

BAGO P. PASANDALAN, PETITIONER, VS. COMMISSION ON ELECTIONS AND BAI SALAMONA L. ASUM, RESPONDENTS.*G.R. No. 150312. July 18, 2002*

Ponente: CARPIO, J.

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A petition for declaration of failure of election must specifically allege the essential grounds that would justify the exercise of this extraordinary remedy. Otherwise, the Comelec can dismiss outright the petition for lack of merit. No grave abuse of discretion can be attributed to the Comelec in such a case because the Comelec must exercise with utmost circumspection the power to declare a failure of election to prevent disenfranchising voters and frustrating the electorate's will.

The Case

Before us is a petition for review on certiorari of the Resolution[1] of the Commission on Elections en banc dated October 12, 2001 dismissing petitioner Bago P. Pasandalan's ("Pasandalan" for brevity) petition to declare a failure of election.

Pasandalan and private respondent Bai Salamona L. Asum ("Asum" for brevity) were candidates for mayor in the Municipality of Lumbayanague, Lanao del Sur during the May 14, 2001 elections.

On May 23, 2001, Pasandalan filed a petition[2] before public respondent Commission on Elections ("Comelec" for brevity) seeking to nullify the election results in Barangay Cabasaran (Precinct Nos. 9A, 10A, 11A and 12A), Barangay Deromoyod (Precinct Nos. 24A, 25A and 26A), Lamin (Precinct Nos. 29A and 30A), Barangay Wago (Precinct Nos. 46A, 47A and 48A), Barangay Meniros (Precinct Nos. 32A, 33A and 34A), Barangay Bualan (Precinct Nos. 6A, 7A and 8A) and Barangay Pantaon (Precinct Nos. 38A and 39A), all of Lumbayanague, Lanao del Sur.

Petitioner alleged that on May 14, 2001, while voting was going on, some Cafgu's stationed near Sultan Gunting Elementary School indiscriminately fired their firearms causing the voters to panic and leave the polling center without casting their votes. Taking advantage of the confusion, supporters of Asum allegedly took the official ballots, filled them up with the name of Asum and placed them inside the ballot boxes. The incident allegedly marred the election results in Precinct Nos. 9A-12A, 24A-26A and 29A-30A.

In Precinct Nos. 46A, 47 and 48A, the members of the Board of Election Inspectors ("BEI" for brevity) allegedly failed to sign their initials at the back of several official ballots and to remove the detachable coupons. The BEI members allegedly affixed their initials only during the counting of votes.

In Precinct Nos. 6A-8A, 32A-34A and 38A-39A, Pasandalan claims that Asum's supporters, taking advantage of the fistfight between Asum's nephew and the supporters of candidate Norania Salo, grabbed the official ballots and filled them up with the name of Asum.

Pasandalan contends that a technical examination of several official ballots from the contested precincts would show that only a few persons wrote the entries.

On June 26, 2001, Asum filed an Answer denying Pasandalan's allegation that the volley of shots fired on May 14, 2001 disrupted the voting. Private respondent countered that the gunshots were heard around 2:35 p.m. and not at the start of the voting. On June 30, 2001, Asum was sworn into office and assumed the position of municipal mayor of the Lumbayanague, Lanao del Sur.

On October 12, 2001, the Comelec issued a Resolution dismissing the petition for lack of merit.[3]

Hence, this petition.

The Comelec's Ruling

The Comelec ruled that the power to declare a failure of election, being an extraordinary remedy, could be exercised only in three instances: (1) the election is not held; (2) the election is suspended; or (3) the election results in a failure to elect. The third instance is understood in its literal sense, that is, nobody was elected.

The Comelec dismissed the petition because none of the grounds relied upon by Pasandalan falls under any of the three instances justifying a declaration of failure of election. First, the elections in the questioned precincts were held as scheduled. Second, the gunshots heard during the casting of votes did not suspend the election as the voting continued normally. Third, Asum was elected by a plurality of votes.

The authenticity and integrity of the election returns were left undisturbed throughout the preparation, transmission, custody and canvass of the returns. Pasandalan alleges fraud and terrorism, in that there was massive substitution of voters, firing of guns to frighten the voters, and failure of the BEI members to sign at the back of some official ballots and to remove the detachable coupons. The Comelec ruled that these allegations are better ventilated in an election contest.

The Comelec did not give credence to Pasandalan's evidence in support of his allegations of terrorism and fraud since the evidence consisted only of affidavits executed by Pasandalan's own poll watchers. The Comelec considered these affidavits self-serving and insufficient to annul the results of the election. Thus, the Comelec dismissed the petition for lack of merit.

