

GERRY B. GARAY, PETITIONER, VS. COMMISSION ON ELECTIONS AND JAIME GATA, JR., RESPONDENTS.

G.R. No. 121331. August 28, 1996

Ponente: PANGANIBAN, J.

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PANGANIBAN, J.:

Did the Commission on Elections commit grave abuse of discretion in setting aside the results of a special election it called due to a failure of elections and in declaring the winner on the basis of a tally board and a certificate of votes in the previous regular elections?

This is the main issue brought to this Court in this petition for certiorari to nullify the Resolution[1] of the respondent Commission on Election En Banc[2] in SPC No. 95-180 promulgated on August 7, 1996.

The Facts

After the results of the May 8, 1995 elections were canvassed in 73 precincts in the Municipality of Matnog, Province of Sorsogon, petitioner Gerry B. Garay, a candidate for vice-mayor, was credited with 5,411 votes and private respondent Jaime Gata, Jr., his rival, 5,391 or a margin of twenty (20) votes in favor of petitioner. The said results, however, excluded the votes from precinct 30-A of Barangay Culasi, Matnog, where armed men forcibly took the ballot box together with the election returns, other election papers, documents and/or paraphernalia.

Because the votes in precinct 30-A would obviously affect the standing of the said candidates, the Municipal Board of Canvassers (MBC) did not proclaim the winner. Failing to convince said Board to proclaim him by virtue of a certificate of votes issued by the Board of Election Inspectors (BEI) showing he garnered 116 votes against 68 votes for Garay in said precinct, respondent Gata brought the matter to the respondent Commission. In his appeal,[3] respondent Gata included a copy of the Tally Board, duly authenticated by the BEI, showing the same count as the Certificate of Votes: that is, Gata-116 votes and Garay - 68 votes. If these were added to the already canvassed votes, Gata would win by a 28-vote margin.

In the meantime, while the said appeal was pending, respondent COMELEC - upon recommendation of Comm. Julio Desamito - conducted a special election in precinct 30-A,[4] on the ground of failure of election due to the loss of the ballot box and the election documents. Both petitioner Garay and respondent Gata actively participated in the election which was held on June 7, 1995. Petitioner won handily in the said election and was thereafter proclaimed Vice-Mayor of Matnog.

The Comelec First Division denied due course to the appeal because of appellant's (Gata) failure "to furnish the Commission all pertinent documents necessary for the latter to rule on the matter." [5] Respondent Gata's motion for reconsideration[6] of this Comelec action is still pending before the Comelec First Division. Subsequently, the COMELEC En Banc issued a Resolution promulgated on August 7, 1995 annulling the special election and directing the MBC to reconvene and to include "in the canvass, the votes reflected on the Tally Board submitted by the Board of Election Inspectors x x x." As a result, respondent Gata was declared winner. The Commission En Banc said that it was "convinced without taint of any doubt that the votes shown in the tally board and

certificate of votes reflect the true and genuine will of the electorate x x x."

The Issue

Petitioner now assails this Resolution of August 7, 1995 claiming grave abuse of discretion by respondent COMELEC (1) for its reversal of its own First Division; and (2) for annulling the special election and allowing the use of the Tally Board and the Certificate of Votes in the new canvass.

In fine, the issue may be worded thus: Did the respondent Commission commit grave abuse of discretion amounting to lack of jurisdiction in setting aside the results of the special election it called due to a failure of elections and in declaring the winner on the basis of the Tally Board and the Certificate of Votes submitted by the private respondent Gata?

Respondent Commission, through the Solicitor General, alleges that, since the Tally Board and the Certificate of Votes were unarguably authentic, there was no basis for holding the special election, as there was no failure of elections. Answering petitioner's contention that the "mandatory procedure of Section 20 of Republic Act No. 7166 and Section 33 of Comelec Resolution No. 2756 were not complied with," respondent Commission said that the special election was called because the winner could not be ascertained on the basis of the Certificate of Votes alone. However, when the Tally Board was taken into account, the Commission En Banc "found that indeed that true results of the election could be determined" from the said Tally Board.

