

**DATU ANDAL S. AMPATUAN, BIMBO Q. SINSUAT, SR., IBRAHIM B. BIRUAR, ALONTO B. DAUDIE, MICHAEKL B. DIRANGAREN, ASNAWIS S. LIMBONA, RUSSMAN Q. SINSUAT, ZALNUDIN M. ABUTAZIL, DATUWAT...**

*G.R. No. 149803. January 31, 2002*

Ponente: PARDO, J.

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**PARDO, J.:**

The case is a petition for certiorari and prohibition under Rule 64 in relation to Rule 65 of the Revised Rules of Court with preliminary injunction or temporary restraining order[1] to nullify and set aside two (2) orders dated July 26, 2001[2] and August 28, 2001[3] of the Commission on Elections (COMELEC), ordering a random technical examination of pertinent election paraphernalia and other documents in several municipalities in the province of Maguindanao to determine a failure of elections.

Petitioners[4] and respondents[5] were candidates for the provincial elective positions in the province of Maguindanao in the May 14, 2001 election. Petitioner Ampatuan and respondent Candao contended for the position of governor. The slate of Ampatuan emerged as winners as per election returns.

On May 23, 2001, respondents filed a petition with the Comelec for the annulment of election results and/or declaration of failure of elections[6] in several municipalities[7] in the province of Maguindanao. They claimed that the elections “were completely sham and farcical.” The ballots were filled-up en masse by a few persons the night before election day, and in some precincts, the ballot boxes, official ballots and other election paraphernalia were not delivered at all.[8]

On May 25, 2001, the Comelec issued an order suspending the proclamation of the winning candidates for congressman of the second district, governor, vice-governor and board members of Maguindanao.[9]

On May 30, 2001, petitioners filed with the Comelec a motion to lift the suspension of proclamation.[10] On June 14, 2001, the Comelec issued an order lifting the suspension of proclamation of the winning candidates for governor, vice-governor and board members of the first and second districts.[11] Consequently, the Provincial Board of Canvassers proclaimed petitioners winners.[12]

On June 16, 2001, respondents filed with the Supreme Court a petition to set aside the Comelec order dated June 14, 2001, and preliminary injunction to suspend the effects of the proclamation of the petitioners.[13] Meantime, petitioners assumed their respective offices on June 30, 2001. On July 17, 2001, the Court resolved to deny respondents’ petition.[14]

Petitioners’ assumption into office notwithstanding, on July 26, 2001, the Comelec ordered the consolidation of respondents’ petition for declaration of failure of elections with SPA Nos. 01-244, 01-332, 01-360, 01-388 and 01-390.[15] The COMELEC further ordered a random technical examination on four to seven precincts per municipality on the thumb-marks and signatures of the voters who voted and affixed in their voter’s registration

records, and forthwith directed the production of relevant election documents in these municipalities.[16]

On August 28, 2001, the Comelec issued another order[17] directing the continuation of the hearing and disposition of the consolidated SPAs on the failure of elections and other incidents related thereto. It likewise ordered the continuation of the technical examination of election documents as authorized in the July 26, 2001 order. On September 27, 2001, the Comelec issued an order outlining the procedure to be followed in the technical examination.[18]

On September 26, 2001, petitioners filed the present petition.[19] They claimed that by virtue of their proclamation pursuant to the June 14, 2001 order issued by the Comelec, the proper remedy available to respondents was not a petition for declaration of failure of elections but an election protest. The former is heard summarily while the latter involves a full-blown trial. Petitioners argued that the manner by which the technical examination is to be conducted[20] would defeat the summary nature of a petition for declaration of failure of elections.

On October 5, 2001, petitioners filed a motion[21] reiterating their request for a temporary restraining order to enjoin the implementation of the July 26, 2001 and August 28, 2001 Comelec orders.