The Issues

Pasandalan now assails the Comelec's dismissal of his petition, raising the following issues:

- "1. WHETHER THE COMMISSION ON ELECTIONS ACTED WITHOUT OR IN EXCESS OF JURISDICTION OR WITH GRAVE ABUSE OF DISCRETION IN DISMISSING THE PETITION IN SPA NO. 01-305 FOR ALLEGED LACK OF MERIT;
2. WHETHER THE COMMISSION ON ELECTIONS COMMITTED GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OF JURISDICTION IN NOT ANNULING THE ELECTION OR DECLARING A FAILURE OF ELECTION IN THE SIXTEEN (16) QUESTIONED PRECINCTS;
3. WHETHER THE COMMISSION ON ELECTIONS ACTED WITHOUT OR IN EXCESS OF ITS JURISDICTION OR WITH GRAVE ABUSE OF DISCRETION IN NOT DECLARING AS ILLEGAL, NULL AND VOID AB INITIO THE PROCLAMATION OF THE PRIVATE RESPONDENT AS THE DULY ELECTED MAYOR OF LUMBAYANAGUE, LANA DEL SUR IN THE LAST MAY 14, 2001 REGULAR ELECTIONS AND MAY 30, 2001 SPECIAL ELECTIONS."

The Court's Ruling

We rule that the petition is without merit. The Comelec correctly dismissed the petition for declaration of failure of election because the irregularities alleged in the petition should have been raised in an election protest, not in a petition to declare a failure of election.

Under Republic Act No. 7166, otherwise known as “The Synchronized Elections Law of 1991,”[5] the Comelec en banc is empowered to declare a failure of election under Section 6 of the Omnibus Election Code (B.P. Blg. 881). Section 6 of the Code prescribes the conditions for the exercise of this power, thus:

“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 law for 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 or failure to elect.”

Based on the foregoing provision, three instances justify a declaration of failure of election. These are:

- “(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 has 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; 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.”[6]

What is common in these three instances is the resulting failure to elect.[7] In the first instance, no election is held while in the second, the election is suspended.[8] In the third instance, circumstances attending the preparation, transmission, custody or canvas of the election returns cause a failure to elect. The term failure to elect means nobody emerged as a winner. [9]

Pasandalan asserts that the conditions for the declaration of failure of election are present in this case. The volley of shots from high-powered firearms allegedly forced the voters to scamper away from the polling place, paving the way for Asum’s supporters to write the name of Asum on the ballots. The gunfire also frightened Pasandalan’s poll watchers. The heavy firing allegedly suspended or prevented the holding of elections in the contested precincts, resulting in failure to elect. The victory of Asum is thus put in serious doubt.

We do not agree. Pasandalan’s allegations do not fall under any of the instances that would justify the declaration of failure of election. The election was held in the 16 protested precincts as scheduled. At no point was the election in any of the precincts suspended. Nor was there a failure to elect because of force majeure, violence, terrorism, fraud or other analogous causes during the preparation, transmission, custody and canvass of the election returns. The alleged terrorism was not of such scale and prevalence to prevent the holding of the election or to cause its suspension. In fact, the casting and counting of votes, the preparation, transmission and canvassing of election returns and the proclamation of the winning candidate took place in due course.

Courts exercise the power to declare a failure of election with deliberate caution so as not to disenfranchise the electorate.[10] The fact alone that actual voting took place already militates against Pasandalan’s cause. Also, Pasandalan’s allegations of terrorism and fraud are not sufficient to warrant a nullification of the election in the

absence of any of the three instances justifying a declaration of failure of election. Terrorism may not be invoked to declare a failure of election and to disenfranchise the greater number of the electorate through the misdeeds of only a few,[11] absent any of the three instances specified by law.

To warrant a declaration of failure of election on the ground of fraud, the fraud must prevent or suspend the holding of an election, or mar fatally the preparation, transmission, custody and canvass of the election returns.[12] The conditions for the declaration of failure of election are stringent. Otherwise, elections will never end for losers will always cry fraud and terrorism.[13]

The allegations of massive substitution of voters, multiple voting, and other electoral anomalies should be resolved in a proper election protest[14] in the absence of any of the three instances justifying a declaration of failure of election. In an election protest, the election is not set aside, and there is only a revision or recount of the ballots cast to determine the real winner.[15]

The nullification of elections or declaration of failure of elections is an extraordinary remedy.[16] The party who seeks the nullification of an election has the burden of proving entitlement to this remedy. It is not enough that a verified petition is filed. The allegations in the petition must make out a prima facie case for the declaration of failure of election, and convincing evidence must substantiate the allegations.[17]

In the instant case, it is apparent that the allegations do not constitute sufficient grounds for the nullification of the election. Pasandalan even failed to substantiate his allegations of terrorism and irregularities. His evidence consisted only of affidavits. Mere affidavits are insufficient,[18] more so in this case since the affidavits were all executed by Pasandalan's own poll watchers. Factual findings of the Comelec are binding on this Court.[19] Accordingly, the following findings of the Comelec in the instant case must be respected:

