

ASUNCION CONUI-OMEGA, PROTESTANT AND APPELLEE, VS. CESAR SAMSON, PROTESTEE AND APPELLANT.

G.R. No. L-21910. November 11, 1963

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

Mrs. Asuncion Conui-Omega and Dr. Cesar Samson were both candidates for the position of councilor in the City of Ormoc in the general elections held on November 10, 1959. After the canvass of the votes made by the city board of canvassers on November 23, 1959, the result showed that Samson had garnered enough votes to be proclaimed as the last of the eight councilors composing the city council with a plurality of three votes over his nearest opponent, Mrs. Asuncion Conui-Omega. On the same date, Mrs. Conui-Omega filed with the Court of First Instance of Leyte a petition for recounting in Precincts Nos. 17 and 28 of said city, which was later amended to include the votes cast in Precinct No. 8. The court gave due course to the petition and issued an order enjoining the board of canvassers from further proceeding with the canvass while it ordered the board to open the ballot boxes and make a recount to determine the candidate duly elected.

Considering that the action taken was illegal, Samson instituted a petition for certiorari and prohibition before the Supreme Court wherein, after due hearing, it rendered decision setting aside the two orders disputed in the case. The decision was promulgated on January 30, 1960, which became final and executory on February 19, 1960. During the pendency, however, of the certiorari case, or more particularly on December 29, 1959, upon authority of the court a quo, the city board of canvassers made a partial proclamation of the councilors-elect on the basis of the statement of the result of the election made on November 23, 1959, leaving unproclaimed the contested eighth councilor-elect. After the partial proclamation, the city board of canvassers adjourned sine die. The decision of the Supreme Court in the certiorari case having become final, Dr. Cesar Samson was proclaimed as eighth councilor-elect on June 2, 1960 by the board of canvassers composed not of the previous members but of the newly elected councilors, together with the other authorized city officials, by authority of the Commission on Elections. And on the same date, Dr. Samson took his oath and assumed office.

On June 14, 1960, Mrs. Asuncion Conui-Omega filed a motion of protest with the court a quo contesting the election of Dr. Cesar Samson, which was amended on June 16, 1960. Summons was served on June 20, 1960, stating therein that protestee may file his answer within the period of 15 days. On June 28, 1960, the protestee, instead of filing an answer, filed a motion to dismiss on the ground that the protest was not filed within the 2-week period provided by law. On July 15, 1960, protestant filed an opposition to the motion to dismiss which was denied on the ground that it was filed beyond the period of 5 days from service of summons. Protestee's motion for reconsideration having been denied, he brought the case by certiorari to the Supreme Court which, *motu proprio*, dismissed it for lack of merit. Whereupon, on August 2, 1960, protestee filed his answer to the motion of protest.

After trial, the court a quo rendered decision declaring protestant the duly elected eighth councilor of Ormoc City with a plurality of 42 votes over the protestee, with costs against the latter. Protestee took steps to appeal from the

decision, but because he failed to exert a bona fide effort to correct his original property bond which he reduced without previous authority of the court, the presiding judge dismissed his appeal and declared the decision final and executory. But, having the protestee brought the case before the Court of Appeals on a petition for mandamus, said Court ordered that the appeal be given due course. In the meantime, on August 24, 1960, protestant took her oath of office as councilor on the strength of the judgment rendered in her favor, and the municipal board of Ormoc City approved a resolution recognizing her as the eighth city councilor and admitted her as such in lieu of protestee.

The present appeal is now before this Court upon the certification of the Court of Appeals that the jurisdiction of the court a quo is one of the issues raised therein.

FIRST ASSIGNMENT OF ERROR

In this assignment of error protestee-appellant disputes the jurisdiction of the court a quo over the protest on the ground that said protest was filed beyond the 2-week period from the promulgation of the result of the election as provided for by law. He contends that the proclamation of the result of the election was made by the board of canvassers on December 29, 1959, which should be considered as the one contemplated by law for it contains all the names of the candidates for councilors and the respective votes garnered by each, including those of the protestant and protestee, so much so that copies thereof were furnished all the candidates and were posted in public places pursuant to law, and since protestant-appellee filed her motion of protest only on June 14, 1960, it is contended that the same was filed beyond the 2-week period provided for by law.