On October 22, 2001, the Comelec issued an order suspending the implementation of the two (2) assailed orders, the pertinent portion of which reads as follows:

“The Commission, in view of the pendency of G. R. No. 149803 xxx, requiring it to comment within ten (10) days from notice, hereby suspends implementation of its orders of July 26, 2001 and August 28, 2001 in deference to the resolution of said court.”[22]

However, on November 13, 2001, the Comelec issued another order lifting the suspension.[23]

On November 20, 2001, we issued a temporary restraining order, to wit:

“xxx the Court Resolved to (a) ISSUE the TEMPORARY RESTRAINING ORDER prayed for, effective immediately and continuing until further orders from this Court, ordering the respondent Commission on Elections to CEASE and DESIST from ordering the lifting of the suspended implementation orders dated 26 July 2001 and 28 August 2001 in SPA No. 01-323 xxx.”[24]

The main issue to be resolved is whether the Commission on Elections was divested of its jurisdiction to hear and decide respondents’ petition for declaration of failure of elections after petitioners had been proclaimed.

We deny the petition.

Petitioners submit that by virtue of their proclamation as winners, the only remedy left for private respondents is to file an election protest, in which case, original jurisdiction lies with the regular courts. Petitioners cited several rulings that an election protest is the proper remedy for a losing candidate after the proclamation of the winning candidate.[25]

However, the authorities petitioners relied upon involved pre-proclamation controversies. In *Loong v. Commission on Elections*,[26] we ruled that “a pre-proclamation controversy is not the same as an action for annulment of election results, or failure of elections.” These two remedies were more specifically distinguished in this wise:

“While, however, the Comelec is restricted, in pre-proclamation cases, to an examination of the election returns on their face and is without jurisdiction to go beyond or behind them and investigate election irregularities, the Comelec is duty bound to investigate allegations of fraud, terrorism, violence, and other analogous causes in actions for annulment of election results or for declaration of failure of elections, as the

Omnibus Election Code denominates the same. Thus, the Comelec, in the case of actions for annulment of election results or declaration of failure of elections, may conduct technical examination of election documents and compare and analyze voters' signatures and thumbprints in order to determine whether or not the elections had indeed been free, honest and clean.”[27]

The fact that a candidate proclaimed has assumed office does not deprive the Comelec of its authority to annul any canvass and illegal proclamation.[28] In the case at bar, we cannot assume that petitioners' proclamation and assumption into office on June 30, 2001, was legal precisely because the conduct by which the elections were held was put in issue by respondents in their petition for annulment of election results and/or declaration of failure of elections.

Respondents' allegation of massive fraud and terrorism that attended the May 14, 2001 election in the affected municipalities cannot be taken lightly as to warrant the dismissal of their petition by the Comelec on the simple pretext that petitioners had been proclaimed winners. We are not unmindful of the fact that “a pattern of conduct observed in past elections has been the pernicious ‘grab-the-proclamation-prolong-the-protest’ slogan of some candidates or parties” such that even if the protestant wins, it becomes “a mere pyrrhic victory, i.e., a vindication when the term of office is about to expire or has expired.” xxx “We have but to reiterate the oft-cited rule that the validity of a proclamation may be challenged even after the irregularly proclaimed candidate has assumed office.”[29]

Petitioners likewise rely on the case of *Typoco, Jr. v. Commission on Elections*.[30] This Court held that Comelec committed no grave abuse of discretion in dismissing a petition for declaration of failure of elections. However, we made a pronouncement that the dismissal was proper since the allegations in the petition did not justify a declaration of failure of elections. “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.”[31]

Respondents' petition for declaration of failure of elections, from which the present case arose, exhaustively alleged massive fraud and terrorism that, if proven, could warrant a declaration of failure of elections. Thus:

“4.1. The ‘elections’ in at least eight (8) other municipalities xxx were completely sham and farcical. There was a total failure of elections in these municipalities, in that in most of these municipalities, no actual voting was done by the real, legitimate voters on election day itself but ‘voting’ was made only by few persons who prepared in advance, and en masse, the ballots the day or the night before election and, in many precincts, there was completely no voting because of the non-delivery of ballot boxes, official ballots and other election paraphernalia; and in certain municipalities, while some semblance of ‘voting’ was conducted on election day, there was widespread fraudulent counting and/or counting under very irregular circumstances and/or tampering and manufacture of election returns which completely bastardized the sovereign will of the people. These illegal and fraudulent acts of desecration of the electoral process were perpetrated to favor and benefit respondents. These acts were, by and large, committed with the aid and/or direct participation of military elements who were deployed to harass, intimidate or coerce voters and the supporters or constituents of herein petitioners, principally, of re-electionist Governor Datu Zacaria Candao. Military units and personnel visibly, openly and flagrantly violated election laws and regulations by escorting people or elements engaged in the illegal, advanced preparation of ballots and election returns and, at times, manning the polling places or precincts themselves and/or staying within the prohibited radius. Ballot boxes and other election paraphernalia were brought not to the precincts or voting centers concerned but somewhere else where massive manufacture of ballots and election documents were perpetrated.”[32]

The Comelec en banc has the authority to annul election results and/or declare a failure of elections.[33] Section 6 of the Omnibus Election Code further provides that:

“Section 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 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 a 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 but not later than thirty days after the cessation of the cause of such postponement or suspension of the election of failure to elect.”

Elucidating on the concept of failure of election, we held that:

“xxx 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*, this Court added that the cause of such failure of election should have been any of the following: force majeure, violence, terrorism, fraud or other analogous cases.”[34]

In another case, we ruled that “while it may be true that election did take place, the irregularities that marred the counting of votes and the canvassing of the election returns resulted in a failure to elect.”[35]

In the case at bar, the Comelec is duty-bound to conduct an investigation as to the veracity of respondents’ allegations of massive fraud and terrorism that attended the conduct of the May 14, 2001 election. It is well to stress that the Comelec has started conducting the technical examination on November 16, 2001. However, by an urgent motion for a temporary restraining order filed by petitioners, in virtue of which we issued a temporary restraining order on November 20, 2001, the technical examination was held in abeyance until the present. In order not to frustrate the ends of justice, we lift the temporary restraining order and allow the technical examination to proceed with deliberate dispatch.

WHEREFORE, the petition is hereby DISMISSED. The temporary restraining order issued on November 20, 2001 is DISSOLVED. The Commission on Elections is directed to proceed with the hearing of the consolidated petitions and the technical examination as outlined in its September 27, 2001 order with deliberate dispatch. No costs.

### **SO ORDERED.**

Davide, Jr., C.J., Bellosillo, Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Buena, Ynares-Santiago, De Leon, Jr., and Carpio, JJ., concur.

Melo, J., please see dissenting opinion.

Sandoval-Gutierrez, J., joins Justice Melo in his dissent.

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[1] Filed on September 26, 2001 (Rollo, pp. 3-26). On October 2, 2001, we required respondents to comment on the petition (Rollo, p. 127).

[2] In the consolidated cases SPA Nos. 01-244 and 01-323 (Rollo, pp. 81-86).

[3] In the consolidated cases SPA Nos. 01-244, 01-323, 01-332, 01-360, 01-388, and 01-390 (Rollo, pp. 117-122).

[4] Official candidates of the Lakas-NUCD-UMDP political party (Rollo, p. 28).

[5] Official candidates under the banner of KAMPI (Rollo, p. 28).

- [6] Docketed as SPA No. 01-323 (Rollo, pp. 27-37).
- [7] Namely: Shariff Aguak, Talayan, Mamasapano, Ampatuan, Datu Odin Sinsuat, South Upi, Salipada K. Pendatun and Datu Piang.
- [8] Rollo, pp. 27-37 at pp. 29-34.
- [9] Rollo, pp. 48-49.
- [10] Rollo, pp. 50-55.
- [11] Rollo, pp. 67-76.
- [12] Petition, Rollo, pp. 3-26 at p. 4.
- [13] Docketed as G.R. No. 148289 (Petition, Rollo, p. 4).
- [14] Petition, Rollo, p. 5.
- [15] One of the assailed orders of this present petition, Order dated July 26, 2001 in SPA 01-323.
- [16] Ibid.
- [17] Rollo, pp. 117-122.
- [18] Rollo, pp. 332-346.
- [19] Rollo, pp. 3-26.
- [20] As outlined in the September 27, 2001 order of the Comelec.
- [21] Rollo, pp. 128-154.
- [22] Rollo, pp. 184-186.
- [23] Rollo, pp. 187-195.
- [24] Rollo, pp. 167-168.
- [25] *Salvacion v. Commission on Elections*, 170 SCRA 513 (1989); *Torres v. Commission on Elections*, 270 SCRA 583 (1997); *Typoco, Jr. v. Commission on Elections*, 319 SCRA 498 (1999).
- [26] 326 Phil. 790, 814 (1996), cited in *Matalam v. Commission on Elections*, 338 Phil. 447 (1997).
- [27] *Loong v. Commission on Elections*, 326 Phil. 790, 814 (emphasis supplied).
- [28] *Aguam v. Comelec*, 132 Phil. 353, 357 (1968).
- [29] Ibid., at p. 358.