“xxx There was an allegation in the amended petition that while voting was taking place in Sultan Gunting Elementary School, gunshots were heard causing the voters to scamper for safety and leave the polling center without having cast their votes. However, other than his bare allegation and the ‘pre-typed’ affidavits of his watchers, petitioner did not present substantial and convincing evidence to support his claim. On the other hand, 1 Lt. Frederick Galang Pa of the 29th Infantry Battalion assigned in Lumbayanague categorically declared in his affidavit that despite the gunshots which were heard at around 2:35 PM when the polls were about to close, “the voting continued normally.” This statement was bolstered by the narrative report of Urangutan Mamailao, Election Officer of Lumbayanague, on the conduct of the election in said municipality. The report was spontaneously prepared when the incident happened. Taken in the light of the presumption of regularity in the performance of official functions, these two affidavits carry great weight. Third, the authenticity and integrity of the election returns are left undisturbed throughout the preparation, transmission, custody and canvass thereof. There was no allegation, much less proof that the sanctity of the election returns was defiled.

xxx

A thorough examination of the affidavits reveals that they suffer from both extrinsic and intrinsic invalidity. The form and the contents of the affidavits were pre-typed, and all the affiants had to do was to fill-up the blank spaces for their names and precinct assignments. This clearly shows that some other person prepared the affidavits and it is doubtful whether the affiants understood the contents thereof before they signed them.

Also worth noting is the fact that the contents of the affidavits are identical. It is highly questionable why different persons have exactly the same observation of different incidents. Even persons confronted with the same occurrence would have different observations of the same incident because human perception is essentially affected by several factors like the senses, mental condition, personal disposition, environment, etc.

Moreover, the affidavits contain inconsistent statements and incredible allegations which bolster the

conclusion that they were tailored to suit the needs of the petitioner. For example, the joint-affidavit of Badjomura Calauto and Macaruog Ampuan states that they were in Barangay Cabasaran during the May 14 election when they saw the men of respondent fill-up the ballots in Precinct Nos. 29A-30A of Barangay Lamin. The venue of voting for Barangay Cabasaran was Sultan Gunting Central Elementary School while that of Barangay Lamin was Lamin Primary School. How they were able to witness said incident when they were miles away from where it happened is mystifying. Besides, this is not the proper forum to challenge illegal voters. Even at the precinct level, petitioner's watchers are empowered to question any irregularity which they think may have been committed by any person or to challenge the capacity of any person offering to vote. Failing to avail himself of this remedy, petitioner cannot now pass the burden to innocent voters by calling for the annulment of the results of a validly held election.”[20]

Pasandalan bewails the Comelec's dismissal of his petition without first conducting a technical examination of the questioned precincts. Pasandalan claims that had the Comelec made a technical examination of the questioned precincts, the Comelec would have discovered massive substitution of voters, terrorism, violence, threats, coercion, intimidation and other electoral frauds, resulting in a failure of election. Pasandalan insists that a technical examination in this case would have been proper as in *Typoco, Jr. v. Commission on Elections*,[21] which is also a case of failure of election.

The Comelec is not mandated to conduct a technical examination before it dismisses a petition for nullification of election when the petition is, on its face, without merit. In *Typoco*, petitioner Typoco buttressed his petition with independent evidence that compelled the Comelec to conduct a technical examination of the questioned returns. Typoco filed a Motion to Admit Evidence to prove that a substantial number of election returns were manufactured. Typoco claimed that the returns were prepared by only one person based on the report of Francisco S. Cruz, a licensed examiner of questioned documents, who examined copies of the election returns of Lakas-NUCD. In the present case, Pasandalan failed to attach independent and objective evidence other than the self-serving affidavits of his own poll watchers.

In *Mitmug v. Commission on Elections*,[22] we ruled that the Comelec could dismiss outright a petition for nullification of election if it is plainly groundless and the allegations therein could be better ventilated in an election protest. In *Banaga, Jr. v. Commission on Elections*,[23] we reiterated this doctrine, thus -

“Finally, petitioner claims that public respondent gravely abused its discretion when it dismissed his petition *motu proprio*. However, the fact that a verified petition has been filed does not mean that a hearing on the case should first be held before Comelec can act on it. The petition to declare a failure of election and/or to annul election results must show on its face that the conditions necessary to declare a failure to elect are present. In their absence, the petition must be denied outright. Public respondent had no recourse but to dismiss the petition. Nor may petitioner now complain of denial of due process, on this score, for his failure to properly file an election protest. The Comelec can only rule on what was filed before it. It committed no grave abuse of discretion in dismissing his petition ‘to declare failure of elections and/or for annulment of elections’ for being groundless, hence without merit.”