It is true that under Section 174 of the Revised Election Code a petition contesting the election of a municipal official-elect shall be filed within two weeks after the proclamation of the result of the election which period is mandatory in the sense that failure to observe it will deprive the court of its jurisdiction over the contest, but there is nothing in this case from which we may infer that the protest was not filed within the aforesaid reglementary period considering that there had been two proclamations made by the city board of canvassers. Note that the first proclamation was made on the basis of the statement of the result of the election made on November 23, 1959, following the motion filed with the court a quo by said board of canvassers in view of the injunction issued by the court a quo in connection with the petition for recount of the votes cast in some precincts which was elevated to the Supreme Court on a petition for certiorari as a result of which the order for recount was set aside in order not to delay the proclamation of the seven councilors whose election was not contested. In other words, the first proclamation made on December 29, 1959, was merely partial leaving aside that which refers to the eighth councilor whose election was contested and was the subject of a recount. But when the recount proceedings were nullified in the certiorari case and the decision became final, the new city board of canvassers was convened and there proceeded with the new canvass resulting in the proclamation of protestee-appellant as the eighth duly elected councilor upon the authority of the Commission on Elections. This second proclamation took place on June 2, 1960, and since the same merely concerned the protestee-appellant, it follows that the motion of protest filed against him by the protestant-appellee on June 14, 1960, is well within the period of two weeks prescribed by law. The peculiar circumstances obtaining in this case cannot be given any other inference or interpretation for to do so would make illusory the protest of protestant-appellee. Certainly, she could not have filed any protest before the proclamation of her opponent, which only took place on June 2, 1960.

SECOND AND THIRD ASSIGNMENTS OF ERROR

These assignments of error have also no legal basis. The record shows that appellant was served with summons on June 20, 1960, but instead of filing an answer he filed a motion to dismiss on June 28, 1960, or 8 days from the service of summons. The law provides that the protestee shall answer the protest within 5 days after service of

summons, or in case there is no summons, from the date of his appearance, and in all cases before the commencement of the hearing. Here a summons was duly served upon protestee and yet he failed to file his answer within the period of five days. The court a quo, therefore, was correct in declaring that protestee shall be deemed to have entered a general denial. The law on this point is clear.

Appellant argues that he was given 15 days within which to file his answer to the protest, but this is merely due to a mistake committed by the clerk of court when he served upon protestee the ordinary form of summons used in civil cases, which error cannot prevail over a specific provision of the law. The provision to the effect that an answer must be filed "in all cases before the commencement of the hearing of the protest" only means that no answer can be filed when the hearing of the protest has started. It does not mean that, if there is summons, the answer can be filed even beyond the period of five days.

FOURTH AND FIFTH ASSIGNMENTS OF ERROR

Appellant contends that the court a quo erred in appreciating the legality or illegality of the ballots cast in his favor in the precincts in question and in permitting appellee to present in evidence the ballot cast in favor of appellant in said precincts which the former failed to produce during the presentation of her evidence in chief and after she had rested her case.

There are abundant authorities in this jurisdiction to the effect that when there is an allegation in an election protest that would require the perusal, examination, or revision of the ballots as evidence, it is the duty of the court to order the opening of the ballot boxes involved if such is necessary to reach a correct decision. And this is justified under the provisions of Section 175 of the Revised Election Code, which are mandatory in nature.^[1] Here, the motion of protest contains sufficient allegations to the effect that frauds, errors and irregularities in the count and canvass of the votes in the precincts in question had been committed, and as long as they refer to the ballots involved in the contested precincts, as in the case here, the trial court is justified in requiring the production of said ballots even if the parties did not deem it necessary to present them in evidence. The only limitation is when the ballots are not involved in the protest. The court a quo did nothing contrary to the limitation of the law on the matter.

SIXTH ASSIGNMENT OF ERROR

Ballots Exhibits A-2 and G-8. These two ballots containing the name "Conui" and "C. Conui" voted for in the proper space for councilors, respectively, were counted by the lower court in favor of Asuncion Conui-Omega under the rule that a ballot where only the surname of the candidate appears is valid (Sec. 149, par. 1, Revised Election Code). We agree with this ruling it appearing that there is no dispute that "Conui" is the maiden surname of appellee. On the second ballot, the initial "C" before "Conui" is the correct initial of appellee's nickname "Conching" (Gonzaga vs. Seno, G. R. No. L-20522, April 23, 1963). In the case of Ochoa vs. Calo (46 Off. Gaz., 2657), it was held that the name "E. Rosales" was valid vote for Elias Ochoa whose maiden name was Elias Rosales. These two ballots were correctly counted for appellee.