**[30] 319 SCRA 498 (1999).**

- [31] *Typoco, Jr. v. Commission on Elections*, 319 SCRA 498, 506 (1999). Emphasis supplied.
- [32] Rollo, pp. 29-30.
- [33] Section 4, R.A. No. 7166, "The Synchronized Elections Law of 1991."
- [34] *Typoco, Jr. v. Commission on Elections*, 319 SCRA 498, 505 (1999), citing *Mitmug v. Commission on*

Elections 230 SCRA 54 (1994).

[35] Soliva v. Commission on Elections, G.R. No. 141723 (April 20, 2001).

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## DISSENTING OPINION

### MELO, J.:

I am constrained to dissent from the majority opinion penned by Mr. Justice Bernardo P. Pardo because of the far reaching implications on the future conduct of national elections as supervised and administered by the Commission on Elections and its handling of resulting election contests.

Petitioners question the jurisdiction of the Commission on Elections (COMELEC) to take cognizance of and act upon private respondents' petition to declare a failure of elections in ten (10) municipalities of Maguindanao during the May 14, 2001 elections.

The issue calls for the clear demarcation of the dividing line in COMELEC's exercise of power insofar as declaring a failure of elections on one hand and deciding an election contest on the other, is concerned.

Petitioners assert that factually and legally, there has been no failure of elections. The fraud, violence, and other electoral irregularities alleged by the respondents cover practically the entire spectrum of serious election anomalies. They will be exactly the same grounds that respondents will raise in an election contest. Petitioners question the consideration of these similar grounds in a summary, non-trial type of examination after their proclamation and several months of occupying the elective positions.

The record shows that COMELEC undertook a deliberate and attentive examination of respondents' objections before it ordered the proclamation of winning candidates. Petitioners ask if all the steps — casting and counting of ballots, canvass of returns, examination of the losing parties' objections, and the proclamation may be undone, set aside, and cancelled on the basis of a random and non-adversarial examination of only 4 to 7 precincts in each of the 10 municipalities where respondents lost and a failure of elections is alleged to have resulted. The undisputed facts, as culled from the record are as follows.-

Datu Andal S. Ampatuan and the other petitioners were candidates for Governor, Vice-Governor, and Board Members, respectively, in the province of Maguindanao during the May 14, 2001 elections. Opposing them were Datu Zacaria A. Candao and the other respondents.

Datu Ampatuan garnered 175,815 votes as against Datu Candao's 114,105 votes, thus getting a majority of 62,711 votes. Ampatuan carried his slate of candidates to victory.

On May 23, 2001 respondents filed a petition before COMELEC to annul elections returns or to declare a failure of elections in 10 out of the 21 municipalities of Maguindanao. Respondents alleged the pre-filling of ballots and other election documents on the day before the May 14, 2001 elections and the submission at gunpoint of falsified or tampered election returns in addition to alleged widespread acts of violence and intimidation inflicted upon the Board of Election Inspectors and Canvassers.

Acting on the petition, COMELEC issued a May 25, 2001 order suspending the proclamation of the winning candidates. It investigated the allegations raised in the petition.

On June 14, 2001 COMELEC lifted its suspension order and directed the proclamation, without delay, of Ampatuan and his co-petitioners as the winning candidates. Based on this June 14, 2001 order, petitioners were

proclaimed duly elected by the Provincial Board of Canvassers (PBC).

