

SALLY A. LEE, PETITIONER, VS. COMMISSION ON ELECTIONS AND LEOVIC R. DIONEDA, RESPONDENTS.

G.R. No. 157004. July 04, 2003

Ponente: CARPIO MORALES, J.

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CARPIO MORALES, J.:

Before this Court is a petition for certiorari with prayer for a temporary restraining order/ writ of preliminary injunction under Rule 64 of the 1997 Rules of Civil Procedure seeking to set aside the February 11, 2003 En Banc Resolution[1] of the Commission on Elections (COMELEC) in SPC No. 01-124.

Sally A. Lee (petitioner) and Leovic R. Dioneda (private respondent) were candidates for mayor of Sorsogon City, Sorsogon in the May 14, 2001 elections.

During the canvassing of the election returns, counsel for private respondent objected to the inclusion of Election Return No. 41150266 for Precinct No. 28A2 in barangay Bucalbucalan, Sorsogon City on the grounds that 1) no entries were made for the position of congressman, and 2) Laban ng Demokratikong Pilipino (LDP) watchers were utilized to fill up election returns.[2]

In her opposition to private respondent's objection, petitioner alleged that 1) the omitted entry in the election return pertains to the position of congressman which cannot be a subject of pre-proclamation controversy, 2) the utilization of the watchers, who were under the direct supervision of the Board of Election Inspectors (BEI), was limited only to the filling up of the entries affecting the party-list and justified by the severe lack of personnel to perform the task, and 3) the alleged defect does not affect the integrity of the election return.[3]

On May 18, 2001, the Board of Canvassers (BOC), finding that the 1) questioned election return was clear and regular on its face, 2) there was no pre-proclamation for members of the House of Representatives and party list, and 3) the grounds relied upon by private respondent are all directed against the proceedings of the BEI and not the BOC, ruled for the inclusion of the return.[4] Private respondent thereupon filed on the same day a notice of appeal of the BOC ruling.[5]

In the meantime, or on May 19, 2001, the BOC proclaimed the winning candidates, including petitioner as city mayor.[6]

Private respondent thus filed on May 23, 2001 before the COMELEC a petition,[7] docketed as SPC No. 01-124, assailing the ruling of the BOC and praying for the exclusion of the questioned election return and the annulment of petitioner's proclamation.

Petitioner filed her answer[8] to the COMELEC petition, praying for its dismissal.

By Resolution[9] of January 10, 2003, the COMELEC Second Division granted the petition of private respondent and accordingly excluded the questioned return from the canvass and nullified the proclamation of petitioner. The dispositive portion of the resolution reads:

WHEREFORE, premises considered, the petition is GRANTED. The order of respondent Board dated May 18, 2001 including Election Return No. 41150266 from Precinct No. 28A2 of Bucalbucalan, Sorsogon City in the May 14, 2001 Elections canvass of Sorsogon City is hereby REVERSED AND SET ASIDE. Said election return is hereby excluded from the May 14, 2001 Elections canvass of Sorsogon City. Further, the proclamation of private respondent Sally Lee on May 19, 2001 is hereby declared NULL and VOID ab initio pursuant to Section 20 (i) of RA 7166.

A new City Board of Canvassers of Sorsogon City is hereby constituted to be composed of the following COMELEC lawyers:

- Atty. Nelia Aureus - Chairperson
- Atty. Allen Francis Abaya - Vice-Chairperson
- Atty. Emilio Santos - Secretary

The new City Board of Canvassers of Sorsogon City is hereby directed to prepare a new Statement of Votes for the position of mayor of Sorsogon City excluding the election return from Precinct No. 28A2 of Bucalbucalan, Sorsogon City and, based on said canvass in the new Statement of Votes, proceed to proclaim the winning candidate for mayor of Sorsogon City.

The original City Board of Canvassers of Sorsogon City is hereby directed to transmit to the new Board all COMELEC forms and documents used in the canvassing including the Board's copies of all election returns canvassed in the May 14, 2001 Elections in Sorsogon City.

Finally, the Law Department is directed to conduct the necessary investigation of the members of the BEI of Precinct No. 28A2 of Bucalbucalan, Sorsogon City for the possible commission of election offenses.

SO ORDERED. (Emphasis and underscoring supplied)

Petitioner's Motion for Reconsideration[10] of the COMELEC Second Division January 10, 2003 Resolution was denied by the COMELEC En Banc, by Resolution[11] of February 11, 2003 the dispositive portion of which reads:

WHEREFORE, in view of the foregoing, the Commission En Banc DENIES the Motion for Reconsideration for lack of merit. The Resolution of the Second Division promulgated on January 10, 2003 is hereby AFFIRMED.

