

JOSE TUBURAN, PETITIONER, VS. FRANK BALLENER AND THE COMMISSION ON ELECTIONS, RESPONDENTS.

G.R. No. L-28751. August 30, 1968

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

In the elections of November 14, 1967 petitioner Jose Tuburan and respondent Frank Ballener were among the seven candidates for the office of Mayor of the newly created municipality of President Roxas, Cotabato. The first canvass was made on December 13, 1967 by the provincial board sitting as municipal board of canvassers, and on the basis thereof Ballener was proclaimed duly elected. Tuburan, through counsel, interposed an objection to the proclamation and asked that it be suspended on the ground that the election return from precinct No. 18 of the said municipality which was used in the canvass was on its face tampered with and falsified, the falsification consisting of the super-imposition in blue pencil of the name of another candidate, Jose Rivalal, over the name of petitioner, thereby crediting to the former the sixty-four (64) votes obtained by the latter. In the same manner petitioner's name was super-imposed over that of Jose Rivalal, making it appear that the former received only two (2) votes, which was the number apparently obtained by the latter.

That the tampering and falsification, if true, involved a sufficient number of votes to affect the results of the election is not disputed. The sixty-four (64) votes, if credited to petitioner, would make him the winner.

The objection was, however, disregarded and Ballener was proclaimed, for which reason petitioner dispatched a telegram to the Commission on Elections on December 16, 1967, alleging the foregoing facts, with a statement that a formal petition would follow. On December 21, 1967 the petition was prepared, asking that the canvass and proclamation of December 13 be annulled and that another canvass be made on the basis of a true and authentic copy of the election return from precinct No. 18. The petition was hand-carried to Manila for filing by a messenger sent by petitioner, but for some reason was not actually filed until the afternoon of December 26. In the meantime, so petitioner avers, he remained in Cotabato, and failing to receive news about the fate of his petition and becoming apprehensive that the period for filing an election protest would expire on December 27, 1967, filed such a protest in the Court of First Instance of Cotabato in the afternoon of December 26. The step he took, he alleges in his petition before us, was a precautionary measure for the protection of his rights.

The petition before the Commission on Elections was heard on December 28. The election return used in the canvass was produced in evidence and compared by the Commission with the copy in its possession. The said copy was clean and showed no erasures or superimpositions. Also submitted in evidence were the following:

(1) An indorsement, dated December 15, 1967, by the municipal treasurer of Kidapawan, Cotabato, acting as deputy of the Commission on Elections for the newly created municipality of President Roxas, stating that according to the tally board in precinct No. 18, duly signed by the members of the board of inspectors, Jose Rivalal obtained one (1) vote (not two as indicated in the questioned return) and petitioner Jose Tuburan obtained sixty-four (64) votes.

(2) A sworn statement of the chairman of the said board of inspectors attesting to the fact that the original election return for precinct No. 18, as accomplished and signed by her and by the other members, had no erasures or superimpositions in blue pencil, particularly that of the name "Rival" over the name "Tuburan," and vice-versa, and that Tuburan obtained sixty-four (64) votes in said precinct.

(3) A similar sworn statement of the poll clerk who, like the chairman, was a public school teacher.

(4) A sworn statement of Jose Rival himself to the effect that in precinct No. 18 he obtained only one (1) vote - a fact personally known to him because he copied the results of the canvassing from the tally board - while Jose Tuburan received sixty-four votes.

In view of the evidence presented before it the Commission on Elections, on December 28, 1967, resolved to set aside the proclamation of respondent Frank Ballener and directed the provincial board of Cotabato, acting as municipal board of canvassers, "to reconvene and recanvass precinct No. 18 of the said municipality (of President Roxas) using the election returns copy for the Commission on Elections and thereafter, to proclaim the winning candidates per canvass made."

The new canvass was carried out on December 31, 1967. Petitioner was credited with sixty-four (64) votes in said precinct and proclaimed elected on the same date. The next day, January 1, 1968, he took his oath and assumed the office of Municipal Mayor.

On January 13, 1968 respondent Ballener filed an election-protest against petitioner in the Court of First Instance of Cotabato. On January 31, 1968 he filed with the Commission on Elections a motion for reconsideration of its resolution of December 28 on the ground that the said body had no jurisdiction to entertain Tuburan's petition to annul the proclamation of Ballener, since at the time said petition was filed there was already a pending election protest instituted by petitioner.

