

ELVIRA B. NAZARENO, PETITIONER, VS. COMMISSION ON ELECTIONS AND EDWINA P. MENDOZA, RESPONDENTS.

G.R. No. 126977. September 12, 1997

Ponente: DAVIDE, JR., J.

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DAVIDE, JR., J.:

In this special civil action for certiorari under Rule 65 of the Rules of Court, petitioner urges us to nullify, for having been issued with grave abuse of discretion, the Order and Writ of Preliminary Injunction issued on 7 November 1996 and 8 November 1996, respectively, by public respondent Commission on Elections (COMELEC) which directed petitioner Elvira B. Nazareno (hereafter, NAZARENO) to cease and desist from performing the duties and functions of the Office of the Mayor of Naic, Cavite.

The facts are not disputed.

NAZARENO and private respondent Edwina P. Mendoza (hereafter, MENDOZA) were two of the candidates for the Office of Mayor of the Municipality of Naic, Province of Cavite, in the local elections of 8 May 1995. In the canvass of the votes, the Municipal Board of Canvassers of Naic credited NAZARENO with 12,624 votes and MENDOZA with 13,896 votes. In light of MENDOZA's winning margin of 1,272 votes, the Board proclaimed MENDOZA as the elected Mayor of Naic.

In due time, NAZARENO filed an election protest against MENDOZA with the Regional Trial Court (RTC) of Cavite, Branch 15, sitting in Naic, Cavite, contesting the results of the election in forty-four (44) precincts. The case was docketed as EPC No. NC-7. In her Answer with Counter-Protest, MENDOZA questioned the results in twenty-nine (29) precincts.

In a decision^[1] rendered on 19 July 1996, then Assisting Judge Emerito M. Agcaoili of Branch 15 of the RTC of Cavite found for NAZARENO and decreed as follows:

In view of the foregoing judgment is hereby rendered declaring --

1. Elvira B. Nazareno winner over protestee Edwina P. Mendoza by a margin of 185 votes in the mayoralty elections of 08 May 1995 and the duly elected Mayor of the Municipality of Naic, Cavite.
2. Ordering protestee Edwina P. Mendoza to vacate the position of municipal mayor and turn over the same to protestant Elvira B. Nazareno.

No costs.

On 27 September 1996 NAZARENO filed a Motion for Immediate Execution of Judgment.^[2] In the meantime, MENDOZA filed a Notice of Appeal and paid the required appeal and docket fees.

On 15 October 1996 this Court issued Administrative Order No. 102-96^[3] directing Judge Emerito M. Agcaoili "to return to his official station at the Regional Trial Court, Branch 9, Aparri, Cagayan and resume his regular duties thereat." Thus, on 16 October 1996, when Judge Agcaoili heard on oral arguments the Motion for

Immediate Execution, MENDOZA contested Judge Agcaoili's authority to act thereon in view of said Administrative Order.

On 17 October 1996, MENDOZA filed a petition for certiorari, prohibition and mandamus with the COMELEC docketed as SPR No. 48-96, praying for the issuance of a temporary restraining order and/or writ of preliminary injunction ordering Judge Agcaoili to "cease and desist from further proceeding with, among others, Election Protest Case No. NC-7." MENDOZA amended the petition on 21 October 1996. On even date, COMELEC issued an Order[4] in SPR No. 48-96 and two other similarly situated cases, SPR No. 49-96 (Conrado Lindo vs. Judge Agcaoili and Rosario Velasco) and SPR No. 50-96 (Francisco Mendoza vs. Judge Agcaoili and Conrado Aure), the pertinent portions of which read:

In the meantime, considering that the designation of the respondent judge as Assisting Judge of the Regional Trial Court, Branch 15, Naic, Cavite, has been revoked by the Supreme Court on October 15, 1996 effective immediately, under Administrative Order No. 102-96, the Commission resolves to restrain the respondent Judge himself from acting or otherwise taking any further action on, resolving or, if resolved, enforcing the order granting the motion for execution pending appeal filed in EPC No. NC-7 entitled ELVIRA B. NAZARENO vs. EDWINA P. MENDOZA, EPC No. NC-8 entitled CONRADO LINDO vs. ROSARIO VELASCO, and EPC No. NC-4 entitled FRANCISCO MENDOZA vs. CONRADO AURE. However, the Regional Trial Court, Branch 15, Naic, Cavite, through the regular Presiding Judge or whoever may be specially designated by the Supreme Court, may resolve the motion unless the Supreme Court otherwise directs.

