause. Before turning to the question raised by the order nisi, Mr Little sought to justify the dismissal of the information by reliance upon a preliminary point. He maintained that s91(10) of the *Justices Act* 1958 compelled a dismissal of the information. That sub-section is in these terms:—

> "In all cases of summary jurisdiction the following rules shall be observed in the proceedings upon the hearing of any information or complaint so far as such rules are respectively applicable thereto:—
>
> "(10) Where at the time and the place appointed the defendant attends in obedience to the summons in that behalf served upon him or is brought before the said court by virtue of any warrant, if the complainant or informant (having in the case of a warrant had reasonable notice of the defendant's arrest) does not appear by himself his counsel or solicitor, the said court shall either dismiss such information or complaint, and hear and determine the defendant's set-off or (where under this Act a counterclaim may be set up) counterclaim in case he has given notice of set-off or counterclaim, or if it thinks proper shall adjourn the hearing or further hearing of the information or complaint or complaint and set-off or complaint and counterclaim (as the case may be) to some other day upon such terms as it thinks fit;"

I consider that provision has no application for a number of reasons. In the first place, I think the section is procedural in operation; in consequence, despite its apparently mandatory requirements, they are requirements that may be waived. The defendant/respondent's conduct at the hearing in making submissions concerning the informant's case and entering into a defence, including the giving of evidence, amounted to such a waiver.

Next, I should think that the introductory words, involving as they do the essential prerequisite of applicability to a given situation, preclude the operation of the sub-section in these circumstances. The object of the provision appears plainly to involve the protection of persons brought to court by others by having the relevant curial process dismissed or adjourned if those others choose not themselves to appear to prosecute their proceedings. Such a situation has no relevance to the proceedings under discussion, as the informant was ready and able on the day of the hearing to proceed with the prosecution despite the non-appearance of himself or any lawyer to represent him.

Finally, it appears to me to be difficult to suggest that s91(10) must be given an inflexible operation so as to compel dismissal or adjournment of the information on the ground of the non-attendance of the informant or his representative, when the Commonwealth legislation provides that the prosecution may be conducted in just such a manner. Mr Little contended that reg 83(1) and reg 83(2) did not have such an effect. Those sub-regulations provide in terms that lodgment with the court of the statutory declarations and certified extract therein referred to carries with it dispensation of personal attendance at the hearing of the prosecuting officer, and in such a circumstance the court is empowered to hear and determine the matter in his absence. To my mind such provisions prevail against the procedural rules contained in s91.

Should I reach such a conclusion the respondent contended that I should find that those regulations were *ultra vires*. Having regard to the conclusions that I have already expressed, it is unnecessary to express an opinion on this submission. Suffice it to say that I am unimpressed with the argument relied upon, namely, that the course authorized by reg 83 necessarily involved the translation of the Stipendiary Magistrate into "both judge and prosecutor" and, as such a change represented so radical a departure from long-entrenched fundamental concepts of trial procedure, regulations purporting to authorize such a procedure must, on that account, be beyond power. It may be that the validity of a regulation, rule or by-law is vulnerable to attack on the ground of its repugnancy to the general law unless there is clear statutory authority for the making of the subordinate legislation in question: see, for instance, *Waterhouse v Knox* (1910) 10 SR (NSW) 155; 27 WN (NSW) 2, and *Ex parte Grinham; Re Sneddon* [1961] SR (NSW) 862. In the latter case the

Full Court pointed out that a statutory regulation cannot, unless clearly so authorized, confer powers repugnant to the general law, as, for example, as in that case, contravening the principle *nemo tenetur seipsum accusare*. However, I should have thought the procedure authorized by the regulations in this case did not have the effect of rendering the Stipendiary Magistrate "both judge and prosecutor". The court should be slow to hold regulations invalid on this ground unless their implementation would involve a flagrant breach of natural justice: *Waterhouse v Knox, supra.*

I turn, therefore, to the primary question raised by the order nisi, namely, could a stated inability to form a preference amount to a valid and sufficient reason for failing to vote. The respondent contended that the burden of proving that he had no valid and sufficient reason for failing to vote was upon the informant. In my view, this contention is ill founded. A reason contemplated by s128A(12)(a) would amount to such an excuse as is referred to in s219 of the *Justices Act* 1958, and by virtue of that provision no proof in relation to such excuse is required on the part of the informant, it being open to be proved by the defendant: see *Barritt v Baker* [1948] VicLawRp 85; [1948] VLR 491; [1949] ALR 144.

In my opinion, the respondent does not, by his possession of a genuinely held inability to form a preference (if one assumes for this purpose that the evidence justified a finding of fact to this effect) thereby gain immunity from the sanction imposed by s128A(12) if he fails to vote. The voting is certainly preferential (s124), but it does not follow that a subjective incapacity on the part of a voter to determine that he prefers one candidate in an election to another affords a valid and sufficient reason for failing to vote.

Now it is true that Higgins J in *Judd v McKeon* [1926] HCA 33; (1926) 38 CLR 380; [1926] ALR 389, did so hold in a passage replete with graphic example. His Honour (at CLR p388) said:

> "...if the elector has in truth no preference, that fact would, in my opinion, constitute a valid and sufficient reason. It is to be presumed in favour of Parliament, unless it clearly say the contrary, that the Act of Parliament does not compel a man to say that he has a preference when he has none—does not compel him to tell a lie. If in what is obviously a labour constituency there were two labour candidates and an anti-labour elector regarded one labour candidate as being as bad as the other, this would, in my opinion, be a valid reason for declining to vote. If Colonel Newcome, after the well-known visit to the club with Clive, were asked to say which of two equally foul-mouthed members he preferred to have on the committee, would he not be justified, in the eyes of reasonable men, in saying, 'I prefer neither'? What if John the Baptist were asked which he preferred—Herod or Herodias? In the position which I suggest, he could not say that one was blacker than the other, for to him they appear to be both as black as pitch."