Datu Candao and his group went to this Court on a petition docketed as G.R. Nos. 148289-90 questioning the lifting by COMELEC of its suspension-of-proclamation order and the subsequent proclamation of Datu Ampatuan and his group. Petitioners in those two cases prayed for a temporary restraining order or a writ of preliminary injunction to suspend the effects of the proclamation of Ampatuan and his companions.

When the prayed-for TRO or writ of preliminary injunction was not issued, herein petitioners on June 30, 2001 assumed the powers and functions of their respective offices. They have served as such up to the present time.

On July 17, 2001, this Court denied for lack of merit, the Candao petition for injunctive relief, thus sustaining the assumption of office by the proclaimed officials.

On July 26, 2001, COMELEC issued the resolution questioned in this present petition. COMELEC consolidated the various petitions for the annulment of election results and/or the declaration of failure of elections. It required a random technical examination on 4 to 7 precincts per municipality on the thumb marks and signatures of the voters. On July 28, 2001, COMELEC issued another resolution, also questioned in the instant petition, continuing the proceedings on the alleged failure of elections and the technical examinations earlier ordered.

On September 26, 2001, the Ampatuan petitioners filed the present petition so as to reverse and set aside the July 26 and 28, 2001 resolutions and praying as well that COMELEC be ordered to dismiss the consolidated SPA No. 01-323.

On October 2, 2001, COMELEC resolved to suspend the implementation of the questioned resolutions, out of deference to the Supreme Court's taking cognizance of the instant petition.

On November 13, 2001, however, the COMELEC decided to lift its October 2, 2001 suspending implementation of the questioned resolutions in spite of the pendency of the instant case.

On November 20, 2001, this Court, acting on an urgent manifestation and motion of petitioner Bimbo Q. Sinsuat, Sr., issued a TRO, ordering COMELEC to cease and desist from directing the lifting of the suspension order which interrupted the implementation of the July 26 and July 28, 2001 resolutions. On December 7, 2001, the COMELEC Chairman ordered implementation of the "cease and desist" TRO of this Court.

Private respondents filed their Comment on the instant petition on November 29, 2001. The Solicitor-General filed a Comment for COMELEC on January 2, 2001. A Consolidated Reply was filed on January 7, 2002 followed by a Manifestation With Urgent Motion To Lift TRO filed by the private respondents.

The issues in this case revolve around the exercise of COMELEC power. Petitioners allege that under the circumstances of the case, COMELEC has no jurisdiction to declare a failure of elections in the 10 municipalities stated in their petitions. Petitioners object to the limited, random, and far-from-thorough technical examination, short-cutting all steps and proceedings which led to their proclamation. They say that the election irregularities alleged by private respondent should be considered by COMELEC under its authority to adjudicate election contests.

When may a failure of election be validly declared by COMELEC in the exercise of its executive-administrative power? On the other hand, when is the controversy appropriate for COMELEC acting as a judicial body? In both cases, the grounds based on fraud, irregularities, and intimidation may be the same. However thin though the line of separation may be, there is a jurisdictional distinction in the exercise of power. And the distinction is based on no less than the Constitution (Section 2, Art. IX-C, Constitution).

The traditional function of COMELEC since its creation in 1940 has been supervisory and administrative in

nature. As an administrative body, COMELEC takes all the necessary measures to promote free, orderly, and honest elections. It has exclusive charge over the enforcement and administration of all laws and regulations relative to the conduct of elections (Section 2, Art. X, the 1935 Constitution, as amended.) It supervises the election machinery and decides questions involving the performance by election officers of their official functions. The authority given to COMELEC to declare a failure of elections and to call for the holding and continuation of the failed election falls under its administrative function. The Court had given a wide latitude to the exercise of this jurisdiction as COMELEC enforces the laws relative to the conduct of elections (*Cauton vs. COMELEC* (19 SCRA 911 [1967]; *Aratuc vs. COMELEC*, (88 SCRA 251 [1979]; *Omar vs. COMELEC*, (102 SCRA 621 [1981]; *Sanchez vs. COMELEC*, 114 SCRA 454 [1982])).

