JESUS O. TYPOCO, JR., PETITIONER, VS. COMMISSION ON ELECTIONS (COMELEC) EN BANC, AND JESUS EMMANUEL PIMENTEL, RESPONDENTS.

G.R. No. 136191. November 29, 1999

Ponente: GONZAGA-REYES, J.

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GONZAGA-REYES, J.:

Before us is a petition for certiorari and prohibition to annul and set aside the resolution of the Commission on Elections (COMELEC) En Banc dated October 12, 1998 which dismissed herein petitioner Jesus Typoco, Jr.'s (TYPOCO) petition for Annulment of Election or Election Results and/or Declaration of Failure of Elections docketed as SPA No. 98-413.

The factual antecedents insofar as pertinent to the instant petition are as follows:

TYPOCO and private respondent Jesus Pimentel (PIMENTEL) were both candidates for the position of Governor in Camarines Norte during the May 11, 1998 elections. On May 22, 1998, TYPOCO together with Winifredo Oco (OCO), a candidate for the position of Congressman of the Lone District of Camarines Norte filed a Joint Appeal before the COMELEC docketed as SPC-No. 98-133. TYPOCO and OCO questioned therein the ruling of the Provincial Board of Canvassers of Camarines Norte which included in the canvass of votes the Certificate of Canvass of the Municipality of Labo, Camarines Norte. TYPOCO also filed a Motion to Admit Evidence to Prove That a Substantial Number of Election Returns Were Manufactured as They Were Prepared by One Person based on the report of one Francisco S. Cruz, a Licensed Examiner of Questioned Document, who examined copies of election returns of the LAKAS-NUCD.

On June 4, 1998, COMELEC (Second Division) issued an Order dismissing the Joint Appeal. Thereafter, TYPOCO filed a Motion for Reconsideration reiterating his motion to admit evidence to prove the manufacturing and/or spurious character of the questioned returns which were allegedly prepared in group by only one person and which will materially affect the results of the election for the position of Governor.

In the meantime, on June 10, 1998, TYPOCO and OCO filed with the COMELEC En Banc a separate petition for Annulment of Election or Election Results and/or Declaration of Failure of Elections in several precincts, docketed as SPA No. 98-413, subject of the instant petition. The petition alleged that massive fraud and irregularities attended the preparation of the election returns considering that upon technical examination, 305 election returns were found to have been prepared in group by one person.

On July 15, 1998, the COMELEC En Banc issued an Order directing the Voters Identification Division of the Commission's Election Records and Statistics Department (ERSD) to examine the COMELEC copies of the 305 election returns questioned by TYPOCO.

On August 12, 1998, the COMELEC's ERSD Voters Identification Division submitted its Questioned Document Report to the COMELEC En Banc on the results of its technical examination of the questioned election returns.

The report disclosed, among others, that the "handwritten entries on 278 COMELEC copies of election returns particularly under the columns Congressman/Governor/Vice-Governor Nickname or Stage Name, were written by one and the same person in groups."[1]

On August 31, 1998, the COMELEC En Banc issued the resolution denying petitioner's motion for reconsideration in SPC No. 98-133 on the ground that an election protest is the proper remedy.

TYPOCO then filed a petition for certiorari and prohibition under Rule 65 with prayer for the issuance of a temporary restraining order and/or writ of preliminary injunction assailing the Order dated June 4, 1998 and the Resolution dated August 31, 1998, respectively issued in SPC No. 98-133 by the COMELEC (Second Division) and the COMELEC En Banc.[2] In a resolution dated September 22, 1998, this Court dismissed the petition finding no grave abuse of discretion on the part of respondent COMELEC in issuing the aforesaid assailed orders. TYPOCO's motion for reconsideration was likewise denied by this Court with finality on September 29, 1998.

