

**PENDATUN SALIH, PETITIONER, VS. COMMISSION ON ELECTIONS
OMARHASSIM ABDULMUNAP AND FAWSI ALONZO, RESPONDENTS.***G.R. No. 122872. September 10, 1997*

Ponente: HERMOSISIMA, JR., J.

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In the May, 1995 elections, petitioner Pendatun Salih, private respondent Fawzi Alonzo and private respondent Omarhassim Abdulmunap ran as candidates for the position of Mayor of the Municipality of Tandubas, Province of Tawi-Tawi. Five of the election returns from the said municipality were contested by the contending parties. The Municipal Board of Canvassers of Tandubas, Tawi-Tawi ruled, however, to canvass these contested election returns on the ground that no sufficient proof was proffered to warrant their exclusion as defective or fraudulent returns. Just the same, said board did not proclaim any winner, its ruling having been raised to the Commission on Elections (hereafter, COMELEC) on appeal and the results of the elections being affected by the inclusion or exclusion of the questioned returns. The Second Division of said commission, on appeal, ruled to include three of the questioned election returns and to exclude the remaining two returns. As a result, the Municipal Board of Canvassers of Tandubas, Tawi-Tawi proclaimed petitioner as winner of the mayoralty elections in the said municipality. Such proclamation was, however, nullified by the COMELEC en banc. Said commission en banc also ordered the inclusion of the two election returns earlier excluded by the Second Division, and directed the Municipal Board of Canvassers of Tandubas to reconvene, complete the canvass by including said two election returns and accordingly proclaim the winning candidate for Mayor of the said municipality.

Threatened to be unseated as Mayor of Tandubas, Tawi-Tawi on the strength of the aforementioned decision of the COMELEC en banc, petitioner has come to us via this petition for certiorari under Rule 65 seeking the nullification of the said en banc decision[1] and a declaration of his status as the duly elected Mayor of Tandubas, Tawi-Tawi.

The antecedents of this case are not in dispute.

The present controversy traces its origin to three appealed cases, docketed as SPC No. 95-234, SPC No. 95-237 and UND No. 95-232, the subject of all of which was the ruling of the Municipal Board of Canvassers of Tandubas, Tawi-Tawi to include five (5) contested election returns from five precincts, namely, Nos. 10, 10-A, 16, 21 and 21-A. These three cases were resolved by the Second Division of the COMELEC in its Resolution dated June 28, 1995. Said Second Division outrightly dismissed UND No. 95-232 for failure to pay docket fees while disposing of the two other appealed cases in this wise:

x x x [T]he Commission (Second Division) x x x shall limit itself to the resolution of the five (5) determined contested election returns coming from Precincts No. 10, 10-A, 16, 21 and 21-A.

The Commission (Second Division), also notes that one of the above appeals, namely, that raised by Petitioner/Appellant Omarhassim Abdulmunap, has been docketed as UND No. 95-232. There is no showing that the petitioner therein remitted the required docket/filing fees for initiating the appeal. This Division is

therefore constrained to order the outright dismissal of the said UND No. 95-232 by reason of failure to pay the mandated filing fees under Sec. 2(a) and (b) of Rule 40, Comelec Rules of Procedure.

The Commission (Second Division) will proceed to resolve the two (2) remaining validly elevated appeals in SPC No. 95-234 and SPC No. 95-237.

SPC No. 95-234

This appeal refers to the contested election returns from Precinct 21 and 21A of Tandubas.

In Precinct 21 (involving Election Return No. 120612), the Ruling on appeal is one which rejected the objection NOT to canvass the election return from this precinct. The ruling states: 'Petitioner failed to indicate either to include or exclude the election return for canvassing, and that there is lack of factual basis.' The objection itself does not establish whether it seeks to include or exclude the return of Precinct No. 21. The document appears to be an 'Opposition to the Objection,' and one cannot ascertain the objector's intention. By reason of the vagueness of the document the Canvass Board was certainly correct when it ruled that there was failure 'to indicate . . . either to include or exclude the election returns' and therefore the ruling to canvass the return should be sustained.

x x x

In regard to Precinct No. 21-A (Election Return No. 120614), the Municipal Canvass Board also ruled to canvass the results of the same for the reason that there appears to be no showing that the return concerned was spurious, falsified, and the results thereof, statistically improbable. In fact, no supporting evidence was adduced and formally offered by the objector to give credence to his claims, except the self-serving joint affidavit also of objector's very own watchers. Absent strong, clear and convincing evidence there can be no legal basis to reverse the findings of the canvass board. The results for Precinct No. 21-A must therefore be likewise included and canvassed as ruled.

SPC No. 95-237

In reference to Precinct No. 10 (Election Return No. 120601), there were several objections interposed, not only by appellant Salih but also by the other candidate Abdulmunap, among which were: That there was no actual voting in the said precinct, or if ever, there was minimal attendance of voters, and tat the election return itself was prepared by the followers of candidate Alonzo. Also, the returns were obviously manufactured, or were falsified, and there was absent the required data as to the number of voters who actually voted.