The New City Board of Canvassers of Sorsogon City constituted by said Resolution is hereby ORDERED to convene immediately, prepare a new Statement of Votes excluding the election returns from Precinct No. 28A[2], Bucalbucalan, Sorsogon City, and on the basis of the new Statement of Votes, proclaim the winning candidate for mayor of Sorsogon City.

The original City Board of Canvassers is directed to transmit to the new City Board of Canvassers the COMELEC documents they used in their canvass. In the event however that the old City Board of Canvassers, for any reason, fail to deliver to the new City Board of Canvassers the COMELEC documents used in the canvassing, specifically the old statement of votes and the election return for Precinct No. 28A[2], prior to date of canvass, the new Board is hereby authorized to use the COMELEC copy of said documents.

This resolution is immediately executory.

SO ORDERED.

Hence, the present petition, alleging that:

I.

PUBLIC RESPONDENT IS WITHOUT JURISDICTION TO GO BEYOND OR BEHIND ELECTION RETURNS AND INVESTIGATE ELECTION IRREGULARITIES IN PRE-PROCLAMATION CONTROVERSY.

II.

PUBLIC RESPONDENT GRAVELY ABUSED ITS DISCRETION WHEN IT RENDERED THE ASSAILED RESOLUTIONS DESPITE THE CLEAR AND APPARENT LACK OF FACTUAL AND LEGAL BASIS TO SUPPORT THE SAME.

III.

PUBLIC RESPONDENT COMMITTED PROCEDURAL LAPSES IN THE PROMULGATION OF THE ASSAILED RESOLUTIONS WHICH AFFECTS THE FAIRNESS STANDARD.[12]

On February 18, 2003, this Court issued a Status Quo Ante Order[13] enjoining the COMELEC to observe the status quo prevailing before the filing of the petition and refrain from implementing the assailed January 10, 2003 and February 11, 2003 Resolutions until further orders from this Court.

Section 243 of the Omnibus Election Code provides:

Section 243. Issues that may be raised in a pre-proclamation controversy. - The following shall be proper issues that may be raised in a pre-proclamation controversy:

(a)

Illegal composition or proceeding of the board of canvassers;

(b)

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

(c)

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

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

On the first assigned error, petitioner argues that as the case at bar is a pre-proclamation controversy, the COMELEC is "restricted to an examination of the election returns and is without jurisdiction to go [beyond] or behind them and investigate election irregularities,"[14] citing the case of *Loong v. Commission on Elections*[15] which held:

x x x

We have recently reiterated the *Dianalan* and *Dimaporo* rulings in the case of *Alfonso v. Commission on Elections*, promulgated in June, 1994. The prevailing doctrine in this jurisdiction, therefore, is that as long as the returns appear to be authentic and duly accomplished on their face, the Board of Canvassers cannot look beyond or behind them to verify the allegations of irregularities in the casting or the counting of the votes. Corollarily, technical examination of voting paraphernalia involving analysis and comparison of voters' signatures and thumbprints thereon is prohibited in pre-proclamation cases which are mandated by law to be

expeditiously resolved without involving evidence aliunde and examination of voluminous documents which take up much time and cause delay in defeat of the public policy underlying the summary nature of pre-proclamation controversies.

x x x (Italics in the original; emphasis and underscoring supplied)

Petitioner's argument is bereft of merit.

The doctrine cited by petitioner presupposes that the returns "appear to be authentic and duly accomplished on their face." Where, as in the case at bar, there is a prima facie showing that the return is not genuine, several entries having been omitted in the questioned election return, the doctrine does not apply. The COMELEC is thus not powerless to determine if there is basis for the exclusion of the questioned election return.

As to the second error raised by petitioner, she claims that contrary to the findings of the COMELEC, there is no evidence on record that an LDP watcher participated in the preparation of the questioned election return. She posits that the omission of entries was not done with malice or bad faith nor meant to subvert the true will of the people, and that the election return in question is clear and regular on its face, duly authenticated by the signatures and thumbmarks of the six watchers and all the members of the BEI. Finally, she posits that an incomplete election return is not necessarily spurious, manufactured or fraudulent to necessitate its exclusion.[16]

While the BOC indeed found the questioned election return clear and regular on its face, it is not conclusive on the COMELEC nor on this Court in light of what transpired during the proceedings before the BOC in which the members of the BEI were examined and gave the following explanations behind the omission of entries for the position of congressman:

x x x

APP DIMAANO: Ito ba ang mga papeles o election return na inyong ginawa sa presinto.

MS. LADUB: Opo.