On 29 October 1996, Judge Napoleon V. Dilag, the regular judge appointed to Branch 15 of the RTC of Naic, Cavite issued an Order[5] granting the motion for execution of judgment upon NAZARENO's filing of a cash bond of P100,000.00. Judge Dilag ruled NAZARENO's right to the office had been established and the people had every right to be governed by their duly elected officials, especially since only 18 months remained of the term for which she was elected. Also on 29 October 1996, the RTC issued a writ of execution[6] directing the Provincial Director of Cavite of the Philippine National Police, who was deputized and appointed as special sheriff, to implement the writ.

On 30 October 1996 NAZARENO took her oath of office before Notary Public Prescila T. Baylosis. [7]

At 8:30 a.m. of 31 October 1996, MENDOZA filed with the COMELEC a petition for Certiorari and Prohibition with Prayer for the Issuance of Temporary Restraining Order and/or Writ of Preliminary Injunction,[8] praying that the writ of execution issued by Judge Dilag be set aside for having been issued without jurisdiction and/or with grave abuse of discretion amounting to lack or excess of jurisdiction in light of the following grounds:

- a) the decision ordered executed was based merely on XEROX COPIES of contested ballots which were NEVER offered in evidence;
- b) no good reason exists for the execution pending appeal;
- c) at the time the order granting execution pending appeal was issued the trial court had also lost jurisdiction over the case. On 27 September 1996 MENDOZA filed her notice of appeal with the trial court and paid all the legal and docket fees with the COMELEC; accordingly, the appeal was perfected. It was "(m)uch later in the afternoon of September 27, 1996" when NAZARENO filed her motion for execution pending appeal.

The COMELEC docketed the case as SPR No. 53-96.

On 5 November 1996 the COMELEC en banc issued in SPR No. 53-96 and in two other related cases, SPR No. 54-96 (Conrado Lindo v. Judge Napoleon V. Dilag, Jr, etc. and Rosario Velasco) and SPR No. 55-96 (Francisco

Mendoza v. Judge Napoleon V. Dilag, Jr., etc. and Conrado Aure), an Order[9] directing respondents Judge Dilag and NAZARENO to answer the petition and setting the application for a writ of preliminary injunction for hearing on 7 November 1996 at 10:00 a.m.

After due hearing, the COMELEC en banc issued in SPR No. 53-96 the challenged Order of 7 November 1996 which reads as follows:[10]

After due hearing, the Commission finds that the petitioner has shown sufficient justification for the issuance of a writ of preliminary injunction, prohibitory and mandatory, to restrain the lower court from executing and implementing the order/writ of execution pending appeal, dated October 29, 1996, in EPC No. NC-7, and the private respondent from assuming and performing the duties and functions and/or to relinquish such duties and functions of mayor of the municipality of Naic, Cavite, upon the filing by petitioners of a bond in the amount of P200,000.00, to answer for whatever damages that private respondent may suffer should it be finally held that the issuance of this injunction was improper or improvident.

The Commission issues this order based on the following considerations:

- (1) That the lower court admittedly did not review or examine the original ballots contested in the election protest but merely relied on xerox copies in deciding the election protest;
- (2) That the lower court based its decision principally on invalidating the votes on two main grounds, namely:
 - (a) that the ballots were written by one hand; and,
 - (b) that the ballots were marked, which, obviously, require visual examination of the disputed ballots.

Viewed in the light of the rules on appreciation of ballots under Section 211 of the Omnibus Election Code, we find the lower court's decision to be seriously impaired and the Commission is not prepared to give its imprimatur on the execution pending appeal of the decision, which was timely appealed.

ACCORDINGLY, the Commission issues a writ of preliminary injunction prohibitory and mandatory, commanding the respondent judge or anyone acting in his behalf, or upon his orders, from executing, enforcing and implementing the order/writ of execution dated October 29, 1996, in EPC No. NC-7 of the Regional Trial Court of Cavite, Naic, Branch XV, and respondent Nazareno from assuming, performing and exercising the duties and functions and/or to relinquish such duties and functions of mayor of the Municipality of Naic, Cavite, upon the filing by the petitioner of a bond in the amount of P200,000.00, to answer for whatever damages that private respondents may suffer by reason of the issuance of this injunction, until further orders of the Commission.