SEVENTH ASSIGNMENT OF ERROR

Ballots Exhibits B-1, B-2, G-1, L-4, and L-8. These five ballots cast in Precincts Nos. 12, 17-A and 57, were counted by the lower court in favor of appellee notwithstanding the fact that only her nickname "Conching" or "Concing" appears on the ballot. In support of its ruling, the lower court took into consideration the evidence that appellee was familiarly known with such nickname invoking our ruling in Abrea vs. Lloren (81 Phil., 809, October 28, 1948). However, in the case of Tajanlangit vs. Cazeñas (G.R. No. L-18894, June 30, 1963), we had

occasion to explain the ratio decidendi in the Lloren case regarding the use of nicknames in the sense that where a nickname only is written, without being accompanied by the name or surname of the candidate, the vote should not be given effect in accordance with paragraph 9, Section 149, in connection with Section 34 of the Revised Election Code, which expressly provides that certificates of candidacy shall not contain nicknames of candidates. Following the doctrine laid down in the Tajanlangit case, therefore, these five ballots where only the nickname "Conching" or "Concing" was written should be rejected and deducted from appellee.

EIGHTH ASSIGNMENT OF ERROR

Ballots Exhibits C-1, C-2, C-6, C-7, D, D-2, D-4 D-5, G-3, H-3, H-7, I-2, J-1, K-1, K-2, K-4, L-13 and L-14. These eighteen ballots were admitted by the lower court as valid votes for appellee. Appellant disagrees with such ruling. We have examined each ballot and have reached the following findings:

Ballot Exhibit C-1. This ballot was prepared by a poor writer. On line 5 for councilors, the word "Comga" may be read. The writer might have intended the letter C as initial for appellee's middle name "Conui", connected with the word "Omga" which might have been intended for Omega. We agree with the lower court that the word written by the voter falls under the rule of idem sonans and the vote is valid (Section 149, par. 2, Revised Election Code).

Ballot Exhibit C-2. Appellant contends that this ballot was written by two different persons. On this we entertain serious doubt. The superimposed writing on lines 2 to 6 for councilors was written with heavier pen pressure and bigger letters but we believe that the same was written by the same writer considering that the terminal letter "a" in "Omega", "Parella" and "Ocubilla" on lines 3, 6 and 8 for councilors, respectively, has the same formation as the letter "a" in "Cea" written on line 6 for senators. Resolving the doubt in favor of the validity of the ballot, we agree with the lower court that this is a good ballot for appellee.

Ballot Exhibit C-6. Again, appellant contends that this ballot was written by two different persons. The contention is without basis.

Ballot Exhibit C-7. The word written on line 3 for councilors is "B. Omegas" and not "Bongas" as claimed by appellant. This ballot was properly admitted for appellee under the rule of idem sonans. The erroneous initial "B" does not annul the vote in her favor (Section 149, paragraphs 2 and 6, Revised Election Code).

Ballot Exhibit D. This ballot was written by a poor writer, but we can easily read on line 3 for councilors the word "C. Omuga", not "C. Moga" as appellant claims. We agree with the ruling that this ballot is valid for appellee under the rule of idem sonans (Section 149, par. 2, Revised Election Code).

Ballot Exhibit D-2. Appellant contends that this ballot is marked with erasures in the spaces for mayor and vice-mayor. The contention is without merit because the erasures are innocent and cannot be considered as mark (Section 149, par. 18, Revised Election Code; Sayo vs. Paredes, ETHR Case No. 109, December 28, 1960). We sustain the ruling of the lower court.

Ballot Exhibit D-4. Appellant contends that this ballot should be rejected as a marked ballot because of the name "N. Apas" written on line 7 for councilors. The contention is untenable. The name might have been intended for candidate Abas for councilor, or at most can only be considered as a stray vote which does not invalidate the whole ballot (Section 149, par. 13, Revised Election Code).