On October 12, 1998, the COMELEC En Banc promulgated a resolution in SPA 98-413, dismissing TYPOCO's petition for the Declaration of Failure of Elections and/or Annulment of Elections in Camarines Norte for lack of merit, thus:

> "The grounds cited by petitioners do not fall under any of the instances enumerated in Sec. 6 of the Omnibus Election Code.
>
> In Mitmug vs. Commission on Elections, 230 SCRA 54, the Supreme Court ruled that before the Comelec can act on a verified petition seeking to declare a failure of elections, at least two (2) conditions must concur: (a) no voting has taken place in the precincts on the date fixed by law, or even if there was voting, the election nevertheless resulted in failure to elect; and (b) the votes that were not cast would affect the result of the election. From the allegations of the petition in the instant cases, it is clear that an election took place and that it did not result in a failure to elect. In fact, by separate resolution, the Commission has authorized the provincial board of canvassers to proclaim the winning candidates and this as been implemented.
>
> WHEREFORE, the Commission hereby DISMISSES the petition in each of the above cases, for lack of merit."[3]

Hence, the instant petition on the grounds that the COMELEC En Banc gravely abused its discretion as follows: 1. in holding that the grounds cited by TYPOCO do not fall under any of the instances enumerated in Section 6 of the Omnibus Election Code; 2. in refusing to annul the election or the election results or to declare a failure of election despite the fact that massive fraud and irregularities attended the preparation of the election returns; 3. in failing to proclaim TYPOCO as the winning candidate for Governor; 4. in failing to annul the proclamation of PIMENTEL which is null and void from the beginning; 5. in ruling that an election protest is the proper remedy and not an annulment of the election or election results and/or declaration of failure of elections.[4]

Simply stated, did the COMELEC commit grave abuse of discretion in not declaring a failure of elections for the position of Governor in Camarines Norte in the May 11, 1998 elections?

In a Manifestation and Motion (In Lieu of Comment) filed by the Office of the Solicitor General (OSG), the latter joins TYPOCO's prayer for affirmative relief. The OSG explains thus:

> "13. The petition a quo (SPA No. 98-413) specifically prayed for annulment of election returns and/or election results in the protested precincts where massive fraud and irregularities were allegedly committed in the preparation of the election returns which, upon technical examination of their authentic copies, were found to have been prepared in groups by one person (Petition, Annex A, p.2).
>
> 14. On this score, it should be stressed that election returns are prepared separately and independently by the

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Board of Election Inspectors assigned in each and every precinct. Hence, uniformity in the handwritten entries in the election returns emanating from different electoral precincts, as in this case speaks only of one thing --- THE ELECTION RETURNS WERE FABRICATED OR TAMPERED WITH.

Here, the COMELEC itself, through its own Voters' Identification Department, certified that out of the 305 election returns in the 12 municipalities of Camarines Norte, 278 or 91.14% thereof were found to have been written by one person which fact lucidly speaks of "massive fraud" in the preparation of election returns.

15. Precisely, massive fraud committed after the voting and during the preparation of the election returns resulting in a failure to elect, is a ground for annulment of election under Section 6 of the Omnibus Election Code. As such therefore, the case at bar falls within the jurisdiction of COMELEC.

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18. At any rate, there is merit to petitioner's claim that the votes in the subject election returns, if correctly appreciated, will materially affect the results of the election for Governor, i.e.,

TYPOCO

PIMENTEL

Votes per PBC Canvass

53,454

64,358

Less: Votes obtained from Fraudulent Returns

11,253

27,060

Difference

42,201

37,325

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Vote Lead of Petitioner

4,876"[5]

The authority of the COMELEC to declare a failure of elections is derived from Section 4 of Republic Act No. 7166, otherwise known as, "The Synchronized Elections Law of 1991," which provides that the COMELEC sitting En Banc by a majority vote of its members may decide, among others, the declaration of failure of election and the calling of special elections as provided in Section 6 of the Omnibus Election Code. Said Section 6, in turn, provides as follows:

> "Sec. 6. Failure of election. - If, on account of force majeure, violence, terrorism, fraud or other analogous causes the election in any polling place has not been held on the date fixed or had been suspended before the hour fixed by the law for the closing of the voting, or after the voting and during the preparation and the transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect, and in any of such cases the failure or suspension of election would affect the result of the election, the Commission shall, on the basis of verified petition by any interested party and after due notice and hearing, call for the holding or continuation of the election not held, suspended or which resulted in a failure to elect on a date reasonably close to the date of the election not held, suspended or which resulted in a failure to elect but not later than thirty days after the cessation of the cause of such postponement or suspension of the election or failure to elect."