Respondent court is commanded to elevate to the Commission on Elections, Manila, the original record of EPC No. NC-7, and all the exhibits and other documentary evidence, including ballot boxes, within five (5) days from notice, under penalties of the law.

The Commission hereby deputizes the Chief, Philippine National Police, or his duly designated representative, to enforce this order.

The Clerk of the Commission shall issue the corresponding writ.

SO ORDERED.

On 8 November 1996 the COMELEC issued the Writ of Preliminary Injunction [11] after MENDOZA posted a cash bond of P200,000.00. Hence this petition based on the following grounds:

5.1.

RESPONDENT COMELEC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT ISSUED THE ORDER OF NOVEMBER 7, 1996 AND THE WRIT OF PRELIMINARY INJUNCTION WITHOUT GIVING PETITIONER NAZARENO THE OPPORTUNITY TO SUBMIT HER FORMAL OPPOSITION AND/OR ANSWER, IN VIOLATION OF HER RIGHT TO DUE PROCESS.

5.2.

RESPONDENT COMELEC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT ENJOINED THE EXECUTION PENDING APPEAL BASED ON ALLEGED CONSIDERATIONS THAT GO INTO THE MERITS OF THE DECISION RATHER THAN ON THE ORDER GRANTING EXECUTION PENDING APPEAL.

5.3.

RESPONDENT COMELEC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT ISSUED THE QUESTIONED ORDER AND WRIT BASED ON ALLEGED IMPAIRED DECISION A COPY OF WHICH WAS NEVER SUBMITTED TO IT OR EVEN OFFERED IN EVIDENCE.

5.4.

RESPONDENT COMELEC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN IT ISSUED THE QUESTIONED ORDER AND WRIT BASED ON XEROX AND UNCERTIFIED COPIES OF PORTIONS OF THE TRANSCRIPT OF STENOGRAPHIC NOTES.

5.5.

RESPONDENT COMELEC COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION WHEN, CONTRARY TO LAW AND EVIDENCE, IT DEPRIVED THE REGIONAL TRIAL COURT OF NAIC, CAVITE OF THE COMPETENCE TO ORDER EXECUTION PENDING APPEAL

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Thereafter, NAZARENO filed “extremely urgent” motions for the issuance of a temporary restraining order, which MENDOZA opposed.

In its Comment for public respondent COMELEC, the Office of the Solicitor General contends that the resolution of 14 January 1997 of this Court in *Conrado Aure v. Commission on Elections and Francisco Mendoza* (G.R. No. 126978) has rendered this petition moot and academic as the ultimate issue in the instant case is “similar to, if not identical with,” the principal issue raised in *Aure*, thus:

The substantial similarity or identity of issue between the aforecited case and the instant case arose from the fact that the challenged order of respondent COMELEC in the aforecited case and the order of respondent COMELEC subject of the instant petition, apart from being identically worded and dated, were issued by respondent COMELEC in SPR No. 55-96 and SPR No. 53-96, respectively, which were two (2) of the three (3) cases consolidated by respondent COMELEC having identical factual and legal backdrops.

Thus, the said ruling of this Honorable Court finds relevance and significance in this case, especially so that the petition filed in the *Aure* case and the instant petition are so identical that, save for the names of the parties, the municipality involved, the case numbers and some dates, both are similarly worded.

The pertinent portions of this Court’s resolution of 14 January 1997 in *Aure* read as follows:

In the special civil action of certiorari at bar, petitioner prays for invalidation of the respondent's Order dated November 7, 1996 – (1) issuing “a writ of preliminary injunction, prohibitory and mandatory, commanding the respondent judge or anyone acting in his behalf, or upon his orders, from executing, enforcing and implementing the order/writ of execution dated October 29, 1996, in EPC No. NC-4 of the Regional Trial Court of Cavite, Naic, Branch XV, and respondent Aure from assuming; performing and exercising the duties and functions and/or to relinquish such duties and functions of mayor of the municipality of Mendez, Cavite, upon the filing by the petitioner of a bond in the amount of P200,000.00, to answer for whatever damages that private respondents may suffer by reason of the issuance of this injunction, until further orders of the Commission,” and (2) commanding said judge “to elevate to the Commission **, Manila, the original records of EPC No. NC-8, and all the exhibits and other documentary evidence, including ballot boxes, within five (5) days from notice, under penalties of the law.” The COMELEC concluded from the evidence adduced at the hearing on the matter of the injunction, that the RTC Judge “admittedly did not review or examine the original ballots contested in the election protest,” yet it rules “(a) that the ballots were written by one hand; and (b) that the ballots were marked, which, obviously, require visual examination of the disputed ballots.”

