21/71

HIGH COURT OF AUSTRALIA

FADERSON v BRIDGER

Barwick CJ, McTiernan and Owen JJ

6 October 1971 — [1971] HCA 46; (1971) 126 CLR 271; [1972] ALR 162; 45 ALJR 570

PARLIAMENTARY ELECTIONS (CTH) – COMPULSORY VOTING – ELECTION FOR SENATE – PREFERENTIAL VOTING – FAILURE TO VOTE – NO PREFERENCE HELD AS BETWEEN CANDIDATES – WHETHER "A VALID AND SUFFICIENT REASON" FOR FAILURE TO VOTE – PERSON CONVICTED BY MAGISTRATE FOR FAILING TO VOTE – WHETHER MAGISTRATE IN ERROR: *COMMONWEALTH ELECTORAL ACT* 1918-1966, SS123, 128A (12).

HELD: Appeal dismissed with costs.
1. The finding of the magistrate that the appellant did not "have any preference amongst the candidates", did not carry the appellant to the point where it could be said that he could not mark the ballot paper in an order of preference. However much the elector may have said he had no personal preference for any candidate, that none of them suited him, he was not asked that question nor required to express by his vote that opinion. He was asked to express a preference amongst those who were available for election, that is, to state which of them he preferred, if he must have one or more of them as Parliamentary representatives, as he must, and to mark down his vote in an order of preference of them.

2. A 'valid and sufficient reason' meant some reason which was not excluded by law and was, in the circumstances, a reasonable excuse for not voting. If it be, as in this case, an open challenge to the very essence of the enactment, it was excluded by law and not valid.
***Judd v McKean* [1926] HCA 33; (1926) 38 CLR 380; 32 ALR 389, per Isaacs J applied.**

3. Accordingly, the Magistrate was right in finding the charge proved.

BARWICK CJ: The appellant was convicted by a magistrate for an offence of failing to vote at an election without a valid and sufficient reason for such failure.

2. The appellant gave evidence before the magistrate to the effect that he could not do as the ballot paper would have required him to do, it being a Senate election involving the expression of preferences. He could not do this he said because he had no preference, and that if he had been forced to state his preference he would have been telling a lie.

3. The appellant did not attend at any electoral booth and obtain a ballot paper.

4. The magistrate found that the appellant did not vote and that his reason for not voting was that he did not have any preference amongst the candidates.

5. Mr Forsyth has assisted us very considerably and has put before us an argument to the effect that the inability of the voter if accepted as a fact to form any preference amongst the candidates is a valid and sufficient reason for failing to vote. Consequently the conviction ought to be set aside.

6. We have not found it necessary to ask counsel for the respondent to assist us, as I formed the conclusion, and so I understand have my brother Justices, that there is no substance in the arguments which have been put before us, although put before us very clearly and expertly.

7. Section 128A places a duty on every elector to record his vote. This is done by attending at a polling booth, accepting a ballot paper, and, as s119 provides, marking it and depositing it in the ballot box. A failure to vote therefore involves a failure to attend, accept the ballot paper and having marked it, to put it in the ballot box. Of course there is no offence committed by not marking the ballot paper in such a fashion that the elector's vote is in law a valid vote.

8. Section 123 in relation to a Senate election requires the voter to "place the number 1 in the square opposite the name of the candidate for whom he votes as his first preference", all the remaining squares to be marked with successive numbers as the voter determines as contingent votes.

9. The first thing I should like to say is that the finding of the magistrate that the appellant did not "have any preference amongst the candidates", in my opinion, does not carry the appellant to the point where it can be said that he could not mark the ballot paper in an order of preference. However much the elector may say he has no personal preference for any candidate, that none of them will suit him, he is not asked that question nor required to express by his vote that opinion. He is asked to express a preference amongst those who are available for election, that is, to state which of them he prefers, if he must have one or more of them as Parliamentary representatives, as he must, and to mark down his vote in an order of preference of them. In that respect I would adopt if I might a sentence from the judgment of Crockett J in *Lubcke v Little* [1970] VicRp 99; (1970) VR 807, at p811:

> "Just as perfection is unobtainable, so too is complete imperfection. The gradation of de-merits in everyone, including prospective parliamentarians, is infinite and so no one individual will compare identically with another — even in denigration."