Reviewing the records elevated to this Commission, and without necessarily relying on the allegations and evidence of the oppositors Salih and Abdulmunap, the Commission finds that there are clear indications that the election return in the precinct is not reflective of the actual voting thereat as shown by the fact that there were 602 voters who appeared to have case their ballots for the gubernatorial candidates Salih and Matba x x x while the registered voters of the said precincts, based on Comelec records number only 586 voters. The existence of excess votes do manifest on its face the anomalous nature of the election returns, and convey the manufacture and fabrication thereof. (Tagoranao vs. Comelec, 22 SCRA 978)

Considered in the light of the other anomalies in the other precinct in the same barangay of SAPA, which is admittedly the home barangay of candidate Alonzo, Precinct No. 10-A, there is every reason to conclude that the narrations and objections of the other candidates to the inclusion of the above return [have] strong and valid basis. The election return from Precinct 10 cannot therefore be canvassed as a valid return, and should be excluded. The ruling of the canvass board allowing the canvass of the said return is therefore reversed.

As regards Precinct No. 10-A (Election Return No. 120602), on record are numerous objections interposed on the inclusion of this return. As in Precinct No. 10, the same was allegedly prepared despite the fact that there was no voting there, and that said return was prepared by the followers of candidate Alonzo, giving him an

overwhelming lead. Further, there were reliable reports that one entire PAD of official ballots was removed from the precinct and filled up by unauthorized individuals, and that the original chairman left the polling place and never returned to complete the work. Additionally, there were the undisputed findings, admitted even by the BEI members that the election return was NOT signed, but only thumbmarked by them. Then there is the abnormally high turnout of registered voters where 544 out of the 546 registered voters were supposed to have cast their ballots.

The Commission finds that the evidence of abnormality and irregularities in this precinct is quite obvious, and thus, affects the validity and legitimacy of the results therein. The lack of signature is a strong evidence of a falsified or a return that is not authentic. The fact that there were thumbmarks thereon cannot dispense with the requirement of signatures, especially where there is NO showing that the thumbmarks do or do not belong to the BEI members.

One other very glaring anomaly admitted under oath by the BEI members themselves as contained in their joint affidavit is their declaration that `Election Return No. 120602 of Precinct No. 10-A was prepared and worked AFTER the counting of the ballots . . . '. Such a process is in direct contravention of the mandatory requirement that the election return MUST be prepared SIMULTANEOUSLY with the counting of the ballots
x x x.

The unequivocal ADMISSION OF PREPARING THE ELECTION RETURN FOR PRECINCT 10-A AFTER THE COUNTING is the best evidence that the said election return is anomalous and was prepared in direct violation of law. Since the admission was executed under oath by the BEI themselves, taken with the totality of circumstances surrounding the preparation of the election returns, this election return from Precinct No. 10-A cannot be relied upon and should be regarded as fictitious or manufactured and excluded from the canvass of the votes cast for the different candidates in the Municipal[ity] of Tandubas.

x x x

In view hereof, the Commission has no alternative but to conclude that the questioned return is illegal and cannot be considered for purposes of canvass. The ruling of the Canvass Board must have to be, as it is hereby, reversed.

Precinct No. 16 (Election Return No. 120608) -- The nature of the objection interposed on this return is such that there is extreme difficulty in accepting the same as truthful in the absence of supporting evidence. The claim that the ballot box of this precinct was snatched, opened, and the ballot therein filled up by other persons, cannot be admitted in the absence of clear and convincing evidence. On its face, the election return for this precinct appears to be regular, such that there is no valid basis to overrule the findings of the Municipal Board of Canvassers to include the same in the canvass.”[2]

The Second Division of the COMELEC thus directed the Municipal Board of Canvassers of Tandubas to complete the canvass of the returns by including those from Precinct Nos. 16, 21, and 21-A while excluding those from Precinct Nos. 10 and 10-A.

On June 30, 1995, said board proclaimed petitioner as winner of the electoral contest for the position of Mayor of Tandubas, Tawi-Tawi, petitioner having been accredited with the highest number of votes among all the mayoralty candidates.

On the same day that petitioner was proclaimed as Mayor, private respondent Abdulmunap filed a Motion for Reconsideration and Suspension of Proclamation.[3] Also on the same day, private respondent Alonzo filed a Motion for Reconsideration[4] praying for the reversal and setting aside of the resolution of the Second Division.

On June 29, 1995, the COMELEC en banc promulgated an Omnibus Resolution on Pending Cases items 1, 2 and 3 of which read:

1. All cases which were filed by private parties without timely payment of the proper filing fee are hereby dismissed;
2. All cases which were filed beyond the reglementary period or not in the form prescribed under appropriate provisions of the Omnibus Election Code, Republic Acts No. 6646 and 7166 are hereby likewise dismissed;
3. All other pre-proclamation cases which do not fall within the class of cases specified under paragraphs (1) and (2) immediately preceding shall be deemed terminated pursuant to Section 16, RA 7166. Hence, all the rulings of boards of canvassers concerned are deemed affirmed. Such boards of canvassers are directed to reconvene forthwith, continue their respective canvass and proclaim the winning candidates accordingly, if the proceedings were suspended by virtue of pending pre-proclamation cases x x x.”[5]

Pursuant to the aforecited omnibus resolution of the commission en banc regarding the dismissal of pending pre-proclamation cases, the Second Division of the COMELEC, in an Order dated July 11, 1995,[6] deemed as terminated SPC No. 95-234, UND No. 95-232 and SPC No. 95-237. This, notwithstanding the fact that private respondents promptly filed their respective motions for reconsideration of the Resolution of the Second Division dated June 28, 1995.

On July 13, 1995, private respondent Alonzo filed a Motion to Reconsider the order Dated July 11, 1995 and Motion to Elevate En Banc the Motion for Reconsideration Dated June 30, 1995.[7]

On July 21, 1995, the Second Division of the COMELEC issued an Order[8] in SPC No. 95-237 whereby the aforementioned motions filed by private respondent Alonzo were certified and ordered elevated to the COMELEC en banc for appropriate action.