Ballot Exhibit D-5. Again, appellant contends that this is a marked ballot because of the name "E. Comejos" written above the crossed-out word "Conjios" on line 1 for councilors. The contention is without merit. Evidently, the first word written "Conejios" was crossed out to correct the spelling to "Conejos". This name shall be counted as a stray vote, Conejos being a candidate for mayor, but shall not invalidate the whole ballot (Section 149, par.

13, Revised Election Code).

Ballot Exhibit G-3. Appellant claims that the surname of appellee on line 5 for councilors was traced under a carbon paper. The claim is without basis. The name "Omega" was clearly written with indelible pencil.

Ballot Exhibit H-3. Appellant contends that this is a marked ballot, the mark consisting of writing the name "R. Mejia", a candidate for vice-mayor, on line 2 for senators, the name "Pelaez" on line 4 for councilors, and because the names of some candidates for councilors were written twice, one in the space for senators and another in the space for councilors. Evidently, the voter made a mistake in first writing the names of the local candidates in the spaces for senators and writing again the names of his candidates for councilors in the proper spaces. The law provides that when the name of candidate appears in two spaces of the ballot, it shall be counted in favor of the candidate for the office with respect to which he is a candidate and the vote for the office for which he is not a candidate shall be counted as stray vote but shall not invalidate the whole ballot (Section 149, pars. 3 and 13, Revised Election Code). This ballot was correctly admitted in favor of appellee.

Ballot Exhibit H-7. This ballot was counted as a valid vote for appellee under the rule of idem sonans. However, we find that only the letters "ACM" were written on line 1 for councilors. The most that we can say is that the first two letters correspond to the initials of Asuncion Conui. The rule for the appreciation of ballots provides that voting with initials only shall not be valid (Section 149, par. 15, Revised Election Code). This ballot should, therefore, be rejected and cannot be counted for appellee.

Ballot Exhibit I-2. Appellant contends that the name "M. Enona" written opposite the printed word councilors renders this ballot as marked. The lower court ruled that this ballot is valid because the alleged mark might have been intended as a vote for M. Canopio, a candidate for councilor. We agree with the ruling that this ballot is valid for appellee who is voted for on line 2 for councilors.

Ballot Exhibit J-1. The vote for E. Conejos, a candidate for mayor, appearing on the first line for councilors is a stray vote but shall not invalidate the whole ballot" (Section 149, par. 13, Revised Election Code). We agree with the ruling of the lower court admitting this ballot in favor of appellee who was voted for on line 7 for councilors.

Ballot Exhibit K-1. The word "irion" written on the first line for senators appears to be an attempt to write the name of a candidate. It does not constitute a distinguishing mark. We agree with the admission of this ballot in favor of appellee who was voted for on line 3 for councilors.

Ballot Exhibit K-2. Appellant contends that this ballot should not be counted in favor of appellee because the word "Ongo" is more similar in sound to Pongos than Omega. An examination of the ballot, however, shows that the vote "C. Omga" was written on line 2 for councilors. This ballot was correctly admitted by the lower court in favor of appellee under the rule of idem sonans (Sec. 149, par. 2, Revised Election Code).

Ballot Exhibit K-4. The capital letter "N" written opposite the printed word senators cannot be considered innocent for the voter had no reason to write it in a place apart from the proper spaces for senators. This ballot should, therefore, be considered marked and should be deducted from appellee.

Ballot Exhibit L-13. This ballot was correctly admitted for appellee who was voted for on line 3 for councilors as "Omega". The word "S. Moya" written on line 2 for councilors, which was alleged by appellant as a mark, shall be counted as a stray vote but shall not invalidate the whole ballot (Section 149, par. 13, Revised Election Code.)

Ballot Exhibit L-14. Appellant alleges that the unintelligible mark appearing below the printed word "Official Ballot" invalidates this ballot as marked. However, an examination of the ballot shows that the alleged identifying mark appears to have been unintentional or accidental (Sec. 149, par. 18, Revised Election Code). This ballot was

properly admitted for appellee who was voted for on line 4 for councilors.