After deliberating on the allegations and arguments set forth in the petition for certiorari, the Court Resolved to DISMISS the same for failure to show any whimsicality, capriciousness, oppressiveness, patent untenability, or unreasonableness in the challenged Order of November 7, 1996 which, on the contrary, appears to be entirely consistent with the facts, and with law and logic. In a word, no grave abuse of discretion has been demonstrated on the part of public respondent. The injunctive writ issued by it does nothing more than to maintain the status quo pending its determination in due course of the merits of the election protest.

On 22 April 1997, the Court denied MENDOZA's motion for leave to file her comment on the petition in view of the denial of her last motion for extension of time to file said comment and noted without action the comment she had by then filed.

After a careful scrutiny of the allegations raised and the arguments adduced in the petition, the comment of public respondent COMELEC, MENDOZA's opposition to the motions for issuance of the temporary restraining order and NAZARENO's reply thereto, the Court has reached the conclusion that NAZARENO has failed to show that public respondent COMELEC committed grave abuse of discretion in issuing the challenged order and writ of preliminary injunction.

The jurisdiction of the COMELEC to issue the extraordinary writs of certiorari, prohibition and mandamus in aid of its appellate jurisdiction has been settled in *Relampagos v. Cumba*.^[12] The decision of Branch 15, RTC, of Naic, Cavite in EPC No. NC-7 was appealable (and was in fact so appealed) to the COMELEC.^[13] Accordingly, the issuance by the trial court of an execution pending appeal may be challenged in a special civil action for certiorari under Rule 65 of the Rules of Court^[14] before the COMELEC.

Upon the filing of the MENDOZA petition in SPR No. 53-96, COMELEC did not issue a temporary restraining order, but required respondents to file an answer to the petition within ten days from notice and set the hearing on the application for a writ of preliminary injunction on 7 November 1996. Due to the urgency of the application, the hearing thereon need not have awaited the filing of the answer. Hence, NAZARENO's first assigned error deserves scant consideration. She was duly represented by counsel at said hearing and her petition did not even intimate that before the hearing commenced, her counsel moved for postponement thereof until she filed her answer. Moreover, she did not show the significance her answer might have had to the defenses she raised against the application for a writ of preliminary injunction. In the same vein, she did not even bother to attach to her petition in this case a copy of her answer, which she must have already filed with the COMELEC.

The second and third assigned errors are equally unpersuasive.

In resolving a special civil action for certiorari assailing an order granting execution pending appeal for having

been issued with grave abuse of discretion, an appellate tribunal -- or the COMELEC in appropriate election cases -- is not limited in its inquiry to the challenged order alone, but must likewise take into account the decision itself. This is obvious from the fact that execution pending appeal allowed by Section 2 of Rule 39 of the Rules of Court is an exception to the general rule that only final judgments may be executed; accordingly, the provision must be strictly construed. It can only be allowed on the basis of "good reasons" to be stated in a special order; the reasons must be of such urgency as to outweigh the injury or damage of the losing party should the latter secure a reversal of the judgment on appeal.[15]

While MENDOZA has admitted in her opposition to the motions for issuance of a temporary restraining order that she did not attach to her petition a copy of the decision, the fact remains that at the hearing of the application for the issuance of a writ of preliminary injunction on 7 November 1996, MENDOZA succeeded in showing that the decision of the Regional Trial Court in EPC No. NC-7 was based on mere photocopies of contested ballots which were never offered in evidence. The COMELEC was so convinced of the fact, hence in the dispositive portion in its challenged order of 7 November 1997, it concluded:

That the lower court admittedly did not review or examine the original ballots contested in the election protest but merely relied on xerox copies in deciding the election protest. (emphasis supplied).