That case concerned the question (additional to an attack upon s128A as being beyond power, but as to which the court was unanimously of the view that the section was valid) as to whether an elector had a valid and sufficient reason for not voting, when each of the candidates possessed political opinions that were or belonged to a party whose principles were as anathema to the elector. In a joint judgment Knox, CJ, Gavan Duffy and Starke JJ, contended themselves with the expression of an opinion that the elector's stated reasons amounted to no more than a statement that his own party in the circumstances prohibited him from voting. Or, at best, they represented the elector's objection to the social order of the community in which he lived. In neither circumstance could such reasons amount to a lawful exculpation from liability to vote.

The remaining two members of the Bench, Isaacs and Rich JJ, examined this aspect a little more fully. Yet, neither (whilst agreeing that the appellant had not shown a valid and sufficient reason for not voting) has said in terms that an inability on the part of an elector to form a preference among candidates failed to provide that elector with an exculpatory excuse for not voting. Perhaps this was the explanation for the respondent in his citation of *Judd v McKeon, supra*, referring the Stipendiary Magistrate in the court below to no more than the dissenting judgment of Higgins J.

Isaacs and Rich JJ, each thought that the fact that no candidate met with the approval of the appellant in that case did not relieve him from his statutory obligation to record his opinion as to his relative preference for those candidates. If that meant that those judges found it unnecessary to consider whether an inability to reach an opinion as to the relative preference amounted to a defence, because that was not really the appellant's argument in *Judd's Case*, then it may be that

the conclusions of Higgins J, to that effect are merely *obiter* and as such, whilst of persuasive authority, are not binding upon me. However, I do not think that those conclusions of Higgins J, are *obiter*, and I believe they represent a direct conflict with the stated views at least of Isaacs and Rich JJ. Certainly Higgins J himself appears to have thought so. Whilst conceding that the appellant in that case had not expressly said that he had no preference and had not even used the word "preference", Higgins J thought that that, in effect, was nevertheless what the elector was saying when he said that none of the candidates met with his approval.

I think that the reasons given by both Isaacs and Rich, JJ, show that they each thought that it was just such a contention that they believed could not render an elector immune from conviction for failing to vote. In other words, the whole tenor of each of the judgments shows they were not stopping short of such a view and were merely saying that non-approval of all candidates is an insufficient excuse. That much is clear, I think, in the case of Isaacs J, from the illustrations he has given of what is comprehended by the expression "valid and sufficient reason". It is clear in the case of Rich J. I think, by his employment of Horatian satire so as to show that that learned judge did not think it possible to say (at least so as successfully to establish a valid and sufficient reason for not voting) that the preferential choice facing any elector could be equated with the notional dilemma facing a Thackeray-created character. His Honour plainly thought that it was not open to say both or all candidates were "as black as pitch". Just as perfection is unattainable, so too is complete imperfection. The gradation of demerits in everyone, including prospective parliamentarians, is infinite, and so no one individual will compare identically with another—even in denigration.

I think, therefore, that Higgins J's dissent is a true dissent. I think that, of the court, certainly Isaacs and Rich JJ differ from Higgins J, on a matter of fundamental interpretation of the words of s128A(12)(a) in relation to a fact situation that directly governs the present case. It follows, of course, that I am bound, as was the court below, to follow the decision of a majority of the High Court which has application to the present case.

If I might respectfully say so, it seems to me that what, for the reasons I have endeavoured to state, I apprehend to be the majority view in *Judd's Case*, where an elector genuinely says he cannot form a preference, is a correct view. Perhaps the legislation in such a case is not compelling a man "to tell a lie". To record an informal vote is not an offence. To fail to mark a ballot paper so as to show preferences as directed in s124 is not an offence. What is made an offence is a failure "to vote" (s128A(12)(a)), that is to obtain a ballot paper (which in reality is what s128A(2) and reg 75 and form 39 of the *Electoral and Referendum Regulations* create as the detectable offence), as distinct from a failure by the elector "to record his vote" which is the notably different expression used, perhaps not insignificantly, in s128A(1). Why I think that Isaacs and Rich JJ have, as I say with the greatest respect, expressed the correct view is that it is a view that conforms with what I understand is inherent in the statutory requirement of compulsory voting. That concept is not concerned with "likes and dislikes". What an elector is told is that he must have A or B—he cannot have both. He is not being asked, "Do you like A or B?"; he is being told, "You must have A or B, and you must make a choice between them". This is a statutory injunction, and it follows that it must be a corollary of that enjoinder that the same statute is not permitting some philosophical or intellectual inability to differentiate between candidates to amount to a valid and sufficient reason for not voting.

Accordingly, the order nisi will be made absolute. The order of the Magistrates' Court at Cheltenham dismissing the information will be set aside. The respondent will be convicted of failing to vote without a valid and sufficient reason and fined one dollar. Order that the costs of the appellant (including all reserved costs) be taxed, and when taxed, be paid by the respondent subject to s161 of the *Justices Act* 1958.

Solicitor for the informant: HE Renfree, Crown Solicitor for the Commonwealth.