NINTH ASSIGNMENT OF ERROR

Ballots Exhibits C-8 and C-9. These two ballots were counted by the lower court in favor of appellee. However, appellant contends that these ballots should "be rejected as marked for containing the irrelevant and impertinent words "Sampion" after the name T. Acuballo on line 8 for councilors in Exhibit C-8, and "Mabohay" after the name F. Abas on line 7 for councilors in Exhibit C-9. We agree with the ruling admitting these ballots for the reason that said words may be considered merely as an expression of affection and friendship allowed under the rules for the appreciation of ballots (Sec. 149, par. 9, Revised Election Code). This Court has held that such words as "Ariba" or "Caibigan" accompanying names of candidates do not annul the ballot as marked (Delgado vs. Tiu, et al., 105 Phil., 835; Amurao vs. Calangi, et al., 104 Phil., 347.)

TENTH ASSIGNMENT OF ERROR

Ballots Exhibits V-148 and V-2. These two ballots were rejected by the lower court as marked, stating that the word "Sinador" on Exhibit V-148 and a figure "1" on Exhibit V-2, both appearing under the printed words " November 10, 1959" are identifying marks. We agree with regard to the word "Sinador" for the voter really had no reason to write that word in a place far and separate from the proper spaces prescribed for official candidates. The voter could not have had any other intention than to mark that ballot. But we disagree with regard to the figure "1" on Exhibit V-2 for the same appears to have been merely accidentally placed therein by the voter. In the absence of evidence aliunde that mark was deliberately placed, it shall be considered innocent which cannot invalidate the ballot. This ballot Exhibit V-2 should be counted in favor of appellant, but ballot Exhibit V-148 was properly rejected.

ELEVENTH ASSIGNMENT OF ERROR

Ballot Exhibit V-6, V-97 and V-28. These three ballots cast in favor of appellant were rejected by the lower court as marked on the ground that prominent political figures, namely "Tan", "Berting Osmeña" and "Macapagal" who were not candidates for any office in that election, were voted for therein, respectively. In support of its ruling, the lower court cited the cases of Raymundo vs. De Ungria, (July 18, 1935, L.J., 918) and Balajadia vs. Eusala (G. R. No. 42579, Jan. 28, 1935) wherein it was held that names of prominent politicians voted for offices for which they are not candidates should invariably be considered as marks sufficient to invalidate the ballots.

However, in at least two recent cases, this Court has held that the ruling in the above-cited cases "should now be considered abandoned or not controlling in view of the fact that the law on which it was predicated has already been modified by the present Revised Election Code which expressly ordains that such kind of voting will not render the ballot invalid." (Jaucian vs. Callos, 104 Phil., 603; 55 Off. Gaz., 10394; Gutierrez vs. Aquino, G. R. No. L-14252, Feb. 28, 1959). In the absence of clear evidence that the names of the prominent politicians written on the ballots were used as identifying marks, said names of non-candidates shall be considered merely as stray votes which shall not invalidate the ballots (Sec. 149, par. 13, Revised Election Code). These three ballots should, therefore, be counted for appellant who was voted thereon in the proper spaces for councilors.

TWELFTH ASSIGNMENT OF ERROR

Ballots Exhibits V-47, V-17, V-22, V-38, V-42, V-58, V-67, V-63, V-79, V-86, V-51, V-118, V-119, V-125, V-154, V-163, V-165, V-172, V-181, V-151, V-160, V-164, V-166, V-53 and V-29. All these twenty-five ballots cast for the appellant were rejected by the lower court as marked or illegal ballots. We have carefully examined all

these ballots and reached the following conclusions.

Ballot Exhibit V-47. The word "Tabonon" written on line 8 for councilors might have been intended as a vote for candidate Tugonon. This ballot should be counted for appellant who was voted for on line 4 for councilor.

Ballot Exhibit V-17. In the absence of evidence that the word "Tacoc" written on line 7 for councilors was intended as an identifying mark, the same shall be considered as a stray vote and shall not invalidate the ballot. This ballot should be counted for appellant.

Ballot Exhibit V-22. This ballot was prepared by a poor writer. The alleged identifying marks found by the lower court are merely an attempt of the voter to write the names of the candidates he desired to vote. The word written on line 3 for councilors which was read by the lower court as "Lansar" may be read as "Sansor" which might have been intended for Samson. This vote should be counted for appellant under the rule of idem sonans. The other word appearing on line 5 for councilors which may be read as "tilanar" shall be considered as a stray vote which does not invalidate the whole ballot (Section 149, par. 13-, Revised Election Code).