When the COMELEC used the word admittedly, it simply meant that: (1) none of the parties disputed the fact that Assisting Judge Emerito Agcaoili rendered his decision in EPC No. NC-7 on the basis of mere photocopies -- not the original -- of the impugned ballots; and (2) NAZARENO presented no evidence to disprove that fact. Indeed, nowhere in the arguments in support of the second and third assigned errors can we find a direct, categorical and explicit statement by NAZARENO that the Agcaoili decision was not based on mere photocopies of the impugned ballots. Instead of going around the bush and merely stressing that a copy of the challenged decision was not attached to the petition, nor shown during the hearing or offered in evidence, NAZARENO could have been more candid and persuasive if she claimed and proved that Agcaoili decided the case not on the basis of photocopies of the ballots, but rather, the original ballots themselves. Interestingly enough, in her Reply to MENDOZA's opposition to the urgent motions for the issuance in this case of a temporary restraining order, NAZARENO failed to offer any credible reply to MENDOZA's assertion that during the hearing of the motion for execution pending appeal before the trial court on 16 October 1996, Judge Agcaoili admitted that his decision was based solely on the review and examination of photocopies of the contested ballots as shown in the following pertinent portions of the transcript of stenographic notes of the proceedings of said date (attached as Annex "1," "1-A," and "1-B" of the Opposition), to wit:

Atty. Macalintal: May we know if the Judge (referring to Judge Agcaoili) reviewed the photocopies of the ballots?

Court (Judge Agcaoili): Yes.

Atty. Macalintal: So it's only the photocopies of the ballots.

Court: Yes.

x x x

Atty. Macalintal: Well, We would just like to make of record that it has already been admitted by the Presiding Judge (Judge Agcaoili) that what was only reviewed by him are the photocopies of the ballots. (TSN. October 16, 1996 at pp. 12 and 13, copies attached as Annexes "1" and "1-A").

x x x

Atty. Macalintal: But we are glad that the Presiding Judge (Judge Agcaoili) already admitted that only the

photocopies of the ballots were reviewed and examined by him....

Court (Judge Agcaoili): Yes, Yes.

Atty. Macalintal: In arriving at this decision?

Court (Judge Agcaoili): Yes, Yes.

Atty. Brillantes Counsel for Petitioner): Yes

(TSN, *ibid*, at page 18, Annex “1-B”). (underscoring supplied)

MENDOZA pointed out that, as shown above, “even counsel for NAZARENO admitted that Judge Agcaoili reviewed and examined only the xerox copies of the contested ballots.”

With the foregoing admissions of Judge Agcaoili, presentation of his decision to the COMELEC during the hearing was unnecessary.

The COMELEC, therefore, cannot be deemed to have acted with grave abuse of discretion in concluding, for purposes of the application for the writ of preliminary injunction that, indeed, Judge Agcaoili’s decision was based on mere photocopies of the challenged ballots.

In the course of the hearing, the COMELEC likewise found that the invalidation of ballots by Judge Agcaoili was based on two grounds: (1) the ballots were written by one hand; and (2) the ballots were marked. Since Judge Agcaoili did not view, examine and appreciate the original ballots involved, the COMELEC acted correctly and judiciously in declaring that “(v)iewed in the light of the rules on appreciation of ballots under Section 211 of the Omnibus Election Code ... the lower court’s decision [is] seriously impaired.” Indeed, it would have been impossible for Judge Agcaoili to determine if the ballots were written by one person or that they were marked solely on the basis of the photocopies thereof as the latter were not the best evidence of the impugned ballots. These findings of the COMELEC can thus hardly be characterized as having been attended by grave abuse of discretion.

The fourth assigned error is utterly without merit. Again, NAZARENO makes no candid declaration that the Agcaoili decision was not based on photocopies of the questioned ballots. NAZARENO merely speculates that the COMELEC “must have based” its finding that “the lower court admittedly did not review or examine the original ballots ... but merely relied on xerox copies ... on the allegation in paragraph 8 of MENDOZA’s Petition stating that judge Agcaoili ‘admitted in open court that his decision was based merely on the XEROX COPIES of the contested ballots and did not look into the original copies of the said ballots.’” MENDOZA based this claim on the transcripts of the stenographic notes of the proceedings of 16 October 1996 before Judge Agcaoili pertinent portions of which were attached to her petition in SPR No. 53-96 as Annexes “C” and “C-1.” But according to NAZARENO, these attached portions were not certified, and during the hearing on 7 November 1996, MENDOZA did not produce, present nor offer in evidence the “official/original or certified true copy” of the transcripts. Yet, nowhere in the petition at bar did NAZARENO assert that during the hearing of 7 November 1996 she challenged the correctness of the attached portions of the transcript which were used by MENDOZA as proof of Judge Agcaoili’s admission. We cannot see how the COMELEC committed abuse of discretion in this regard.