Clearly, the fact that a verified petition is filed with the Comelec does not necessarily mean that a technical examination or a hearing on the case should be conducted first before the Comelec can act on the petition. There is no grave abuse of discretion if the Comelec dismisses the petition even without a technical examination or hearing if the petition fails to show on its face the existence of any of the three instances required by law to declare a failure of election. The Comelec in this case correctly dismissed the petition.

Pasandalan believes that notwithstanding the fact that actual voting took place in the questioned precincts, the election in this case, just like in *Basher v. Commission on Elections*,[24] was “illegal, irregular, and void.”[25] Citing *Basher*, Pasandalan argues that the peculiar set of facts in this case do not merely show a failure of election

“but the absence of a valid electoral exercise.”[26]

The fact that an election is actually held prevents as a rule a declaration of failure of election. It is only when the election is attended by patent and massive irregularities and illegalities that this Court will annul the election. Basher is an example of such a case.

In Basher, after a series of failed elections in Barangay Maidan, Municipality of Tugaya, Lanao del Sur during the 1997 barangay elections, the election was reset to August 30, 1997. Due to the prevailing tension in the locality, the voting started only at around 9 p.m. and lasted until the early morning of the following day. Basher filed a petition for the nullification of election. The Comelec ruled against a failure of election because actual voting had taken place. However, we overturned the Comelec ruling because the election was unauthorized and invalid. The electorate was not given sufficient notice that the election would push through after 9 p.m. of the same day. Moreover, the voting did not comply with the procedure laid down by law and by Comelec rules as to the time and place of voting. Thus, we held that the “election” was illegal, irregular and void. Consequently, we annulled the proclamation of the winning candidate and ordered a special election.

Basher does not apply to this case. Unlike in Basher, the election in this case proceeded as scheduled, in accordance with law and Comelec rules. None of the extreme circumstances that marred the election in Basher is present in this case. We have ruled that there is failure of election only if the will of the electorate is muted and cannot be ascertained.[27] If the will of the people is determinable, the same must be respected as much as possible.[28] In this case, the will of the electorate is readily discernible. Pasandalan should have filed an election protest to substantiate his allegations of electoral anomalies, not a petition to declare a failure of election.

WHEREFORE, the instant petition is DISMISSED. The assailed Resolution of public respondent Comelec is AFFIRMED. Costs against petitioner.

SO ORDERED.

Bellosillo, (Acting C.J.), Puno, Vitug, Kapunan, Mendoza, Panganiban, Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Austria-Martinez, and Corona, JJ., concur. Davide, Jr., C.J., on leave.

[1] Penned by Alfredo L. Benipayo (Chairman), with Commissioners Luzviminda G. Tancangco, Rufino S.B. Javier, Ralph C. Lantion, Mehol K. Sadain, Resurreccion Z. Borra, and Florentino A. Tuason, Jr., concurring.

[2] Docketed as SPA No. 01-305.

[3] Rollo, p. 34.

[4] Rollo, pp. 14-15.

[5] “Sec. 4. Postponement; Failure of Election and Special Elections. - The postponement, declaration of failure of election and the calling of special elections as provided in Sections 5, 6 and 7 of the Omnibus Election Code shall be decided by the Commission sitting en banc by a majority vote of its members. The causes or the declaration of a failure of election may occur before or after the casting of votes on the day of the election. xxx.”

[6] Banaga, Jr., v. Commission on Elections, 336 SCRA 701 (2000).

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Mitmug v. Commission on Elections, 230 SCRA 54 (1994).

[11] Hassan v. Commission on Elections, 264 SCRA 125 (1996).

- [12] Banaga v. Commission on Elections, *supra*, note 6.
- [13] Mitmug v. Commission on Elections, *supra*, note 10.
- [14] Rollo, pp. 7-11.
- [15] Carlos v. Angeles, 346 SCRA 571 (2000).
- [16] Mitmug v. Commission on Elections, *supra*, note 10.
- [17] *Ibid.* See also Banaga v. Commission on Elections, *supra*, note 6.
- [18] Cordero v. Commission on Elections, 310 SCRA 118 (1999).
- [19] *Ibid.*
- [20] Rollo, pp. 30-32.
- [21] 319 SCRA 498 (1999); Rollo, p. 16.
- [22] *Supra*, note 10.
- [23] *Supra*, note 6.
- [24] 330 SCRA 736 (2000); Rollo, p. 16.
- [25] *Ibid.*
- [26] Rollo, p. 19.
- [27] Banaga v. Commission on Elections, *supra*, note 6.
- [28] *Ibid.*

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