The scope of COMELEC's jurisdiction to declare a failure of elections may be broad but it has to be limited to the statutory grant of power. More so since elections have already been held and winning candidates have been proclaimed.

In 1973, the revised Constitution added the judicial function of adjudicating certain election contests to COMELEC jurisdiction (Sec. 2, Art. XII-C of the 1973 Constitution). The procedures followed in a judicial contest are markedly different from those used by COMELEC in its enforcement and administrative machinery. The two functions cannot be mixed up in one indiscriminate proceeding. The administrative function should not supersede or encroach on the exercise of judicial powers over election contests.

In election contests, COMELEC is no longer concerned with the enforcement of the laws or the conduct of elections. Exercising its judicial functions, COMELEC ascertains who between the contending candidates actually received the majority or plurality of the legitimate or valid ballots (*Gardiner vs. Romulo*, 26 Phil. 521 [1914]).

Under the present Constitution, COMELEC exercises original jurisdiction over all contests, relating to the election, returns, and qualifications of all elective regional, provincial, and city officials, and appellate jurisdiction over election contests involving elective municipal and barangay officials (Sec. 2, Art. IV-C of the 1987 Constitution). The question asked in election protests is who are the real choices of the people (*De Mesa vs. Mencias*, (18 SCRA 933 [1966]; *Garcia vs. Court of Appeals*, (36 SCRA 582 [1970])). Thus, allegations of fraud and irregularities in the casting and counting of ballots and canvass of returns are examined with the end in view of ascertaining who among the contestants is the legitimate winning candidate and not for the holding or continuation of failed or suspended elections.

The distinction is important in the case at bar. Did private respondents correctly invoke the enforcement powers of COMELEC when they filed their petitions to declare a failure of elections? Or should they have resorted to a regular election contest where the alleged frauds, irregularities, and terrorism may be examined to determine who between the petitioners and the private respondents are the legitimate choices of the voters of Maguindanao?

As contended by petitioners, the validity of the votes cast, the truth of alleged coercive or fraudulent acts, and other questions as to who of the candidates actually and truly received the majority of the votes — these are for an election contest to determine.

In *Sison vs. COMELEC* (334 SCRA 170 [1999]), we ruled that under the pertinent provisions of the Omnibus Election Code, there are only three instances where a failure of elections 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; or
- (b) The election in any polling place had not 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 cause; or

(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.

As in *Sison vs. COMELEC*, a painstaking examination of the record of the instant case would show that there was no failure of elections as provided under the Omnibus Election Code.

Elections were actually held on May 14, 2001. There was no suspension of voting in any polling place before the hour fixed for the closing of the voting. The records do not show any failure to elect based on events after the voting and during the preparation, transmission, and canvass of the returns. The actions COMELEC took in the instant case go beyond the boundaries expressed in the Omnibus Election Code and the precedents set by this Court.

In his Comment for the public respondent, the Solicitor General takes the side of private respondents and recommends the dismissal of the instant petition. While urging respect for COMELEC expertise and respondent's privilege to choose remedies, the Solicitor General makes a significant admission, thusly:

As a final statement, the attention of the Honorable Court, however, is invited to the fact that the COMELEC in its Comment dated November 22, 2001 in the related case of *Candao vs. COMELEC*, G.R. Nos. 148289-90 has already concluded that the May 14, 2001 election in the Province of Maguindanao, where petitioner Ampatuan and private respondent Candao were the candidates for governor, was free and fair, thus:

- The records show that the voters of Maguindanao were able to cast their votes freely and fairly. Their votes were counted correctly. The people have spoken. Their sovereign will has to be obeyed.
- Mere allegations of failure of elections cannot prevent the commission from issuing an order lifting its previous Order to suspend the proclamation of winning candidates. This is pursuant to its general power to issue orders, resolutions in regard to conduct of free, orderly, and honest elections. The Commission cannot frustrate the will of the people by delaying the proclamation of the winning candidates. Election to public office involves public interest (emphasis supplied).