In light of the foregoing, we thus rule that the findings and conclusions of the COMELEC in its order of 7 November 1996 were entirely consistent with the facts duly established during the hearing and with applicable law and logic. Hence, the last assigned error must likewise fail. The COMELEC did not deprive the Regional Trial Court of its competence to order execution pending appeal; it merely exercised its power, in aid of its

appellate jurisdiction to maintain the status quo, by way of the injunctive writ obtained in a special civil action for certiorari.

Indeed, our resolution of 14 January 1997 in *Aure v. COMELEC* (supra) applies on all fours in this case.

WHEREFORE, for lack of merit, the instant petition is DISMISSED with costs against petitioner.

SO ORDERED.

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

Puno, J., please see concurring opinion.

[1] Annex "G" of Petition; Rollo, 48-79.

[2] Annex "H" of Petition; Id., 80-83.

[3] Annex "I" of Petition; Id., 85.

[4] Annex "J" of Petition; Rollo, 86-87.

[5] Annex "K" of Petition; Id., 88-91.

[6] Annex "L" of Petition; Rollo, 92-93.

[7] Annex "M" of Petition; Id., 94.

[8] Annex "O" of Petition; Id., 96-107.

[9] Annex "P" of Petition; Id., 120. The Order was signed by Chairman Bernardo P. Pardo and Commissioners Salazar-Fernando, Desamito, Dy-Liacco Flores and Guiani. Over the printed name of Commissioner Gorospe is written the letters OB, followed by an illegible initial.

[10] Signed by Chairman Bernardo P. Pardo and Commissioners Maambong, Salazar-Fernando, Desamito, Dy-Liacco Flores and Guiani. Over the printed name of Commissioner Gorospe is written the letters OB, followed by an illegible initial.

[11] Annex "D" of Petition; Rollo, 42-43.

[12] G.R. No. 118861, 27 April 1995; 243 SCRA 690[1995].

[13] Section 2(2), Subdivision C, Article IX, 1987 Constitution; Section 21, Rule 35, Revised COMELEC Rules of Procedure.

[14] See *Jaca v. Davao Lumber Co.*, 113 SCRA 107, 129[1982]; *City of Manila v. Court of Appeals*, 204 SCRA 362, 368-369[1991].

[15] *City of Manila v. Court of Appeals*, supra note 14 at 367.

CONCURRING OPINION

PUNO, J.:

I write this brief concurring opinion only to dispel the drift of any idea that our decision in the case at bar conflicts with our decision in *Lindo v. COMELEC, et al.*, GR No. 127311 dated June 19, 1997. There is no conflict between the two for in the case at bar, the ponente, Mr. Justice Davide, Jr., clearly demonstrated that "the decision of the RTC in EPC No. NC-7 was based on mere photocopies of contested ballots which were never offered in evidence." Necessarily, this Court refused to execute it pending appeal. In *Lindo*, we did not arrive at this conclusion, and we prudentially ruled that the issue of whether the RTC merely relied on xerox copies of ballots is factual in nature and its resolution should be left with the COMELEC. At the time we decided *Lindo*, his appeal was already pending with the Second Division of the COMELEC and among the issues he raised was the alleged use of xerox copies of ballots by the trial court. In due time, the said COMELEC division decided *Lindo's* appeal on its merit by opening the ballot boxes involved in the protest and examining the contested ballots. It ruled that *Lindo* lost by thirty-two (32) votes to *Velasco*. This resolution is not yet final as *Lindo* can still challenge it in the COMELEC en banc and thereafter, thru a petition for certiorari in this court. Nonetheless, we cite the resolution of the COMELEC 2nd Division as it underscores the decisive difference in facts between the case at bar and *Lindo* with respect to the alleged use of photocopies of ballots by the trial court.

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