On the same date, July 21, 1995, petitioner filed an Ex-Parte Manifestation before the Second Division of the COMELEC. In said manifestation, petitioner informed the commission that private respondent Abdulmunap had formally filed an election protest case before the Regional Trial Court of Bongao, Tawi-Tawi.[9] Acting on such manifestation, the Second Division issued an Order dated August 4, 1995 noting said manifestation and referring the same to the COMELEC en banc insofar as SPC No. 95-237 is concerned considering that the said case had already been, on July 21, 1995, elevated to the commission en banc.

On December 15, 1995, the COMELEC en banc promulgated its decision in SPC No. 95-237 reversing the Second Division and ordering the inclusion of the contested election returns from Precinct Nos. 10 and 10-A. The commission en banc reversed the Second Division in this manner:

Peripherals aside, this case boils down to one proposition. Whether or not to include the results of Precinct Nos. 10 and 10-A in the canvass.

The Commission (Second Division) was correct in dismissing the appeals/petitions in SPC No. 95-234 and UND No. 95-232, upholding the ruling of the MBC in the former and for failure to pay the requisite fee in the latter. We have, however, our misgivings insofar as Precinct Nos. 10 and 10-A are concerned.

The assailed resolution ruled to exclude the returns from these precincts premised on the findings ‘that there was no actual voting in the said precinct, or, if ever, there was minimal attendance of voters, and that the election return itself was prepared by the followers of candidate Alonzo. Also, the returns were obviously manufactured or were falsified, and there was absent the required data as to the number of voters who actually voted’ in the case of Precinct No. 10 x x x and the alleged missing pad of official ballots and the declaration of the BEI of Precinct No. 10-A x x x.

These conclusions fall short of the criteria established for the proper and strict appreciation of the evidence on record. The affidavits executed by the watchers of petitioner Salih, as heretofore mentioned, were misleading and did not meet the standards for appropriate consideration (*Pimentel, Jr. vs. COMELEC*, 140 SCRA 136). In

short, there were no specific evidence to prove the abnormality and irregularities allegedly committed in Precinct No. 10-A. Neither is there basis to rule that there were excess votes in Precinct No. 10 because the total registered voters for this precinct is 586 and the combined votes of the four (4) mayoralty candidates is only 562 (Doruelo vs. COMELEC, 133 SCRA 376). Moreover, the assertion against the BEI of Precinct 10-A is belied by the minutes of the Board and to attribute wrongdoing in the preparation of the election return for this precinct is a misinterpretation of the import of their joint affidavit which is but an error in semantics.

Going back to the Resolution of June 28, 1995 and the Order of July 11, 1995, it appears that the Commission (Second Division) superseded its own directive to exclude Precinct Nos. 10 and 10-A by considering SPC No. 95-237 TERMINATED thereby affirming the ruling of the MBC to include in the canvass the election returns from these two precincts. In essence, We are merely confirming this rectification.

On the other hand, the ex parte manifestation of petitioner Salih, through counsel, filed on August 4, 1995 that therefore, the previous MOTION FOR RECONSIDERATION OF THE RESOLUTION PROMULGATED ON JUNE 28, 1995 dated June 30, 1995 is not and must not be included in the matters ELEVATED to the Commission En Banc, the case having been terminated at the Division level, is rendered moot and academic by the en banc hearing of the motion on August 24, 1995.

The most telling argument against petitioner's perorations is the fact that he was proclaimed by the MBC of Tandubas during the pendency of a motion for reconsideration filed by respondent Alonzo in SPC No. 95-237 and petitioner Abdulmunap in SPC Nos. 95-234 and 95-237, it appearing that the results on Precinct Nos. 10 and 10-A would affect the election (Section 245, Omnibus Election Code).

All told, We find no solid nor convincing evidence to warrant the exclusion of the election returns of Precinct Nos. 10 and 10-A from the canvass and hereby ORDER their inclusion in the canvass.

x x x

WHEREFORE, premises considered, the Commission RESOLVED, as it hereby RESOLVES to annul the proclamation of Pendatun Salih x x x as mayor x x x of Tandubas, Tawi-Tawi x x x for being based on an incomplete canvass and during the pendency of a motion for reconsideration timely filed (Tatlonghari vs. COMELEC, July 31, 1991, 199 SCRA 849; Mentang vs. COMELEC, 229 SCRA 666).

ACCORDINGLY, the Municipal Board of Canvassers of Tandubas is DIRECTED to bring to the Commission, Manila, all the election records and documents in this case including the Statement of Votes by Precincts and the Election Returns of Precinct Nos. 10 and 10-A, and turnover said election records and documents to the newly-constituted Board of Canvassers x x x which shall immediately RECONVENE, complete the CANVASS by including the results in Precincts 10 and 10-A and thereafter, PROCLAIM the winning candidates for Mayor x x x of the said Municipality."

It is significant to state at this juncture that Precinct Nos. 10 and 10-A are bailiwicks of private respondent Alonzo. Predictably, therefore, petitioner, foreseeing his impending ouster upon the completion of the canvass which is now to include the election returns from private respondent Alonzo's bailiwicks, as ordered by the COMELEC en banc, filed the instant petition.

On December 22, 1995, we issued a Temporary Restraining Order enjoining the COMELEC from enforcing and/or implementing its en banc decision herein assailed during the pendency of this case.