(Comment For Public Respondent, p. 11 to 12).

If the elections were free and fair and the sovereign will has to be obeyed, COMELEC has no lawful authority to conduct its random technical examination and on the basis of a superficial examination of a limited number of ballots, declare a failure of elections.

In *Borja vs. COMELEC* (260 SCRA 604 [1996]), we stated that the phrase "failure to elect" must be literally interpreted to mean that nobody emerged as a winner. Petitioners cite the dictionary meaning of failure as "a failing to occur, be performed, or be produced; non-performance; or default. Under the literal or connotation or common understanding of the word "failure," it appears that elections were actually held in all municipalities of Maguindanao on May 14, 2001.

Our ruling in *Typoco vs. COMELEC* (319 SCRA 498 [1999]) sustains the position of petitioners. Respondents, however, argue that the *Typoco* doctrine is not applicable to the facts of the present petition. In *Typoco*, this Court ruled that the basis for a declaration of a failure of election must be such that it prevented or suspended the holding of an election including the preparation and transmission of the election returns. Respondents contend that in *Typoco*, COMELEC first ascertained the degree of the occurrence of the fraud and its effect on the overall voting before dismissing the petition to declare a failure of elections which allegedly was not done in this case.

The record shows that COMELEC'S initial reaction to the filing of the Candao petition for a declaration of failure of elections was neither precipitate, hasty, nor ill-considered. As earlier stated, two days after the May 23, 2001

filing of respondents' petition before it, COMELEC suspended the proclamation of the Ampatuan group. For 20 days, COMELEC considered the Candao petition. Only on June 14, 2001 did COMELEC order the proclamation of the winning candidates. The proclaimed candidates did not immediately assume their respective offices. It was only when this court did not issue the prayed-for TRO in G.R. Nos. 148289-90 did they assume their offices. They waited until June 30, 2001 to do so.

After the filing of the May 23 failure-of-election petition, COMELEC did not limit itself to hearing and considering the submissions of the contending parties. It sought a report from the Provincial Board of Canvassers (PBC). The June 11, 2001 report of the PBC is cited by COMELEC in its June 14, 2001 Order when it directed the PBC "to proceed with the proclamation of the mentioned winning candidates without delay, except that for Congressman of the Second District."

The PBC Report states *inter alia*:

The provincial canvassing had been smooth and orderly and was witnessed by several watchers and counsels representing the different candidates and political parties.

With respect to the petitions for exclusion of Certificate(s) of Canvass (COCs) on several municipalities, the PBC is now finalizing its ruling with the general finding/observation that almost all, if not all of the petitions, are either not grounds for a pre-proclamation controversy, or that, although the grounds are proper, the supporting evidences do not support the same. Apparently, the petitions for exclusion filed by both candidates Datu Zacaria Candao and Datu Andal Ampatuan had to be dismissed by the PBC considering that most of the issues raised by the parties are proper ground(s) for election protest. On the other hand, questions on manifest errors in the face of the certificates of canvass had been correction *motu prop(ri)o* by the Board or upon manifestation by the Counsels.

Finding the provincial canvassing to be orderly and without any legal flaw, it is recommended that the results of the canvassing be upheld after a final ruling on the petitions for exclusion had been finally disposed of by the Provincial Board of Canvassers. ...

COMELEC took notice, in its Order, of the serious allegations of respondents that there was a total failure of elections in 9 municipalities due to "massive fraud committed prior to the actual voting, widespread terrorism and violence prior to and during election day." It also considered the allegation on sham and farcical elections" in 8 municipalities. COMELEC looked into the degree of the alleged fraud and its overall effects before it ordered proclamation.

COMELEC cited the case of *Dagloc vs. COMELEC* (321 SCRA 273 [1999]), that "grounds which are proper for electoral contests — which are the same as grounds for the declaration of failure of elections — should not be allowed to delay the proclamation of winners."

It is quite obvious that in continuing with the failure-of-election proceedings after ordering proclamation, COMELEC has included in its enforcement functions, questions which it acknowledges are also appropriate for an election contest. COMELEC must adopt the proper procedure. Should it act as an administrative enforcer of election laws or as a judicial tribunal adjudicating an election contest?