To face the voter with a list of names of persons, none of whom he may like or really want to represent him and ask him to indicate a preference amongst them does not present him with a task that he cannot perform.

10. The case in my opinion is covered by what was decided in *Judd v McKeon* [1926] HCA 33; (1926) 38 CLR 380; 32 ALR 389. It is quite true that in that case the elector laid some stress on the compulsive effect of his membership of a political party in relation to his ability to choose a candidate but the majority, in my opinion, indicated that the voting obligation did not involve him in choice in the sense of selection between alternatives, one of which was suitable to him. In the judgment of Knox CJ, Gavan Duffy J and Starke J it is said that:

> "In common parlance 'to choose' means no more than to make a selection between different things or alternatives submitted, to take by preference out of all that are available. As an illustration of the meaning of the corresponding noun 'choice' the *Oxford Dictionary* quotes the phrase 'I have even thee thy choice of the manner in which thou wilt die,' and this use of the word seems to exclude the idea that a right of choice can only be said to be given when one or other of the alternatives submitted is desired by the person who is to exercise the right, or, in other words, to choose between them." (1926) 38 CLR 380, at p383.

Although it is true that the majority of the Court did indicate that the compulsive quality of membership of the political party felt by the elector was not an adequate excuse, the reasons for judgment from which I have just quoted went on to say–

> "But if the reasons be taken as representing the individual views of the appellant they amount to no more than the expression of an objection to the social order of the community in which he lives." (1926) 38 CLR 380, at p384.

11. However, Isaacs J, in his judgment, did deal with the nature of a valid and sufficient reason in passages that I think that I should quote. His Honour said this:

> "But the opportunity exists." (That is the opportunity for all persons to be candidates.) "And when all opportunities are reduced to the actual candidatures and the time comes for each constituency to return its quota to the national Parliament, there is no force whatever in the contention that a valid and sufficient reason exists for non-compliance with the primary duty of voting, merely because no one of the ultimate candidates meets with the approval of the given elector. If that were admitted as a valid and sufficient reason, compulsory voting would be practically impossible." (1926) 38 CLR 380, at p386.

If I may here interpolate, this appellant really says that he is not required to vote because there is no one of the ultimate candidates who meets with his approval. It is that reason, he says, which disables him from expressing a preference. Later on, Isaacs J says this:

> "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, as in this case, an open challenge

> to the very essence of the enactment, it is, of course, excluded by law and not valid."
> (1926) 38 CLR 380, at p386.

12. In my opinion the argument in this case really amounts to this: that this elector says he was under no duty to vote because in fact no candidate met with his approval; all of them met equally with his disapproval. That, to my mind, is what Isaacs J refers to as "an open challenge to the very essence of the enactment". Therefore what I have just read from his Honour's judgment in *Judd's Case* [1926] HCA 33; (1926) 38 CLR 380; 32 ALR 389 seems to me to fit this case.

13. Higgins J, of course, went the whole distance that the appellant would wish to go: but he was plainly in the minority. Rich J (1926) 38 CLR 380, at p390, in referring to the "compleat" candidate, seems to me to have been referring to that appellant's reasons as expressing his individual opinion and was expressing a view which precludes the acceptance of the argument of the appellant in this case.

14. Accordingly, in my opinion the magistrate was right and this appeal ought to be dismissed.

McTIERNAN J: I agree with the reasons which have been given by the Chief Justice and I do not wish to add anything to what his Honour said.

OWEN J: I agree that the appeal should be dismissed. The point raised by the appellant is, I think, concluded against him by the judgments of the majority of this Court in *Judd's Case* [1926] HCA 33; (1926) 38 CLR 380 and in particular by the judgment of Isaacs J in that case.

ORDER: Appeal dismissed with costs.