Petitioner mainly contends that the assumption by the COMELEC en banc of jurisdiction over SPC No. 95-237, after the same had been deemed terminated by the Second Division of the same commission in a duly promulgated resolution, is tainted with grave abuse of discretion. As an indicia of such grave abuse of discretion, petitioner points out that all three commissioners constituting the Second Division, have cast their dissenting votes to the majority decision of the COMELEC en banc.

We, however, do not subscribe to petitioner's contentions. The records clearly bear out that the order issued by the Second Division on the strength of which SPC No. 95-237 was deemed terminated, came in the heels of private respondents' timely filed motions for reconsideration. There was thus pending at least two motions for reconsideration of the decision of the Second Division ordering the exclusion of the election returns from private respondent Alonzo's bailiwicks that were Precinct Nos. 10 and 10-A. The pendency of such motions rendered ineffective the resolution of the Second Division ordering the dismissal of SPC No. 95-237, considering the inherent contradiction in such a situation involving pending motions for reconsideration in a case that was being dismissed without the issuance of any order finally disposing of the pending motions. The right of private respondents to ask for reconsideration of a decision that aggrieved them, cannot be defeated by the mere expediency or careless measure of ipso facto terminating the case without finally resolving the pending motions for reconsideration. Rather than find the COMELEC en banc guilty of grave abuse of discretion, we find the Second Division of the same commission to have exceeded its powers in terminating an appealed case in which motions for reconsideration were pending and remain unacted upon.

This petition is dismissible for the reasons above stated. However, the question as to whether or not to include the election returns from Precinct Nos. 10 and 10-A, ought to be categorically answered to foreclose any further debate on the matter. We shall therefore proceed to rule on this question.

We agree with the COMELEC en banc in having included the election returns from Precinct Nos. 10 and 10-A in the canvassing of the votes cast during the May, 1995 elections for the position of Mayor of Tandubas, Tawi-Tawi.

The Second Division of the COMELEC excluded the returns from Precinct Nos. 10 and 10-A on the grounds that no actual voting in the said precincts had taken place; that if there had been actual voting, there was minimal attendance of voters; that the election returns were prepared by the followers of private respondent Alonzo; that a missing pad of official ballots was missing; that for these reasons, the election returns in question were obviously manufactured or falsified, and that said returns lacked the data as to the number of voters who actually voted.

On top of all these findings, however, the Second Division did not make any findings of actual physical alterations or other forms of defects on the face of the questioned election returns. The conclusion that they are manufactured, falsified or fraudulent necessitates the premise that no actual voting occurred and/or that the followers of private respondent Alonzo and not the members of the Board of Election Inspectors, were the persons who prepared the questioned election returns. Even the finding of the Second Division to the effect that the returns lacked data as to the actual number of voters, is imperatively predicated on the premise that there had not been in fact such voting as the returns reflect on their face or that there had in fact been minimal voting which was not, however, reflected on the questioned returns, the same having been prepared by private respondent Alonzo's followers.

In other words, the Second Division of the COMELEC believed that sham voting had taken place in Precinct Nos. 10 and 10-A and considered the election returns therefrom a product of fraud perpetrated by private respondent Alonzo in his bailiwicks.

The records of this case, however, are utterly wanting of evidence of such sham and fraudulent voting. The Second Division of the COMELEC largely relied on the affidavit executed by the members of the Board of Inspectors who alleged therein that they prepared the returns after the counting of the votes. Proceeding therefrom, the Second Division leaped to the conclusion that the questioned returns were fictitious, manufactured or fraudulent and must, as such, be excluded from the canvass. This allegation, however, barely makes out a valid pre-proclamation controversy on the ground of fictitious or manufactured election returns, for ultimately, the

grounds relied upon by the Second Division in order to justify its order to exclude the election returns from Precinct Nos. 10 and 10-A, necessitate evidence of sham voting and such fraudulent schemes perpetrated by private respondent Alonzo, but no such evidence was proffered and had there been so, the same is hardly proper in a pre-proclamation controversy such as the instant case. In other words, on the basis only of the election returns which, on their face, appear regular and wanting of any physical signs of tampering, alteration, or other similar vice, the Second Division could not justifiably exclude said returns on the occasion of a pre-proclamation controversy whose office is limited to incomplete, falsified or materially defective returns which appear as such on their face. If there had been sham voting or minimal voting which was made to appear as normal through the falsification of the election returns by private respondent Alonzo's followers, such grounds are properly cognizable in an election protest and not in a pre-proclamation controversy. Our ruling in the landmark case of *Gov. Tupay T. Loong, et al. v. COMELEC, et al.* and its companion cases, leaves no room for entertaining such grounds in a pre-proclamation controversy. We instructed in that case:

Very few aspects of our law today can match the dynamism that has characterized the formulation of our jurisprudential rule on pre-proclamation controversies. The debate has, however, constantly revolved around whether or not the COMELEC may go beyond the face of the election returns in determining their authenticity and genuineness. The rule first established in illustrative cases like *Nacionalista Party vs. Comelec* and *Dizon vs. Provincial Board* is that the COMELEC cannot go beyond the election returns in canvassing the same. This rule, however, was eroded in subsequent cases since 1966, when in the case of *Lagumbay vs. Comelec*, we empowered the COMELEC to nullify certain contested returns on the ground of statistical improbability x x x. And then in the 1971 case of *Diaz, Sr. vs. Commission on Elections*, in the light of the allegations of petitioners therein to the effect that the elections in question were tainted with fraud, terrorism and other irregularities, we sanctioned the COMELEC's procedure of causing the examination by fingerprint and handwriting experts and analysis of the signatures and fingerprints of the precinct books of voter and the CE 39's and voting records, in order to determine whether the reported elections were a sham amounting to no election at all and accordingly deny prima facie value to the election returns and reject them as manufactured or false returns. We reiterated this Ruling in *Estaniel vs. Commission on Elections* and amplified the same in *Usman vs. Commission on Elections*. And in the case of *Olfato vs. Commission on Elections*, we went as far as to hold that the statutory enumeration of the grounds proper for filing a pre-proclamation controversy is not exclusive.