In a Resolution dated February 20, 1996, this Court required the respondent Commission "to forthwith certify to this Court the entire records of the case, including (a) the Certificate of Votes and the Tally Board of Precinct No. 30-A of Barangay Culasi, Matnog, Sorsogon, and (b) any duly-authenticated copy of the Election Returns (for the May 8, 1995 regular elections) for said precinct, if available, and if not available, to explain in writing why not available, all within a period of ten (10) days from notice." In compliance, the Comelec certified and elevated to this Court:

- "1. Records of SPC No. 95-180 (In the matter of appeal from the ruling of the Board of Canvassers of Matnog, Sorsogon, Jaime Gata, Jr., petitioner-appellant).
2. Tally Board of Precinct No. 30-A of Barangay Culasi, Matnog, Sorsogon, consisting of five (5) pages, sealed in five (5) separate envelopes, each envelope containing one (1) page.
3. Certificate of Votes for Precinct No. 30-A, Barangay Culasi, Matnog, Sorsogon, attached to the Motion for Reconsideration marked as Exhibits 'A' and 'G', pages 55 and 65 of the records of the case."

The Comelec also explained that the Election Returns could not be produced because, as stated in the submitted affidavit executed by Lyn M. Garil, Chairman of the Board of Election Inspectors for Precinct No. 30-A, Matnog, Sorsogon, said returns were "snatched by armed men in the evening of May 8, 1995 together with all the contents of the ballot box for said precinct."

The Court's Ruling

After judicious deliberation and consultation, we hold that the Comelec En Banc gravely abused its discretion when it decided to set aside and annul the special election it had earlier called and conducted because of failure of election due to the forcible taking by armed men of the ballot box together with the election returns and other election documents and paraphernalia.

The respondent Commission's plea that it is "convinced without taint of any doubt that the votes shown in the tally board and certificate of votes reflect the true and genuine will of the electorate" is weak and unpersuasive because the Certificate of Votes and the Tally Board were already in the possession of the COMELEC before it decided to call the special election. Note that private respondent Gata presented the Certificate before the

Municipal Board of Canvassers (MBC) during the canvassing. When the latter rejected it, Gata appealed to the COMELEC from the said ruling, attaching to his appeal a copy of the Tally Board. Nevertheless, the respondent Commission still decided to hold the special election.

The Certificate of Votes presented by Gata may have been obtained by him pursuant to Section 16 of R.A. No. 6646 (The Electoral Reform Law of 1987).[7]

Thus, when the said Certificate was rejected by the MBC, it must have been because Gata not only failed to comply with the procedure for its identification and offer as mandated in Section 17 of R.A. No. 6646 which reads:

"SEC. 17. Certificate of Votes as Evidence. - The provisions of Sections 235 and 236 of Batas Pambansa Blg. 881 notwithstanding, the certificate of votes shall be admissible in evidence to prove tampering, alteration, falsification or any anomaly committed in the election returns concerned, when duly authenticated by testimonial or documentary evidence presented to the board of canvassers by at least two members of the board of election inspectors who issued the certificate: Provided, That failure to present any certificate of votes shall not be a bar to the presentation of other evidence to impugn the authenticity of the election returns."

but also because a certificate of votes can never be a valid basis for canvass. According to Section 17, a certificate of votes can only be "evidence to prove tampering, alteration, falsification or any other anomaly committed in the election returns concerned, when duly authenticated x x x." A certificate of votes does not constitute sufficient evidence of the true and genuine results of the election; only election returns are, pursuant to Sections 231, 233-236, and 238 of B.P. Blg. 881.[8]

In like manner, neither is the tally board sufficient evidence of the real results of the election. Moreover, in the instant case, the fact that the tally board made its appearance only when Gata attached it to his appeal makes it highly suspect and therefore unreliable. Such appearance has not been convincingly explained even by Lyn M. Garil, chairman of the BEI. Her affidavit that the Tally Board "dropped to the floor" as the armed men left the polling place is hearsay. Section 217 of B.P. Blg. 881 (The Omnibus Election Code) requires that the tally board or sheet shall, together with other election documents, be placed inside the ballot box:

"SEC. 217. Delivery of the ballot boxes, keys and election supplies and documents. - Upon the termination of the counting of votes, the board of election inspectors shall place in the compartment for valid ballots, the envelopes for used ballots hereinbefore referred to, the unused ballots, the tally board or sheet, a copy of the election returns, and the minutes of its proceedings, and then shall lock the ballot box with three padlocks and such safety devices as the Commission may prescribe. Immediately after the box is locked, the three keys of the pad locks in three separate envelopes and shall be sealed and signed by all the members of the board of election inspectors. The authorized representatives of the Commission shall forthwith take delivery of said envelopes, signing a receipt therefore, and deliver without delay one envelope to the provincial treasurer, another to the provincial fiscal and the other to the provincial election supervisor.

The ballot box, all supplies of the board of election inspectors and all pertinent papers and documents shall immediately be delivered by the board of election inspectors and the watchers to the city or municipal treasurer who shall keep his office open all night on the day of election if necessary for this purpose, and shall provide necessary facilities for said delivery at the expense of the city or municipality. The book of voters shall be returned to the election registrar who shall keep it under his custody. The treasurer and the election registrars, as the case may be, shall on the day after the election require the members of the board of election inspectors who failed to send the objects referred to herein to deliver the same to him immediately and acknowledge receipt thereof in detail. "(Sec. 161, 1978 EC).

Since the ballot box, and necessarily, all the election documents contained therein, had been forcibly taken and

had never been recovered, then the tally board must have been likewise lost.

The fact that the Comelec decided to hold the special election shows that it was not convinced of the authenticity and/or sufficiency of Gata's "certificate of votes" and "tally board."

The special election was called pursuant to Section 6 of the Omnibus Election Code, which requires notice and hearing before a special election may be held. There was no objection from any candidate or political party to the holding of the special election (as none had questioned it). In fact, the main protagonists - the petitioner and private respondent Gata - even actively participated in the said election. The latter's active participation therein rendered his appeal from the ruling of the MBC moot and placed him in estoppel from relying again on his "certificate of votes" and "tally board." Therefore, the First Division of the COMELEC should have simply dismissed Gata's appeal on the ground that it had become moot and academic, instead of dismissing it on the merits because of Gata's failure to "furnish the Commission all pertinent documents necessary for [the Division] to rule on the matter."

The COMELEC En Banc committed a more serious error, amounting to grave abuse of discretion, when it reversed its First Division and gave due course to the appeal. Worse, it annulled the special election had declared that Gata's "certificate of votes" and "tally board" reflected the true and genuine will of the electorate." The latter declaration effectively overturned its earlier decision to hold the special election which decision was obviously based on its finding that the said "certificate of votes" and "tally board," then already before it, were insufficient or inadequate to prove that there was failure of election. Moreover, the decision to hold the special election and long become final; such election having already been held and the winner proclaimed, the COMELEC therefore had lost its jurisdiction to revoke and set aside that decision. Additionally, it might be argued that in upholding the Certificate of Votes and Tally Board as reflective of the will of the electorate, and annulling the special elections, the Comelec also in effect declared without adequate basis, said special elections as not reflective of such popular mandate.

On the other hand, if the position of the COMELEC were to be sustained, then we would in effect be ruling that it acted without or in excess of jurisdiction or with grave abuse of discretion when it called and conducted the special election, which was not at all raised as an issue in this case. So too, we would permit the COMELEC to reverse and set aside a final and already executed decision to hold the special election; and allow it to decide a controversy - viz., the appeal from a ruling of the MBC - which had in fact and in law been rendered moot and academic by the special election.