APP DIMAANO: Opo. Ngayon, page one tungkol senators, okay. Sa party list, meron kayong inilagay na resulta ng botohan. Punta tayo sa page one noong local positions, tignan nyo po sa parte ng congressman kung ano ang nakalagay. Kayo po una - kayo po Ginang Jamisal.

MS. JAMISAL: Wala ho.

APP DIMAANO: Wala ho. Kayo po Gina Labayo.

MS. LABAYO: Wala ho.

APP DIMAANO: Wala ho. Kayo ho Ladub - Ginang Ladub.

MS. LADUB: Wala ho.

APP DIMAANO: Okay, doon sa ibang position, governor, vice governor, board member, city . . . anong masasabi ninyo?

MS. JAMISAL: Okay naman po.

APP DIMAANO: Meron lahat - meron doon. Balik tayo doon sa position noong congressman at saka representative.

APP DIMAANO: Maari bang sabihin ninyo sa amin kung bakit ito inamin niyo at nakikita rito sa dokumentong ito sa election return na wala ni anong marka, ni pangalan at saka itong mga ano `yan . . . nararapat na markings. Mauna ka Ginang Jamisal.

MS. JAMISAL: Siguro ho dahil siguro medyo ano na kami over fatigue na - inaantok na. `yong nakita ko na mga naka-tally dito `yon lang at saka may mga bilang `yon lang ang pinirimahan ko dahil `yon lang . . . Hindi ko na ho na ano `yong sa taas may pangalan pa lang congressman hindi naitala ni Gina `yong pangalan ng kandidato sa congressman kaya't hindi ko na pinirmahan. So ang pinirmihan ko lang `yong may mga tally. Hindi ko na na ano ho na wala pala `yong congressman. Hindi ko lang nabasa ito na congressman. Kung siguro ho nakita ko lang na congressman sasabihin ko ho . . . sasabihin ko kay Gina na ilagay ang ano . . . ang kandidato sa congressman.

APP DIMAANO: Kayo Ginang Ladub, ano ang paliwanang niyo.

MS. LADUB: Masama ho ang pakiramdam ko.

APP DIMAANO: Ano ho ba ang isaktong papel niyo noong election doon sa loob ng presinto. Taga ano ho kayo?

MSA. LADUB: Nagta-tally ho.

APP DIMAANO: Anong ibig sabihin ng tally.

MS. LADUB: Ako pa ang humahawak nitong sa senator sa pag tally ko po.

APP DIMAANO: Alin ang isaktong pinagtally-han niyo ho? Anong position?

MS. LADUB: Senator.

APP DIMAANO: At saka senator lang ho ba?

MS. LADUB: Opo.

APP DIMAANO: eh `yong party list sinong . . .

MS. JAMISAL: `Yong iba ho, sir na ano naming, `yong watcher kasi hindi pa naming kayang na ano . . . siguro naman sir walang problema . . .

ATTY. FORTES: Anong presinto `yan?

WATCHER: 28A

ATTY. FORTES: 28A.

APP DIMAANO: Okay, dito tayo sa congressman sinong may in-charge dito - sino?

MS. JAMISAL: (Pointing to Ms. Labayo.)

APP DIMAANO: Gina Labayo. Kayo ho anong masasabi niyo rito. Dapat ba ritong meron o wala.

MS. LABAYO: Meron ho.

APP DIMAANO: Dapat . . . meron daw. O ngayon, bakit wala?

MS. LABAYO: Nakalimutan ko ho. Humihingi po ako ng tawad sa inyo.

APP DIMAANO: Hindi, ipaliwanag mo lang kung bakit kayo nakalimot. Hindi naman kami nag-ano niyon. Nag-uusig kami kasi `yon din ang sasabihin naming kung bakit.

MS. LABAYO: Sobrang pagod po, sir.

APP DIMAANO: Wala na bang ibang dahilan diyan. Wala ka na bang ibang paliwanang maliban sa nakalimot ka't napapagod ka na.

MS. LABAYO: (Silence.)

x x x [17](Italics in the original; emphasis supplied)

As the above-quoted record of the proceedings before the BOC shows, Gina Labayo, a member of the BEI, admitted that there were supposed to be entries for the position of congressman but she forgot to record them as she was extremely tired. Such convenient explanation, without more, does not, however, appear satisfactory.