x x x

The year 1987 marked the return to the previous rule that in pre-proclamation controversies, allegations that clean, regular election returns are in fact sham returns because no free and honest elections had at all been held due to fraud, terrorism and other illegal electoral practices, are to be rejected and held to be inappropriate matters to be raised in pre-proclamation cases, the same being properly the office of election contests over which electoral tribunals have sole, exclusive jurisdiction. x x x

x x x

The policy consideration underlying the delimitation both of substantive ground and procedure is the policy to determine as quickly as possible the result of the election on the basis of canvass. Thus, in the case of *Dipatuan vs. Commission on Elections*, we categorically ruled that in a pre-proclamation controversy, COMELEC is not to look beyond or behind election returns which are on their face regular and authentic returns. A party seeking to raise issues resolution of which would compel or necessitate COMELEC to pierce the veil of election returns which are prima facie regular on their face, has his proper remedy in a regular election protest. By their nature, and given the obvious public interest in the speedy determination of the results of elections, pre-proclamation controversies are to be resolved in summary proceedings without the need to present evidence aliunde and certainly without having to go through voluminous documents and subjecting them to meticulous technical examinations which take up considerable time.

x x x The prevailing doctrine in this jurisdiction, therefore, is that as long as the returns appear to be authentic and duly accomplished on their face, the Board of Canvassers cannot look beyond or behind them to verify allegations of irregularities in the casting or the counting of the votes.”[10]

As the election returns from Precinct Nos. 10 and 10-A, which were excluded by the Second Division of the COMELEC, are undisputedly prima facie regular and untampered on their face, the COMELEC en banc correctly reversed the Second Division and ordered the inclusion of said returns in the canvass of the votes cast in the mayoralty elections in the Municipality of Tandubas, Tawi-Tawi. As such, there is clearly no basis to ascribe grave abuse of discretion to the COMELEC en banc.

WHEREFORE, the instant petition is hereby DISMISSED. The Temporary Restraining Order heretofore issued is hereby DISSOLVED.

Costs against petitioner.
SO ORDERED.

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

Davide, Jr., and Puno, JJ., Joins J. Panganiban’s separate (concurring) opinion..

Panganiban, J., please see Separate Concurring Opinion.

[1] Resolution in SPC No. 95-237 promulgated on December 15, 1995; Rollo, pp. 32-44. [The voting was 4-3, with Commissioners Manolo B. Gorospe, Remedios Salazar-Fernando and Teresita Dy-Liacco Flores, all of the Second Division, dissenting].

[2] Resolution in SPC No. 95-234, UND No. 95-232 and SPC No. 95-237 promulgated on June 28, 1995, pp. 2-6; Rollo, pp. 59-63.

[3] Dated June 30, 1995; Rollo, pp. 67-73.

[4] Dated June 30, 1995; Rollo, pp. 74-92.

[5] Rollo, p. 133.

[6] Rollo, pp. 132-134.

[7] Dated July 13, 1995; Rollo, pp. 135-141.

[8] Dated July 21, 1995; Rollo, pp. 144-145.

[9] Branch 5.

[10] Gov. Tupay T. Loong, et al. v. The Commission on Elections, et al., G.R. Nos. 107814-107815, 120826, 122137 and 122396, May 16, 1996.

SEPARATE OPINION

PANGANIBAN, J.:

In two recent unanimous en banc decision,[1] the Court reiterated the general rule that in resolving pre-proclamation controversies grounded on Section 243[2] in relation to Sections 234, 235 and 236 of the Omnibus Election Code, “the Comelec and the Board of Canvassers x x x need not look beyond the face of the [assailed] election returns.”[3] And that “as long as the returns appear to be authentic and duly accomplished on

their face, the Board of Canvassers cannot look beyond or behind them to verify allegations of irregularities in the casting or the counting of the votes.”[4] Indeed, “[a] party seeking to raise issues the resolution of which would compel or necessitate Comelec to pierce the veil of election returns which appear prima facie regular on their face, has his proper remedy in a regular election protest.”[5] This limitation is impelled by the public policy which requires summary resolution of pre-proclamation cases and by practical realities demonstrating that boards of canvassers “do not have the facilities, the time and even the competence to hear, examine and decide on alleged election irregularities x x x.” I do not think there is any dispute on this general rule. I restated it anyway because the ponencia of Mr. Justice Hermosisima seems to convey the impression that this Court has some equivocation on this doctrine. There is none. I do not detect any in Mr. Justice Davide’s Concurring and Dissenting Opinion either.

