

**LILIA PEÑA, NENITA TISBE, RODRIGO GELLE, CARLOS LEYNES AND
ROGELIO MAGSINO, PETITIONERS, VS. HON. DAMASO S. TENGCO,
JUDGE, BRANCH II, COURT OF FIRST INSTANCE OF BATANGAS, AND
WE...**

G.R. No. L-28395. December 26, 1967

Ponente: SANCHEZ, J.

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SANCHEZ, J.:

Candidates, amongst others, for Councilor of Lipa City in the November 14, 1967 elections were petitioner Rogelio Magsino, independent, and respondent Wenceslao Vivas of the Nacionalista Party.

On November 23, 1967, upon the averment that a discrepancy exists in the number of votes obtained by petitioner Magsino in the election returns submitted by the Municipal Treasurer of Lipa City to the board of canvassers, on the one hand, and the official report of Magsino's watcher duly signed by all the members of the board of inspectors and the election returns furnished the Liberal Party, on the other, Magsino sought a recount of votes in a number of precincts [Election Case 1888, Court of First Instance of Batangas, Branch II]. On November 24, 1967, respondent judge did the following: He granted a recount of Magsino's votes solely for precincts 94 and 100; gave orders that the ballot boxes for said precincts be opened in open court; had the votes of Magsino actually counted in his (the judge's) presence and in the presence of the interested parties; and issued thereafter a written order directing the board of canvassers "to include and admit in their record as basis for their canvass that Petitioner, Rogelio Magsino, obtained from Precinct No. 100, 42 votes and from Precinct No. 94, 69 votes in his favor." Subsequently, however, i.e., on November 27, 1967, respondent judge, taking note of the rule that copies of statements given to the political parties may not serve as basis for recount, *motu proprio*, set aside his order of November 24, 1967.

On November 25, 1967, respondent Wenceslao Vivas likewise petitioned for a recount of the votes he obtained in precinct 94 of Lipa City [Election Case 1890 of the same court]. His ground therefor was that "whereas in the ballots actually read and recorded by petitioner in the course of the recounting conducted by this Court under Election Case No. 1888 on November 24, 1967, he obtained 64 votes in said precinct," the returns submitted by the board of election inspectors to the city board of canvassers showed that he only obtained 60 votes. Respondent judge likewise denied this petition of Vivas.

Meanwhile, on November 30, 1967, all the members of the board of election inspectors (which includes the poll clerk) of said precinct 94 went to court [Election Case 1895, Court of First Instance of Batangas, Branch II] upon a verified petition with a prayer that the erroneous copies of the election returns for the precinct aforesaid be ordered corrected by changing the entry of the votes obtained by petitioner Rogelio Magsino from 61 to 69 votes. They ascribed the error to fatigue, lack of sleep, and physical exhaustion coupled with poor lighting. They also aver that in the recount of November 24, 1967, in Election Case 1888, the error they committed was confirmed.

But the court, acting on the foregoing petition, on December 6, 1967, issued an order in said Election Case 1895

granting not only the board's petition for correction with reference to petitioner Magsino, as prayed for therein, but also directed the board of canvassers to credit Wenceslao Vivas with 64 votes instead of 60 votes appearing in the election returns for precinct 94. The court's reason for directing the correction as to the votes obtained by Vivas - in spite of the fact that the board did not petition for this - is that during the recounting in Election Case 1888, Vivas made of record "that he obtained 64 votes although this was not given due consideration during that hearing."

A move by petitioner Magsino to reconsider the portion of the order of December 6, 1967 in Election Case 1895 just adverted to, to eliminate therefrom the directive to the board of canvassers to credit respondent Wenceslao Vivas with 64 votes instead of 60, was thwarted below.

Offshoot is the present original petition before this Court for certiorari with a prayer for a writ of preliminary injunction. We issued a restraining order. Upon the return of respondent Vivas, and the oral arguments at the hearing held on December 19, 1967, the case is now before us for decision on the merits.