Petitioner opposed the motion, but the Commission granted it in a resolution dated February 23, 1968, giving petitioner, however, a period of 10 days within which "to go to the Supreme Court for appropriate relief." Petitioner moved to reconsider but was turned down, and hence commenced the instant petition for certiorari with preliminary injunction. The petition was given due course and the injunction was issued.

The issues posed by the parties are two: (1) whether or not the Commission on Elections had jurisdiction to entertain Tuburan's petition to annul Ballener's proclamation, considering that when it was filed there was already a pending election protest lodged by Tuburan with the Cotabato Court of First Instance; and (2) whether or not Ballener's motion for reconsideration January 31, 1968 was filed beyond the reglementary period.

On the first issue respondents maintain that the Commission on Elections was without jurisdiction. The general rule is, of course, that once a Court of First Instance has acquired jurisdiction by virtue of the filing of an election protest all questions relative thereto must be decided in the case itself and not in a separate proceeding before a different forum (*Reyes vs. Reyes*, G. R. No. L-28476, January 31, 1968; *Acain vs. Board of Canvassers*, G. R. No. L-16445, May 23, 1960).

The peculiar circumstances obtaining in the present case, in our opinion, justify its being treated as an exception to the general rule. In *Reyes vs. Reyes*, the petition for annulment of the proclamation was filed in the Commission on Elections on December 2, 1967, and the election protest was filed by the same petitioner in the Court of First Instance on December 4. There was clearly a deliberate intent to abandon the proceeding in the Commission by a subsequent voluntary submission of the same question to the Court. A choice or option was open to the party seeking relief, with full knowledge of the fact that when he filed his protest his petition for annulment had already been lodged. In the present case there is reason to believe petitioner's allegation that he

went to the Court of First Instance on December 26, 1967 merely as a precautionary measure for the protection of his rights, because the period for filing a protest was due to expire the next day, December 27, and he had yet no knowledge or information as to whether or not the formal petition he had sent by personal courier to the Commission since December 21 had actually been filed. The uncertainties of travel and transportation from Cotabato to Manila and the fact that two successive holidays intervened^[1] could really have given cause for apprehension; and the step taken by petitioner to solve the dilemma in which he found himself should not be taken as necessarily foreclosing the remedy he had first sought and which, after all, would be not only adequate but the most expeditious under the circumstances.

There is one overriding fact that projects itself above all others: the evidence of falsification, on which presumably the Commission on Elections based its resolution December 28, 1967, is strong and convincing, and there is no attempt to dispute its veracity for any reference to contrary evidence which if presented would tend to overthrow the said resolution on the merits. The annulment of petitioner's proclamation and the reinstatement of that of respondent would in effect entrench the latter in the contested office and shift the burden of attack to the former notwithstanding the import of the finding the Commission that respondent's right rests upon the falsified return from precinct No. 18. The situation runs counter to the elementary norms of justice and fair play, and, should not be countenanced under the circumstances of this case.

The second issue is procedural in nature. The Commission on Elections annulled respondent's proclamation by resolution dated December 28, 1967. Said respondent filed his motion to reconsider thirty-four days thereafter, on January 31, 1968, or beyond the ten-day reglementary period and therefore the resolution had already become final.

Respondent Ballener contends that since he was served notice of said resolution merely by telegram^[2] the service was defective and hence the period within which to file a motion for reconsideration had not even commenced to run when he did file his motion on January 31, 1968. A number of facts militate against this contention. First, respondent was represented by counsel in the recanvass held on December 31, 1967, and raised no objection thereto on the ground of lack of proper notice. The inference that may be gathered from this is that respondent then considered the telegraphic notice as sufficient. Second, on January 13, 1968 he instituted an election protest against petitioner in the Cotabato Court of First Instance. This again is a re-cognition of petitioner's proclamation, since such a protest may be lodged only against a proclaimed candidate and within fourteen days thereafter (Sec. 174, Rev. Election Code).

Apropos it may be observed that when respondent chose to file a regular election protest it was long before he moved to reconsider the resolution setting aside his proclamation and consequently he was under no apprehension that such a motion might not reach the Commission on time for causes beyond his control. In other words, the protest was not instituted *ad cautelam*; and the rule that an election contest in court forecloses proceedings in the Commission on Elections should, if it has any application here at all, apply to respondent.

The writ prayed for is granted; and the resolution of respondent Commission on Elections dated February 23, 1968 annulling the proclamation of petitioner on December 31, 1967, is set aside. No pronouncement as to costs.

Concepcion, C.J., Reyes, Dizon, Zaldivar and Sanchez, JJ., concur.

[1] December 24 was a Sunday and the next day was Christmas day.

[2] Admittedly received by him on December 28, 1967.

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