Apparently, the case now before us hinges on the substantive question of whether to include in the canvass the contested election returns in two precincts, namely 10 and 10-A. If both are included, as the Comelec en banc did, Private Respondent Alonzo would win the elections. But if both are excluded, as the Comelec Second Division did, petitioner would win. To paraphrase Hamlet, to include or not to include is the question. (Parenthetically, I should add that the total count for the remaining uncontested valid election returns and the exact count for each of the two contested precincts should have been indicated in the assailed Comelec orders or should have been pointed out by the parties in their pleadings because a pre-proclamation plea can be granted only where petitioner can show that a nullification of one or both returns will materially affect the election results.[6] This is especially important where more than one precinct is involved, as each precinct may be ruled upon separately and the result may or may not be affected depending on the total votes validated or invalidated thereby.)

In any event, the Comelec Second Division excluded the two contested election returns on the ground that they were “obviously manufactured or were falsified” based on the following findings:

(1) For Precinct 10 --

(a) There were only 586 registered voters in this precinct, but on the election return it appears that 602 cast their ballots for the gubernatorial candidates. Citing *Tagoranao vs. Comelec*,[7] the Second Division ruled that “the existence of excess votes” as shown on the face of the election return “convey[s] the manufacture and fabrication thereof.”

(b) “Considered in the light of the other anomalies in the other precinct[s] in the same barangay of SAPA, which is admittedly the home barangay of candidate Alonzo.” the Second Division held -- but without mention of any supporting evidence -- that “there is every reason to conclude that the narration and objections of the other candidates to the inclusion of the above return [have] strong and valid basis.” Among these “objections” of the other candidates are: no actual voting allegedly took place in the precinct, and the election return was prepared by the “followers of [C]andidate Alonzo.” To repeat, no hard evidence was however mentioned by the Second Division to back up such allegations.

(2) For Precinct 10-A --

(a) There was a “lack of signatures” of the election inspectors on the election returns.

(b) [T]here [was] no showing that the thumbmarks (on the returns) do or do not belong to the BEI members.”

(c) BEI members executed a joint affidavit stating that the election return “was prepared and worked AFTER the counting of ballots...”

To be sure, the Resolution of the Second Division dated June 28, 1995 was not a model of clarity and precision in

explaining why it decided to exclude these two election returns.[8] It was a hodgepodge of the petitioner's allegations which were confusingly melted down to the Resolution's findings. That notwithstanding, the Comelec en banc ruled that the "conclusions [of the Second Division] fall short of the criteria established for the proper and strict appreciation of the evidence on record." It ratiocinated:

x x x The affidavits executed by the watchers of [P]etitioner Salih, as heretofore mentioned, were misleading and did not meet the standards for appropriate consideration (Pimentel, Jr. vs. COMELEC, 140 SCRA 136). In short, there were no specific evidence to prove the abnormality and irregularities allegedly committed in Precinct No. 10-A. Neither is there basis to rule that there were excess votes in Precinct No. 10 because the total registered voters for this precinct is 586 and the combined votes of the four (4) mayoralty candidates is only 562. (Doruelo vs. COMELEC, 133 SCRA 376). Moreover, the assertion against the BEI of Precinct 10-A is belied by the minutes of the Board and to attribute wrongdoing in the preparation of the election return for this precinct is a misinterpretation of the import of their joint affidavit which is but an error in semantics.

xxx xxx xxx

All told, We find no solid nor convincing evidence to warrant the exclusion of the election returns of Precinct Nos. 10 and 10-A from the canvass and hereby ORDER their inclusion in the canvass."

On the basis of the above discussion, I believe that the Comelec en banc should be sustained and the petition dismissed for the following reasons:

(1) The simple fact that the total votes cast for the gubernatorial candidates exceeded the number of registered voters for Precinct 10 cannot invalidate the election return because, as pointed out by the Comelec en banc, the relevant position at issue here is not that of governor, but that of mayor for which the total votes cast for all candidates was only 562, whereas the total number of registered voters was 586.

(2) The other reason given by the Second Division for invalidating the return in Precinct 10 is plainly speculative and not based on hard evidence. True, petitioner alleged that no actual election took place in this precinct and that the return was prepared by the followers of Private Respondent Alonzo, but even the Second Division could not anchor its ruling on any hard evidence substantiating such allegation. Said Division merely concluded that, inasmuch as precinct 10 was geographically close to Precinct 10-A, both being located in Barangay Sapa, then the anomalies that allegedly took place in Precinct 10-A must have infected Precinct 10. I believe that speculation can never be a substitute for evidence in any legal proceeding and cannot overturn the presumption of regularity in the execution of an election document.

(3) The lack of signatures and the non-identification of the thumbmarks, while patent on the face of the Precinct 10-A return, are not by themselves sufficient to invalidate the said return.[9] In any event, the chairman and two members of the Board of Election Inspectors in said precinct executed a joint affidavit[10] satisfactorily explaining this lapse, as follows:

"3. If we failed to affix our signatures in the election returns, as all what we did is we thumbmarked the elections [sic] returns, then thru the poll clerk [sic] we wrote/printed our names, we did not sign the election return[s], as we thought that after thumbmarking it, that was all that we were to do in so far as the thumbmarking is concerned. If we knew then that we have also to sign, we will definitely do the same. Nevertheless the thumbmark appearing thereo[n] at the bottum [sic] of the election returns is our thumbmark. We even initialed each column of the election return[s], that is in the taras line of each candidate. Definitely our failure to sign the election return[s] is due to our inexperience. Election returns No. 120602 of precinct no. 10-A was prepared and worked by us after the counting of the ballots and done inside the PNP building where the ballots were transferred to the municipal hall at Silantup, Ungus Matata, Tandubas. Also perhaps to the lack of sleep and exhaustion for the work during

the election day proper, the watching of the ballot box for two nights at the municipal hall, as well as the work done the whole day of May 10, 1995, Wednesday, has something to do with the performance of our work. We even forgot to make the necessary entries in page three of the election return[s], which copy with no entry whatsoever thereo[n], remains in our possession inadvertently. For these omissions [sic] we have committed we are asking the proper authorities to give us the understanding. We are willing to sign the election [sic] returns and to make the necessary entries on page three of the elections [sic] returns, if authorized and allowed;"