Ballot Exhibit V-38. This ballot was rejected by the lower court as marked with the word "Bangos". An examination of the ballot, however, shows that the word on line 4 for senators may be read as "Bargas", which might have been intended for senatorial candidate Vargas. This ballot should be counted for appellant who was properly voted for on line 5 for councilors.

Ballot Exhibit V-42. Again, the lower court rejected this ballot on the strength of the words appearing on line 7 and 8 for senators which may be read "Mcino" and "Basual". In the absence of evidence of that these words were used as identifying marks, the same shall be counted as stray votes but shall not invalidate the whole ballot (Sec. 149, par. 13, Revised Election Code.) This ballot should be counted for appellant who was voted for on line 5 for councilors.

Ballots Exhibits V-58, V-67 and V-60. These three ballots were rejected by the lower court on the ground that in each ballot the names of the candidates for senators were written by a hand different from the one that wrote the names of the candidates for mayor, vice-mayor and councilors. We have carefully examined each ballot and found that each ballot was prepared by only one voter considering the same formation of letters, pen pressure, slant, rhythm of writing and individual handwriting characteristics. All these three ballots should be counted for appellant who was voted thereon for councilors.

Ballot Exhibit V-63. The alleged identifying mark found by the court in invalidating this ballot is the word "Oray" written on line 8 for senators. In the absence of evidence that the word was intended as an identifying mark, the same shall be considered merely as a stray vote which does not invalidate the whole ballot (Sec. 149, par. 13, Revised Election Code). This ballot should be counted for appellant who was voted for councilor on line 2 thereof.

Ballot Exhibit V-79. This ballot was prepared by an intelligent voter as shown by his good penmanship. The writing of the words "Kid Morjon" which, as counsel for appellant admits, refer to "a brand of canned fish", indicates the intention of the voter to identify this ballot with an impertinent, irrelevant and unnecessary expression. (Caraecl vs. Del Rosario, 94 Phil., 308; 50 Off. Gaz., 571; Tabiana vs. Abordo, ETHR Case No. 111, September 22, 1961.) We, therefore, agree with the ruling invalidating this ballot as marked.

Ballot Exhibit V-86. The writing of the word "Afag" before the name Laguitan in the space for mayor is not sufficient to invalidate the ballot as marked. The word which refers to an organization headed by candidate Laguitan may therefore be considered merely as a qualifying circumstance. This ballot should be counted in favor of appellant who was voted for on line 5 for councilors.

Ballot Exhibit V-51. In the absence of evidence that the word "Lansac" on the first line for councilors was intended as an identifying mark, the same shall be considered merely as a stray vote. This ballot is good for appellant who was voted for on line 2 for councilors.

Ballots Exhibits V-118 and V-119. The lower court anchored its rejection of these two ballots on the fingerprint stains appearing thereon. With regard to ballot Exhibit V-118 the finding is correct because the voter really had no reason to place his fingerprints on said ballot if his intention is not to mark it. But the finding is not correct with regard to ballot Exhibit V-119 for the stain appearing thereon is not a fingerprint and appears to have been accidentally placed. Ballot Exhibit V-119 should, therefore, be counted in favor of appellant, but ballot Exhibit 118 should be considered as marked.

Ballots Exhibits V-125 and V-154. These ballots were rejected on the ground that names of non-candidates appear to have been voted thereon, namely, "Locio Casbon" on line 7 for senators in Exhibit V-125 and "Benbenido Laurente", "Nano Dejanio" and "Egnasio Montenegro" on lines 3 to 5 on Exhibit V-154. In the absence of evidence that these names were used as identifying marks, the same shall be considered merely as stray votes (Section 149, par. 13, Revised Election Code). These ballots should be counted for appellant.

Ballot Exhibit V-163. This ballot was prepared by a poor writer. The alleged identifying marks appearing on line 3 for councilors is merely an attempt to write the name of a candidate. This ballot is good for appellant whose name may be read on line 2 for councilors.

Ballot Exhibit V-165. We agree with the ruling of the lower court declaring this ballot as invalid for containing the impertinent, irrelevant and unnecessary expression "DRACULA, good for hanging day" written on lines 7 and 8 for councilors. The writing of the same serves no purpose other than to identify or mark the ballot (Caracle vs. Del Rosario, *supra*).