The same provision is reiterated under Section 2, Rule 26 of the Revised COMELEC Rules.

Based on the foregoing laws, the instant petition must fail because the allegations therein do not justify a declaration of failure of election.

The COMELEC correctly pointed out that in the case of Mitmug vs. Commission on Elections[6], this Court held that before COMELEC can act on a verified petition seeking to declare a failure of election, two (2) conditions must concur: first, no voting has taken place in the precincts concerned on the date fixed by law or, even if there was voting, the election nevertheless resulted in a failure to elect; and second, the votes cast would affect the result of the election. In Loong vs. Commission on Elections[7], this Court added that the cause of such failure of election should have been any of the following: force majeure, violence, terrorism, fraud of other analogous cases. Further, in Borja, Jr. vs. Commission on Elections[8], we stated that:

> "The COMELEC can call for the holding or continuation of election by reason of failure of election only when the election is not held, is suspended or results in a failure to elect. The latter phrase, in turn, must be understood in its literal sense, which is "nobody was elected."

Clearly then, there are only three (3) instances where a failure of election may be declared, namely: (a) the election in any polling place has not been held on the date fixed on account of force majeure, violence, terrorism, fraud, or other analogous causes; (b) the election in any polling place had been suspended before the hour fixed by law for the closing of the voting on account of force majeure, violence, terrorism, fraud or other analogous causes; (c) after the voting and during the preparation and transmission of the election returns or in the custody or canvass thereof, such election results in a failure to elect on account of force majeure, violence, terrorism, fraud, or other analogous causes.[9] In all instances there must have been failure to elect; this is obvious in the first scenario where the election was not held and the second where the election was suspended. As to the third scenario, the preparation and transmission of the election returns which give rise to the consequence of failure to elect must as aforesaid be literally interpreted to mean that nobody emerged as a winner.

None of these circumstances is present in the case at bar. While the OSG joins TYPOCO in pinpointing anomalies

in the preparation of the election returns due to the uniformity of the handwriting in the same, implying that fraud was committed at that stage, the fact is that the casting and counting of votes proceeded up to the proclamation of the winning candidate thus precluding the declaration of a failure of election. While fraud is a ground to declare a failure of election, the commission of fraud must be such that it prevented or suspended the holding of an election including the preparation and transmission of the election returns.[10]

It can thus readily be seen that the ground invoked by TYPOCO is not proper in a declaration of failure of election. TYPOCO's relief was for COMELEC to order a recount of the votes cast, on account of the falsified election returns, which is properly the subject of an election contest.[11]

The COMELEC, therefore, had no choice but to dismiss TYPOCO's petition in accordance with clear provisions of the law and jurisprudence.

WHEREFORE, finding no grave abuse of discretion committed by public respondent Commission on Elections, the petition is DISMISSED and its Resolution En Banc of October 12,1998 dismissing the petition before it on the ground that the allegations therein do not justify a declaration of failure of election is AFFIRMED.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Melo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Purisima, Buena, Ynares-Santiago, and De Leon, Jr., JJ., concur.
Pardo, J., no part.

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[1] Rollo, pp. 79-80.

[2] Docketed as G.R. No. 135020-21.

[3] Rollo, p. 34.

[4] Rollo, pp. 13-14.

[5] Rollo, pp. 162-164.

[6] 230 SCRA 54 (1994).

[7] 257 SCRA 1 (1996).

[8] 260 SCRA 604 (1996).

[9] Canicosa vs. Comission on Elections, 282 SCRA 512 (1997).

[10] See above-quoted Section 6.

[11] Sanchez vs. Commission on Elections, 153 SCRA 67 (1987).

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