(4) The aforementioned portion of the joint affidavit attesting to the belated preparation of the return in Precinct 10-A is formidable evidence pointing to the probability of its having been "manufactured," even if the Comelec en banc belittled such tardiness by citing contrary provisions in the minutes of the BEI and by labeling it "an error in semantics." I agree with Mr. Justice Davide's stand that Section 212 of the Omnibus Election Code requires the BEI to prepare the election return simultaneously with the counting of votes in the polling place, and that a violation of this requirement is enough to invalidate an election return; otherwise, the floodgates to fraud may be opened.[11] However, this rule will not apply to the present case because, granting *arguendo* that this return should be invalidated, petitioner has not shown by any computation, as I earlier explained, that the results would be materially affected. Otherwise stated, petitioner has not demonstrated that the non-inclusion of the return in Precinct 10-A will make him win the election. In every pre-proclamation controversy, the petitioner must show that the inclusion/exclusion he or she seeks will change the results.[12] Otherwise the petition will be dismissed, as in this case.

(5) The petitioner has not overcome the presumptions of regularity in the performance of official duties and the validity of election documents to a point sufficient to warrant the exclusion of the two contested returns -- at the very least, the return in Precinct 10.

(6) The findings of facts of the Comelec are entitled to great respect, even finality, since it is the agency specially tasked by the Constitution to administer elections.[13] Petitioner has not shown that the Comelec committed GRAVE ABUSE of discretion in its declaration that "no solid or convincing evidence warrant[s] the exclusion of the election returns of Precinct Nos. 10 and 10-A." There is grave abuse of discretion when the exercise of judgment is capricious and whimsical such that it becomes tantamount to lack of jurisdiction, or "where the power is exercised in an arbitrary or despotic manner by reason of passion or personal hostility, and it must be so patent and gross as to amount to an evasion of positive duty or to a virtual refusal to perform the duty enjoined or to act at all contemplation of law." [14] Such arbitrariness or despotism does not obtain here.

(7) Petitioner has not presented any cogent reason or ground to deviate from the firm rule that in pre-proclamation controversies, the Comelec and the boards of canvassers need not look beyond the face of election returns. He has not satisfactorily shown that the questioned returns are not authentic. The allegation that they were prepared long AFTER the counting -- which would have been sufficient ground to show that they were "manufactured" -- remained just that in the case of Precinct 10, an allegation without adequate proof; and in the case of Precinct 10-A, without any showing that its exclusion would enable petitioner to win.

8. Finally, the assailed en banc Resolution found that "petitioner Salih did not raise any objection during the canvass of the election returns for Precincts 10 and 10-A as evidenced by the Minutes of the Proceedings. Only [C]andidate Matba, Jaafar and Abdulmunap, through counsel, questioned these election returns (pages 3 to 11, Minutes) with annexes '1' and '2' [CE Form 26-B]"; and that in any event, petitioner failed to perfect his appeal from the ruling of the MBC within the "non-extendible" reglementary five-day period, pursuant to Section 20, RA 7166, [15] which expired on May 23, 1995. Salih filed his appeal only on May 27, 1995. In *Dimaporo*, we ruled that failure to comply with pre-proclamation requirements is fatal.

x x x We reiterate the mandatory requirement to comply with the procedure for pre-proclamation controversies

in view of the public policy to have a quick determination of the result of the election. By [their] nature, pre-proclamation controversies already delay proclamation. To allow the deviation from procedural requirements is to open cases of this nature to protracted uncertainty because new grounds and new issues can be raised at the different levels of jurisdiction.”[16]

If only for the foregoing procedural lapse (which is a finding of fact binding on this Court) and for no other, this petition should be dismissed.

In sum, I hold that the return in Precinct 10 cannot be excluded because there is no hard evidence showing that it was prepared AFTER the counting. While the joint affidavit of the BEI admittedly proves that the return in Precinct 10-A was prepared AFTER the counting, such return cannot be validated just the same because petitioner has not demonstrated that its exclusion would alter the election result, i.e., that he would win. And the Comelec en banc’s factual finding that petitioner failed to object to these two returns during the MBC proceedings and/or that his appeal from the MBC ruling was filed late is the final lethal blow to this petition.

WHEREFORE, I vote to DISMISS the petition for its failure to show grave abuse of discretion on the part of Respondent Commission.

[1] Matalam vs. Commission on Election, G.R. No. 123230, April 18, 1997; and Loong vs. Commission on Election, 257 SCRA 1, May 16, 1996.

[2] “Sec 243. Issues that may be raised in pre-proclamation controversy. – The following shall be proper issues that may be raised in a pre-proclamation controversy:

(a) Illegal composition or proceedings of the board of canvassers;

(b) The canvassed election returns are incomplete, contain material defects, appear to be tampered with or falsified, or contain discrepancies in the same returns or in other authentic copies thereof as mentioned in Sections 233, 234, 235 and 236 of this Code;

(c) The election returns were prepared under duress, threats, coercion, or intimidation, or they are obviously manufactured or not authentic; and

(d) When substitute or fraudulent returns in controverted polling places were canvassed, the results of which materially affected the standing of the aggrieved candidate or candidates.”