While it is true that the respondent Commission has the power to annul special elections or declare a failure of special elections where it is shown that no voting had taken place or the election therein resulted in a failure to elect; and the votes not cast would affect the results of the election,[9] nonetheless, in the instant case, the June 17, 1995 electoral exercise was not a failed election, as voting had taken place and the election did not result in a failure to elect. In other words, the people spoke freely and honestly in a contest voluntarily participated in by both parties herein. Hence, the popular will as clearly expressed in the votes cast and counted should prevail over dubious election documents of a previous failed election in the same precinct. Since the validity and binding force of this special election has not been put at issue and since for all it is worth, such electoral exercise, both in the casting and canvassing of votes, was conducted regularly and peacefully, then this Court's duty is to resolve the issue "in a manner that would give effect to the will of the majority" as expressed in such special election, for it is merely sound public policy to cause elective offices to be filled by those who are the unquestioned choice of the majority.[10]

WHEREFORE, premises considered, the petitioner is GRANTED, and the challenged COMELEC En Banc

resolution of 7 August 1995 is hereby SETASIDE. Further, respondent COMELEC is directed to deny respondent Gata's Motion for Reconsideration.

SO ORDERED.

Narvasa, C.J, Padilla, Regalado, Davide, Jr., Romero, Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Francisco, Hermosisima, Jr., and Torres, Jr., JJ., concur.

[1] Rollo, pp. 25-32.

[2] Signed by Chrmn. Bernardo P. Pardo and Comms. Regalado E. Maambong, Remedios A. Salazar-Fernando, Manolo B. Gorospe, Graduacion A. Reyes Claravall, Julio F. Desamito and Teresita Dy-Liaco Flores.

[3] Rollo, pp. 43-47.

[4] Rollo, p. 50.

[5] Rollo, pp. 48-49. The denial is contained in a Resolution promulgated on May 26, 1995 signed by Pres. Comm. (of the First Division) Regalado E. Maambong and Comms. Graduacion A. Reyes-Claravall and Julio F. Desamito.

[6] Rollo, pp. 51-54.

[7] "SEC. 16. Certificate of Votes. - After the counting of the votes cast in the precinct and announcement of the results of the election, and before leaving the polling place, the board of election inspectors shall issue a certificate of votes upon request of the duly accredited watchers. The certificate shall contain the number of votes obtained by each candidate written in words and figures, the number of the precinct, the name of the city or municipality and province, the total number of voters who voted in the precinct and the date and time issued, and shall be signed and thumbmarked by each member of the board."

[8] SEC. 231. Canvass by the board. - The board of canvassers shall meet not later than six o'clock in the afternoon of election day at the place designated by the Commission to receive the election returns and to immediately canvass those that may have already been received. It shall meet continuously from day to day until the canvass is completed, and may adjourn but only for the purpose of awaiting the other election returns from other polling places within its jurisdiction. Each time the board adjourns, it shall make a total of all the votes canvassed so far for each candidate for each office, furnishing the Commission in Manila by the fastest means of communication a certified copy thereof, and making available the data contained therein to the mass media and other interested parties. As soon as the other election returns are delivered, the board shall immediately resume canvassing until all the returns have been canvassed.

The respective board of canvassers shall prepare a certificate of canvass duly signed and affixed with the imprint of the thumb of the right hand of each member, supported by a statement of the votes and received by each candidate in each polling place and, on the basis thereof, shall proclaim as elected the candidates who obtained the highest number of votes cast in the province, city, municipality or barangay. Failure to comply with this requirement shall constitute an election offense.

Subject to reasonable exceptions, the board of canvassers must complete their canvass with thirty-six hours in municipalities, forty-eight hours in cities and seventy-two hours in provinces. Violation hereof shall be an election offense punishable under Section 264 hereof.

With respect to the election for President and Vice-President, the provincial and city boards of canvassers shall prepare in quintuplicate a certificate of canvass supported by a statement of votes received by each candidate in

each polling place and transmit the first copy thereof to the Speaker of the Batasang Pambansa. The second copy shall be transmitted to the Commission, the third copy shall be kept by the provincial election supervisor or city election registrar; the fourth and the fifth copies of each of the two accredited political parties. (Sec. 169, 1978 EC).