Moreover, in her Answer to the original petition filed with the COMELEC, petitioner admitted that pollwatchers, who were not members of the BEI, participated in the preparation of the election return. Thus she alleged:

x x x

More importantly, the transcript of the proceedings (Annex "A-3" page 9 and 15) will show and prove that what were prepared and made by the pollwatchers were the entries in the TALLY BOARD and the votes cast in the Election Return for Party List Representative;

x x x [18] (Emphasis and underscoring omitted; italics supplied)

As thus correctly ruled by the COMELEC Second Division:

Votes for an important position such as congressman do not simply vanish into thin air. Those who are mandated by law to account for such votes, if mistakenly omitted, are at least expected to give a fairly reasonable account of why and how they have been omitted. Absent such explanation, doubt arises as to the authenticity of the returns and the manner of their preparation, specially in this case where a party watcher was allowed to take part in the preparation of the election return.

x x x[19] (Emphasis and underscoring supplied).

As to the third error raised by petitioner, she argues that the January 10, 2003 Resolution of the COMELEC Second Division was promulgated without giving her notice, and that were it not for her counsel's "accidental" visit to the COMELEC on January 13, 2003, said counsel would not have known that said resolution was already promulgated and the 5-day period from the date of promulgation to file a motion for reconsideration, as provided under the following provision of Rule 19 of the 1993 COMELEC Rules of Procedure, would have lapsed:[20]

Section 2. Period for Filing Motions for Reconsideration. - A motion to reconsider a decision, resolution, order or ruling of a Division shall be filed within five (5) days from the promulgation thereof. Such motion, if not pro-forma, suspend the execution or implementation of the decision, resolution, order and ruling.

And petitioner, noting that the ponente of the En Banc Resolution was not therein indicated, raises the possibility that the ponente for the Second Division Resolution and that of the En Banc Resolution were the same, thus violating Section 1, Rule 4 of the COMELEC Rules[21] which reads:

Section 1. Disqualification or Inhibition of Members. - (a) No Member shall sit in any case in which he or his spouse or child is related to any party within the sixth civil degree of consanguinity or affinity, or in which he has publicly expressed prejudgment as may be shown by convincing proof, or in which the subject thereof is a decision promulgated by him while previously serving as presiding judge of an inferior court, without the written consent of all the parties, signed by them and entered in the records of the case; Provided, that no Member shall be the "ponente" of an en banc decision/resolution on a motion to reconsider a decision/resolution written by him in a Division.

x x x (Emphasis supplied; italics in the original)

In *Lindo v. Commission on Elections*,[22] this Court held that the 5-day period for the filing of an appeal

commences from the date of receipt of copy of the decision. As correctly ruled by the COMELEC:

The petitioner misinterpreted the provision of Section 2, Rule 19 of the 1993 Comelec Rules of Procedure when she stated that "Unlike other cases, the reglamentary period within which a party can have the decision or resolution reviewed on motion for reconsideration runs from the date of promulgation." When not promulgated in open hearing, a simple procedural sense would dictate that the period to file a Motion for Reconsideration must have to be tolled from the date of receipt of the decision/resolution involved.

Further, the doctrine laid down in the case of *Lindo v. Comelec* (194 SCRA 25) would have supported the proposition that the additional requirement imposed by the COMELEC Rules on advance notice of promulgation does not form part of the process of promulgation and that the failure to serve such notice in advance did not prejudice the rights of the parties and did not vitiate the validity of the decision nor of the promulgation, as the period for the unsatisfied party to move for reconsideration can be exercised - not from the date of promulgation, as misconstrued by petitioner, but from her actual receipt of a copy of the resolution in question.[23] (*Italics in the original; emphasis supplied*)

As to the non-indication of the ponente of the COMELEC En Banc Resolution, petitioner merely proffers a possibility of violation of the COMELEC Rules. It is presumed, however, that an official duty has been regularly performed.[24]

The lack of merit of petitioner's arguments notwithstanding, the COMELEC, in ordering the exclusion of the questioned return, should have determined the integrity of the ballot box, the ballot-contents of which were tallied and reflected in the return, and if it was intact, it should have ordered its opening for a recounting of the ballots if their integrity was similarly intact. So instructs Section 234 of the Omnibus Election Code which reads:

Section 234. Material defects in the election returns. - If it should clearly appear that some requisites in form or data had been omitted in the election returns, the board of canvassers shall call for all members of the board of election inspectors concerned by the most expeditious means, for the same board to effect the correction.

