Heine v. Radio Station WSZO and Jordon

Supreme Court
Burnett C.J.; Kondo and Gunatilaka, High Court Associate Justices, sitting by designation
6 June 1988

Pleading and practice—facts of appeal are moot—actual controversy must exist at stage of appellate review—whether appeal concerns public interest and a substantial, recurring controversy.
Administrative law—unwritten rules of radio station—right of candidate to equal time broadcast—whether unwritten rules satisfied statutory minima.
Fundamental rights—free speech—right of candidate to equal time radio broadcast.

The appellant was a candidate for election to the national legislature (the Nitijela) in 1987. Trust Territory statutes mandate "full access", "an opportunity to respond", and at least one hour in radio broadcast time. The appellant was denied his broadcast opportunity, and lost his application for an injunction, in the Court below, because the challenge was brought too late.

HELD:

(1) Although his application was, in fact, now moot, the rules of radio broadcasting of candidates' material is an actual controversy of a recurring, substantial sort, of great public interest, and should be adjudicated. *Roe* v. *Wade* 410 U.S. 113, 35 L.Ed. 2d. 147, 93 S. Ct. 705 (1973) applied.

(2) The rules, as unwritten policy, did not comply with existing law. The Court ordered the appellees to promulgate rules before the next election which comply with the law.

Other case referred to in judgment:
Roe v. *Wade* 410 U.S. 113, 35 L. Ed. 2d. 147 93 S. Ct. 705 (1973)

Legislation referred to in judgment:
Marshall Islands Administrative Procedure Act 1979 35 T.T.C. Ch. 2, sections 51, 52, and 53

Other sources referred to in judgment:
2 Am. Jur. 2d., "Appeal and Error", section 768

BURNETT C.J.

Judgment:

The appellant was a candidate for election to the Nitijela in the November 1987 election. He appeals from an order of the High Court which denied his petition for a mandatory injunction to require appellees to permit him access to radio facilities for

the broadcast of his political speech, at his previously scheduled time, 7.15 p.m., 15 November 1987.

The High Court finding was that appellant had slept on his rights, having chosen to challenge rules of the appellees too late in the day.

We say, first, that we cannot disturb the ruling of the High Court, since the basic issue raised by the appellant is, clearly, moot.

This appeal brings into question the announced rules of the appellee station as to what was required of candidates wishing to use public broadcast facilities. There appear to be no written rules.

It is agreed that all candidates, according to unwritten policy, were required to submit their tape for broadcast (not more than thirty minutes), before 5.00 p.m. on 10 November 1987. The tape was required to remain in the appellees' possession until broadcast time, on 15 November 1987.

Having reserved a time-slot, and delivered his tape on 10 November, the appellant's campaign manager was then returned the tape, being told that the full thirty minutes was not used and that the time could be used with either music, or additional speech. The tape was held and not returned to the station until the appellant learned that his speech would not be broadcast.

The appellant insists that the entire procedure is contrary to law, and cites 35 T.T.C. Ch. 2, still applicable to the Republic of the Marshall Islands.

35 T.T.C., section 51 requires that "full access" be given to any candidate for public office, and that any "program . . . shall be broadcast as submitted without any preview or censorship . . .".

35 T.T.C., section 52 provides that "Each station may promulgate rules. . . . The limit placed upon the duration of programs shall not be less than one hour".

The following section makes clear that any individual "made the subject of criticism . . . shall be allowed an opportunity to respond to or rebut such criticism".

It is obvious that when the prime broadcast time is scheduled for the night before the election (and time limited to only half that required by law) the only opportunity for rebuttal given by 35 T.T.C. 53 is given those with a late time-slot.

We have no particular problem with the pre-broadcast retention of the tape, so long as it is retained only for the purpose of determining the time for scheduling purposes. If used for censorship, it would be clearly improper.

There seems to be no doubt that the announced "rules" for political broadcast do not meet the law.

Having found the basic appeal to be moot, we are left with the question as to whether the fundamental inquiry is of such a nature as to require us to retain it as a matter of "public interest".

The appellant urges us to decide the basic question of compliance of station rules with the law; as a possibly recurring problem, it could, again, escape appellate review. We agree.

An appeal is not moot where it involves a controversy which is likely to recur, not as to parties before the Court, but with respect to others who are most certainly to be later before the Court.

The State decisions on this question are unanimous in holding that an appellate court should retain jurisdiction in the face of mootness, when there is involved a recurring controversy of great public interest (2 Am. Jur. 2d. appeal and error Sec. 768).

The definitive rule was set by the Supreme Court in *Roe* v. *Wade* 93 S. Ct. (1973):

> The usual rule in federal cases is that an actual controversy must exist at stages o appellate or certiorari review, and not simply at the date the action is initiated.

The *Roe* v. *Wade* case set forth a classic situation in which there could well be a recurring controversy without effective appellate review, and so held it reviewable.

We find here a situation where there is substantial, recurring public interest and where, in the ordinary course of events, the challenge might well escape ordinary appellate review.

We find, therefore: that the question presented is not barred from appellate review as moot; that the decision of the High Court will stand as to the primary challenge; and that the announced rules (or policy) of the appellees are contrary to law, and cannot stand.

It is therefore ordered that the appeal is dismissed, as moot. The appellees will, however, prior to the next scheduled election, promulgate rules to govern succeeding elections and the broadcast of candidates speeches in accord with applicable law. Such rules will be adopted, and promulgated, in accord with the Marshall Islands Administrative Procedure Act of 1979 (P.L. 1979-23).