SEC.233. When the election returns are delayed, lost or destroyed. - In case its copy of the election returns is missing, the board of canvassers shall, by messenger or otherwise, obtain such missing election returns from the board of election inspectors concerned, or if said returns have been lost or destroyed, the board of canvassers, upon prior authority of the Commission, may use any of the authentic copies of said election returns or a certified copy of said election returns issued by the Commission, and forthwith direct its representative to investigate the case and immediately report the matter to the Commission.

The board of canvassers notwithstanding the fact that not all the election returns have been received by it, may terminate the canvass and proclaim the candidates elected on the basis of the available election returns if the missing election returns will not affect the result of the election. (Sec. 171, 1978 EC).

SEC. 234. Material defects in the election returns. - If it should appear that some requisites in form or data have been omitted in the election returns, the board of canvassers shall call for all the members of the board of election inspectors concerned by the most expeditious means, for the same board to effect the correction: Provided, That in case of the omission in the election returns of the name of any candidate and/or his corresponding votes, the board of canvassers shall require the board of election inspectors concerned to complete the necessary data in the election returns and affix therein their initials: Provided, further, That if the votes omitted in the returns can not be ascertained by other means except by recounting the ballots, the Commission, after satisfying itself that the identity and integrity of the ballot box have not been violated, shall order the board of election inspectors to open the ballot box, and, also after satisfying itself that the integrity of the ballots therein has been duly preserved order the board of election inspectors to count the votes for the candidate whose votes have been omitted with notice thereof to all candidates for the position involved and thereafter complete the returns.

The right of a candidate to avail of this provision shall not be lost or affected by the fact that an election protest is subsequently filed by any of the candidates. (Sec. 172, 1978 EC).

SEC. 235. When election returns appear to be tampered with or falsified. - If the election returns submitted to the board of canvassers appear to be tampered with, altered or falsified after they left the hands of the board of election inspectors, or otherwise not authentic, or were prepared by the board of election inspectors under duress, force, intimidation, or prepared by persons other than the member of the board of election inspectors, the board of canvassers shall use the other copies of said election returns and, if necessary, the copy inside the ballot box which upon previous authority given by the Commission may be retrieved in accordance with Section 220 hereof. If the other copies of the returns are likewise tampered with, altered, falsified, not authentic, prepared under duress, force, intimidation, or prepared by persons other than the members of the board of election inspectors, the board of canvassers or any candidate affected shall bring the matter to the attention of the Commission. The Commission shall then, after giving notice to all candidates concerned and after satisfying itself that nothing in the ballot box indicate that its identity and integrity have been violated, order the opening of the ballot box and, likewise after satisfying itself that the integrity of the ballots therein has been duly preserved shall order the board of election inspectors to recount the votes of the candidates affected and prepare a new return which shall then be used by the board of canvassers as basis of the canvass. (Sec. 173, 1978 EC)

SEC. 236. Discrepancies in election returns. - In case it appears to the board of canvassers that there exists discrepancies in the other authentic copies of the election returns from a polling place or discrepancies in the votes

of any candidate in words and figures in the same return, and in either case the difference affects the results of the election, the Commission, upon motion of the board of canvassers or any candidate affected and after due notice to all candidates concerned, shall proceed summarily to determine whether the integrity of the ballot box had been preserved, and once satisfied thereof shall order the opening of the ballot box to recount the votes cast in the polling place solely for the purpose of determining the true result of the count of votes of the candidates concerned. (Sec. 174, 1978 EC)

SEC. 238. Canvass of remaining or unquestioned returns to continue. - In cases under Sections 233, 234, 235, and 236 hereof, the board of canvassers shall continue the canvass of the remaining or unquestioned election return. If, after the canvass of all the said returns, it should be determined that the returns which have been set aside will affect the result of the election, no proclamation shall be made except upon orders of the Commission after due notice and hearing. Any proclamation made in violation hereof shall be null and void. (New)

[9] *Mitmug vs. Commission on Election, et al.*, 230 SCRA 54, February 10, 1994.

[10] *Frivaldo vs. Commission on Election, et al.*, G.R. No. 120295 and *Lee vs. Commission on Elections, et al.*, G.R. No. 123755, June 28, 1996.

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