Provided, That in case of the omission in the election returns of the name of any candidate and/or his corresponding votes, the board of canvassers shall require the board of election inspectors concerned to complete the necessary data in the election returns and affix therein their initials: Provided, further, That if the votes omitted in the returns cannot be ascertained by other means except by recounting the ballots, the Commission, after satisfying itself that the identity and integrity of the ballot box have not been violated, shall order the board of election inspectors to open the ballot box, and, also after satisfying itself that the integrity of the ballots therein has been duly preserved, order the board of election inspectors to count the votes for the candidate whose votes have been omitted with notice thereof to all candidates for the position involved and thereafter complete the returns. The right of a candidate to avail of this provision shall not be lost or affected by the fact that an election protest is subsequently filed by any of the candidates. (*Emphasis supplied*)

And so does Section 235 of the same Code which provides:

Section 235. When election returns appear to be tampered with or falsified. - If the election returns submitted to the board of canvassers appear to be tampered with, altered or falsified after they have left the hands of the board of election inspectors under duress, force, intimidation, or prepared by persons other than the members of the board of election inspectors, the board of canvassers shall use other copies of said election returns and if necessary, the copy inside the ballot box which upon previous authority given by the Commission may be retrieved in accordance with Section 220 hereof. If the other copies of the returns are likewise tampered with, altered, falsified, not authentic, prepared under duress, force, intimidation, or prepared by persons other than the board of election inspectors, the board of canvassers or any candidate affected shall bring the matter to the attention of the Commission. The Commission shall then, after giving notice to all candidates concerned and after satisfying itself that the integrity of the ballot box and, likewise after satisfying itself that the integrity of

the ballots therein has been duly preserved shall order the board of election inspectors to recount the votes of the candidates affected and prepare a new return which shall then be used by the board of canvassers as basis of the canvass. (Emphasis and underscoring supplied)

Thus, this Court in *Patoray v. Commission on Elections*[25] held:

x x x

As to the election return for Precinct No. 20-A, we ruled that the COMELEC erred in resorting to the Certificate of Votes in excluding the return in said precinct. Since the return was incomplete for it lacked the data as to provincial and congressional candidates, the applicable provision would be Section 234 of the Omnibus Election Code which deals with material defects in election returns. Thus, we ruled that the COMELEC should have first determined the integrity of the ballot box, ordered the opening thereof and recounted the ballots therein after satisfying itself that the integrity of the ballots is intact. We then directed the COMELEC to issue another Order in accordance with said Decision.

x x x (Italics in the original; emphasis and underscoring supplied)

If the integrity of the ballot box had been violated, then there would be no need to open it. If not, and upon opening it there is evidence that the integrity of the ballots had been violated, there would be no recounting thereof, and the COMELEC would then seal the box and order its safekeeping. Thus Section 237 of the Omnibus Election Code provides:

Sec. 237. When integrity of ballots is violated. - If upon the opening of the ballot box as ordered by the Commission under Sections 234, 235 and 236, hereof, it should appear that there are evidence or signs of replacement, tampering or violation of the integrity of the ballots, the Commission shall not recount the ballots but shall forthwith seal the ballot box and order its safekeeping.

WHEREFORE, the COMELEC is, in accordance with the foregoing discussion, hereby DIRECTED to determine within twenty days whether the integrity of the ballot box, the ballot-contents of which were tallied and reflected in the questioned return, is intact and, if in the affirmative and the integrity of the ballots is likewise intact, to order the Sorsogon City Board of Election Inspectors to recount the votes cast in Precinct No. 28A2 in Barangay Bucalbucalan, Sorsogon City and prepare a new return to serve as basis of canvass by said board; otherwise the ballot box should no longer be opened or the ballots should no longer be recounted as the case may be, in which case an order for the safekeeping of the ballot box should be issued. The Status Quo Ante Order issued on February 18, 2003 is hereby DISSOLVED.

SO ORDERED.

Davide, Jr., C.J., Bellosillo, Puno, Vitug, Panganiban, Ynares-Santiago, Sandoval-Gutierrez, Carpio, Corona, and Azcuna, JJ., concur.

Quisumbing, J., on leave.

Austria-Martinez, J., on official leave.

Callejo, Sr., J., no part.

[1] Rollo at 76-81.

[2] Id. at 103.

[3] Id. at 130.

[4] Id. at 130-131.

[5] Id. at 132.

[6] Id. at 133.

[7] Id. at 85-101.

[8] Id. at 134-149

[9] Id. at 59-73; Presiding Commissioner Ralph C. Lantion dissents.

[10] Id. at 150-195.

[11] Id. at 76-81.

[12] Id. at 26.

[13] Id. at 224-225.

[14] Id. at 27.

[15] 257 SCRA 1 (1996).

[16] Rollo at 28-39

[17] Id. at 107-111.

[18] Id. at 137.

[19] Id. at 67.

[20] Id. at 40-42.

[21] Id. at 42-43.

[22] 194 SCRA 25 (1991).

[23] Rollo at 238.

[24] Section 3(m), Rule 131 of the Revised Rules on Evidence.

[25] 274 SCRA 470(1997).

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