In its June 14, 2001 Order, COMELEC decided that the controversy over the position of Congressman for the Second District of Maguindanao is for the House of Representatives Electoral Tribunal (HRET) to resolve. There is a contradiction in the COMELEC order. The HRET is a judicial body. If COMELEC declares a failure of elections in the Second District, neither the Congressman nor the provincial officials would have been elected. New elections have to be called for all positions. There is all the more reason that since the case of the Congressman is referred to a judicial tribunal, the same should also be done in the cases of the Governor and other

provincial officials. Why should sauce for the Congressman not also be sauce for the Governor and other provincial officials.

Petitioners deplore the allegedly cavalier attitude of COMELEC towards this Court. Petitioners cite the critical attitude of COMELEC at this Court's alleged failure to act as fast as COMELEC wants it to act. Petitioners quote the portion of the COMELEC Order that "it is high time that we implement our July 26, 2001 and August 28, 2001 orders," that "a reasonable period has already lapsed and this Commission cannot indefinitely wait for the developments in G.R. No. 149803" and that "proceedings in the cases before us should not, therefore, be interrupted."

The primary causes of delay in this case are the flip-flopping, indecisive, and contradictory actions taken by COMELEC.

In *Cabagnot vs. COMELEC* (260 SCRA 503 [1996]), we ruled that COMELEC has ample powers but such powers must be exercised prudently and not whimsically or capriciously. In the instant case, as in *Cabagnot*, COMELEC has flip-flopped in its actions. The inconsistent actions taken tend to denigrate public trust in its objectivity and dependability as the constitutionally mandated body to supervise the conduct of elections and adjudicate election cases within its jurisdiction. The parties mention the tensions, violent disturbances and other dangers to peace and order which could arise from the incidents of this case.

In *Dagloc vs. COMELEC*, *supra* and *Dimaporo vs. COMELEC* (186 SCRA 769 [1990]), we emphasized that public policy frowns upon the occurrence of "grab-the-proclamation and prolong-the protest" situations. However, I believe that the possibility of such an occurrence, especially if it is debatable, slight, or unlikely, has to be balanced against the clear and present dangers created by a lengthy period of non-proclamation of winners or, worse, a provisional unseating of incumbent officials based on a perfunctory and random examination of a limited number of ballots.

The Court must guard against proclamation grabbing on one hand and the equally pernicious effects of unseating proclaimed winners on the basis of random technical examinations or an improperly declared failure of elections.

Under the circumstances of the case at hand, the grounds raised for a declaration of failure of elections are more correctly addressed in election contests. In *Dimaporo vs. COMELEC*, *Ibid.*, we stated that "public interest requires that the positions for the filling of which the elections are held should be filled as promptly as possible subject to the results of an election protest that may ensue." In *Abella vs. Larrazabal* (180 SCRA 509 [1989]), such questions as those involving appreciation of ballots, conduct of campaign and balloting, which require more deliberate and necessarily longer consideration, are left for examination in the corresponding election protest. As early as 1926, this court stated in *Mandac vs. Samonte* (49 Phil. 284 [1926]), that courts should be slow in multiplying elections, exercising the power only when it is shown that the irregularities and fraud are so numerous as to show an unmistakable design to defraud and defeat the true expression of the will of the electorate.

In *Sanchez vs. COMELEC* (153 SCRA 67 [1987]), we explained that the powers of COMELEC are essentially executive and administrative in nature and the question of whether or not there had been terrorism, vote-buying, and other irregularities in the election should be ventilated in a regular election protest and that the COMELEC, acting in a non-judicial capacity, is not the proper forum for deciding such matters.

Under the circumstances of the present case and based on applicable law, an election protest is the appropriate remedy. Complex matters which necessarily entail the presentation of conflicting testimony should not be resolved in random, technical, and summary proceedings.

I, therefore, vote to reverse and set aside the questioned resolutions of the Commission on Elections dated July 26,

2001 and July 28, 2001 and for SPA No. 01-323 before the Commissions on Elections to be dismissed.

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