1. The order of respondent judge in Election Case 1895 (instituted by all the members of the board of inspectors) directing the correction of the election returns in precinct 94 by increasing the number of votes received by petitioner Magsino from 61 to 69, in our opinion, is well taken. We perceive no abuse of discretion on the part of respondent judge. There is the impressive unanimity on the part of the Chairman of the board, the inspectors, and the poll clerk - in the petition sub-scribed and sworn to by all of them - that actually a mistake was committed. The order in this respect is in line with the provisions of Section 154 of the Revised Election Code,[1] and the jurisprudence of this Court that correction may be ordered only upon the unanimous consent of all the members of the board.[2] Of course, in the exercise of its discretion whether to grant or deny the authority to correct mis-takes, a judge may satisfy himself as to the truth of the inspectors' petition and of the error.[3] The judge need not open the ballot boxes to ascertain the truth of the inspectors' affidavits.[4] But where, as in this case, the ballot boxes were actually opened and the recount of the votes for Magsino in fact made and the error of the inspectors confirmed, the order of the judge to amend the returns as to said candidate is more than justified.

2. But respondent Wenceslao Vivas in effect argues that it would be unjust to him if respondent judge's order of December 6, 1967 be dismembered, such that correction of the returns for precinct 94 be allowed as to petitioner and denied as to him. Really, if official recount of the votes for Vivas were actually made and it be an established fact that Vivas in that precinct obtained 64 votes instead of 60 which appear in the returns, his pose merits serious consideration. Because, ad-herence to form over substance is not to be exalted.

But the claim of respondent Vivas that the votes he garnered in precinct 94 should be increased from 60 to 64 loses potency on the face of the fact that respondent judge in his order of November 24, 1967 (Case 1888) did not make a finding that in the recount then made, the votes tallied for Vivas actually numbered 64. His own petition for recount in Election Case 1890 states that his reason for the recount is the fact that "the ballots were actually read and recorded petitioner" in the course of the recounting in Election Case 1888. This statement is echoed by respondent judge himself in the order of December 6, 1967 in Election Case 1895 when he made the statement therein that during the recounting in Election Case 1888, the increased number of votes of Vivas "was made of record by him" (Vivas). It is well to recall at this point that the board of inspectors after the recount in Election Case 1888 unanimously asked for a correction of the returns of the votes cast for petitioner Magsino. But the same board of inspectors failed to move in reference to the alleged increased votes of respondent Vivas. And, we are loathe to tag the members of the board of inspectors with partiality. For, none is suggested in the record. To use as basis for correction of returns, Vivas' statement as to the votes he received in precinct 94, is to pass the line which divides averment from estab-lished fact.

There was grave abuse of discretion when respondent judge, in his order of December 6, 1967, directed the correction of the returns from precinct 94 insofar as respondent Wenceslao Vivas is concerned, to increase the number of votes received by said respondent from 60 votes to 64 votes. Because, as petitioner puts it: "If the entry of '60' votes for herein respondent Wenceslao Vivas in the Election Return of Precinct No. 94 is amended to '64', he would have 2 votes more than those of herein Petitioner Rogelio Magsino; otherwise, the latter would have 2 votes more than those of the former."

For the reasons given, the petition for a writ of certiorari is granted; the order of respondent judge of December 6, 1967 in Election Case No. 1895 of the Court of First Instance of Batangas, Branch II, only insofar as it directs the correction of the election returns with respect to respondent Wenceslao Vivas, is hereby declared null and void; and the restraining order heretofore issued herein is hereby made permanent.

Costs against respondent Wenceslao Vivas.

SO ORDERED.

Concepcion, C.J., Reyes, JBL, Dizon, Makalintal, Bengzon, Zaldivar, Ruiz Castro, Angeles, and Fernando, JJ., concur.

[1] Section 154 of the Revised Election Code reads: "Alteration in the state-ment. - After the announcement of the result of the election in the poll-ing place, the board of inspectors shall not make any alteration or amendment in any of its statements, unless it be so ordered by a competent court."

[2] Benitez vs. Paredes and Dizon, 52 Phil. 1, 11; Aguilar vs. Navarro, 55 Phil. 898, 903; Board of Election Inspectors of Boñgabon vs. Sison, 55 Phil. 914, 918; Lacson vs. Commission on Elections, L-16261, December 28, 1959; Gumpal vs. The Court of First Instance of Isabela, L-16409 and L-16416, November 29, 1960; Astilla vs. Asuncion, L-22246, February 29, 1964; Javier vs. The Court of First Instance of Antique, L-24747, February 28, 1966.

[3] Board of Election Inspectors of Bongabon vs. Sison, supra, at p. 917; Rabe vs. Commission on Elections, L-16341 and L-16470, May 25, 1960.

[4] Rabe vs. Commission on Elections, supra.

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