Ballot Exhibit V-172. The word "Ala" written on the first line for councilors is not sufficient to invalidate this ballot as marked. The rules for the appreciation of ballots provide that the first letters or syllables of names which the voter does not continue shall be considered innocent and shall not invalidate the ballot (Sec. 149, par. 18, Revised Election Code). This ballot should be counted for appellant.

Ballot Exhibit V-151. The word "Oki" written on line 7 for councilors is not sufficient to invalidate this ballot as marked. After voting for six candidates for councilors, the voter wrote "Oki", which merely indicates his desistance from voting further rather than a desire to mark the ballot. In one case, we held that the words "Nothing else" or "Wala na" similarly written in spaces on which the voter has not voted were merely considered as signs indicating desistance from voting (Sec. 149, par. 17, Revised Election Code; Gutierrez vs. Aquino, *supra*). This ballot should be counted for appellant.

Ballots Exhibits V-164, V-166 and V-181. These ballots were rejected as marked the alleged marks consisting of the word "Botax" on line 8 for councilors in Exhibit V-164; "Poyon" in the space for mayor in Exhibit V-166; and "Balas" in the same space in Exhibit V-181. In the absence of evidence that these words were used as identifying marks, the same shall be considered merely as stray votes. These three ballots should be counted in favor of appellant.

Ballots Exhibits V-53 and V-29. These two ballots were rejected as marked with the name of a non-candidate "Florentino Maquilan" written on line 8 for councilors in Exhibit V-53 and the initials on the same line on Exhibit V-29. In the absence of evidence aliunde, the writing of the name "Florentino Maquilan" should be considered merely as stray vote, but the initials "F.M." shall be considered as marked for there is the presumption that it was written as an identifying mark. This ballot Exhibit V-29 should, therefore, be deducted from appellant, but ballot

Exhibit V-53 should be counted in his favor.

THIRTEENTH ASSIGNMENT OF ERROR

Ballot Exhibit A. Appellant claims that this is clearly a marked ballot, but did not point out any identifying mark. We found no mark in this ballot except some accidental stains at the back which shall be considered innocent (Sec. 149, par. 18, Revised Election Code). This ballot was properly admitted for appellee.

Ballot Exhibit A-1. Appellant contends that the name "Conching Omega" was written by a different hand. This observation is without basis. The name of the candidate on line 2 for councilors written in printed form does not constitute a distinguishing mark. The rules for the appreciation of ballots provide that the use of two kinds of writing shall be considered innocent and shall not invalidate the ballot (Sec. 149, par. 181, Revised Election Code). This ballot was properly admitted for appellee.

FOURTEENTH AND FIFTEENTH ASSIGNMENTS OF ERROR

We did not find any error in the computation of the lower court in arriving at the conclusion that appellee received a total of 4,692 votes and appellant 4,650 votes, in accordance with its own rulings, thereby declaring appellee winner by a majority of 42 votes.

Summarizing our findings in relation to the fifty-nine (59) ballots subject of this appeal, we find that seven (7) ballots (Exhs. B-1, B-2, G-1, L-4, L-8, H-7, and K-4) which were admitted by the lower court in favor of appellee should be deducted from the 4,692 votes credited to her by said court, thereby leaving 4,685 votes. We also find twenty-five (25) ballots (Exhs. V-2, V-6, V-97, V-28, V-47, V-17, V-22, V-38, V-42, V-58, V-67, V-160, V-63, V-86, V-51, V-119, V-125, V-154, V-163 V-172, V-151, V-164, V-166, V-181 and V-53) which were rejected by the lower court should be counted in favor of appellant and added to the 4,650 awarded to him, thereby making a total of 4,675. Appellee has still a plurality of ten (10) votes over appellant.

Wherefore, the decision of the lower court is modified in the sense that appellee Asuncion Conui-Omega obtained a plurality of ten (10) votes, instead of 42, over appellant Cesar Samson. Costs against appellant.

Bengzon, C. J., Padilla, Labrador, Reyes, J. B. L., Barrera, Dizon, Regala, and Makalintal, JJ., concur.

[1] *Ibasco vs. Ilao, et al.*, 110 Phil., 553; *Borja vs. De Leon, et al.*, L-20245, September 30, 1963.

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