[3] Matalam vs. Comelec, pp. 1-2.

[4] Loong vs. Comelec, p. 23.

[5] Dipatuan vs. Comelec, 185 SCRA 86, May 7, 1990.

[6] Dimaporo vs. Comelec, 186 SCRA 769, June 26, 1990; Matalam vs. Comelec, supra.

[7] 22 SCRA 978, March 12, 1968.

[8] Quoted hereunder is the Second Division’s very language “justifying” the exclusion of the Precinct 10-A returns:

“Considered in the light of other anomalies in the other precinct in the same barangay of SAPA, which is admittedly the home barangay of candidate Alonzo, Precinct No. 10-A, there is every reason to conclude that the narrations and objections of the other candidates to the inclusion of the above return [have] strong and valid basis. The election return from Precinct 10 cannot therefore be canvassed as a valid return, and should be excluded. The

ruling of the canvass board allowing the canvass of the said return is therefore reversed.” [emphasis in the original]

[9] See *Arroyo vs. House of Representatives Electoral Tribunal*, 246 SCRA 384, July 14, 1995; *Pimentel, Jr. vs. Comelec*, 140 SCRA 126, November 19, 1985; *Guiao vs. Comelec*, 137 SCRA 356, July 5, 1985; *Baterina vs. Comelec*, 205 SCRA 1, January 6, 1992.

[10] Annex 7 to Private Respondent Alonzo’s Comment; rollo, p. 231.

[11] While this irregularity does not appear on the face of the election return, non-compliance with the requirement under the Omnibus Election Code that the said election document be accomplished simultaneously with the counting of ballots is a ground to invalidate the said election return. As this anomaly pertains to the election returns and not to the ballots, it must be addressed at the earliest possible time, i.e., in the pre-proclamation case. To allow its resolution only in an election protest is, indeed, to open the floodgates to fraud.

[12] *Dimaporo vs. Comelec*, supra; *Matalam vs. Comelec*, supra.

[13] *Navarro vs. Comelec*, 228 SCRA 596, December 17, 1993; *Lozano vs. Yorac*, 203 SCRA 256, October 28, 1991.

[14] *Bustamante vs. Commissioner on Audit*, 216 SCRA 134, 136, November 27, 1992, citing several cases; *Sinon vs. Civil Service Commission*, 215 SCRA 410, November 5, 1992, also citing several cases.

[15] “Section 20, Procedure in Disposition of Contested Election Returns. -- (a) Any candidate, political party or coalition of political parties contesting the inclusion or exclusion in the canvass of any election returns on any of the grounds authorized under Article XX or Sections 234, 235 and 236 of Article XIX of the Omnibus Election Code shall submit their oral objection to the chairman of the board of canvassers at the time the questioned return is presented for inclusion in the canvass. Such objection shall be recorded in the minutes of the canvass.

(b) Upon receipt of any objection, the board of canvassers shall automatically defer the canvass of the contested returns and shall proceed to canvass the returns which are not contested by any party.

(c) Simultaneous with the oral objection, the objecting party shall also enter his objection in the form for written objections to be prescribed by the Commission. Within twenty-four (24) hours from and after the presentation of such an objection, the objecting party shall submit the evidence in support of the objection, which shall be attached to the form for written objections. Within the same period of twenty-four (24) hours after presentation of the objection, any party may file a written and verified opposition to the objection in the form also to be prescribed by the Commission, attaching thereto supporting evidence, if any. The board shall not entertain any objection or opposition unless reduced to writing in the prescribed forms.

The evidence attached to the objection or opposition, submitted by the parties, shall be immediately and formally admitted into the records of the board by the chairman affixing his signature at the back of each and every page thereof.

(d) Upon receipt of the evidence, the board shall take up the contested returns, consider the written objections thereto and opposition, if any, and summarily and immediately rule thereon. The board shall enter its ruling on the prescribed form and authenticate the same by the signatures of its members.

(e) Any party adversely affected by the ruling of the board shall immediately inform the board if he intends to appeal said ruling. The board shall enter said information in the minutes of the canvass, set aside the returns and proceed to consider the other returns.

(f) After all the uncontested returns have been canvassed and the contested return ruled upon by it, the board shall suspend the canvass. Within forty-eight (48) hours therefrom, any party adversely affected by the ruling may file with the board a written and verified notice of appeal; and within an unextendible period of five (5) days thereafter, an appeal may be taken to the Commission.

(g) Immediately upon receipt of the notice of appeal, the board shall make an appropriate report to the Commission, elevating therewith the complete records and evidence submitted in the canvass, and furnishing the parties with copies of the report.

(h) On the basis of the records and evidence elevated to it by the board, the Commission shall decide summarily the appeal within seven (7) days from receipt of said records and evidence. Any appeal brought before the Commission on the ruling of the board, without the accomplished forms and the evidence appended thereto, shall be summarily dismissed.

The decision of the Commission shall be executory after the lapse of seven (7) days from receipt thereof by the losing party.

(i) The board of canvassers shall not proclaim any candidate as winner unless authorized by the Commission after the latter has ruled on the objections brought to it on appeal by the losing party. Any proclamation made in violation hereof shall be void ab initio, unless the contested returns will not adversely affect the results of the election. (Underscoring supplied.)

[16] *Dimaporo vs. Comelec*, supra, p. 787.

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