

MAYOR NOEL E. ROSAL, PETITIONER, VS. COMMISSION ON ELECTIONS, SECOND DIVISION, AND MICHAEL VICTOR IMPERIAL, RESPONDENTS.

G.R. NO. 168253. March 16, 2007

Ponente: CORONA, J.

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CORONA, J.:

Petitioner Noel E. Rosal and private respondent Michael Victor C. Imperial were candidates for mayor of Legaspi City in the May 10, 2004 elections. After the counting and canvassing of votes, petitioner was proclaimed as the duly elected mayor of Legaspi City, having received 44,792 votes over private respondent's 33,747 and thereby winning by a margin of 11,045 votes.

On May 24, 2004, private respondent instituted a petition to annul the proclamation,[1] assailing the canvass of election returns in the 520 precincts that had functioned during the election. On July 6, 2004, the case was superseded by an election protest filed by private respondent with the Commission on Elections (Comelec) contesting the results of the election in all 520 precincts on the grounds of miscounting, misreading and misappreciation of votes, substitute voting, disenfranchisement of voters, substitution and padding of votes, and other alleged irregularities. The protest was docketed as EPC No. 2004-61 and raffled to the Second Division of the Comelec.

After an initial hearing on private respondent's protest and petitioner's answer, the Second Division issued on November 17, 2004 an order directing the collection of the ballot boxes from the contested precincts and their delivery to the Comelec. On December 16, 2004, private respondent filed a manifestation[2] apprising the Second Division of the fact that out of the 520 ballot boxes retrieved for delivery to the Comelec, 95 had no plastic seals, 346 had broken plastic seals and only 79 remained intact with whole plastic seals and padlocks.

Revision of the contested ballots commenced in mid-January of 2005[3] and concluded on February 2, 2005. The revision report indicated a reduction in petitioner's vote count from 44,792 votes to 39,752 and an increase in that of private respondent from 22,474 to 39,184 votes. Shortly thereafter, petitioner filed a "motion for technical examination of contested ballots" on the ground that thousands of ballots revised by the revision committees were actually spurious ballots that had been stuffed inside the ballot boxes sometime after the counting of votes but before the revision proceedings. The Second Division denied the motion.

After the revision, the case was set for hearing on February 24, 2005. In that hearing, private respondent manifested that he would no longer present testimonial evidence and merely asked for time to pre-mark his documentary evidence. On March 9, 2005, private respondent filed his formal offer of evidence, thereby resting his case and signaling petitioner's turn to present evidence in his defense.

On March 17, 2005, the first hearing set for the presentation of his evidence, petitioner was directed to pre-mark his exhibits and formalize his intention to have his witnesses subpoenaed. Accordingly, petitioner filed on April 11, 2005 a motion for issuance of subpoena duces tecum and ad testificandum to witnesses whose testimonies

would allegedly prove that a significant number of the revised ballots were not the same ballots that had been read and counted by the Board of Election Inspectors (BEI) during the election.

In an order dated April 25, 2005,[4] the Second Division ruled that the testimonies of the proposed witnesses were "unnecessary" inasmuch as the Comelec had the authority and wherewithal to determine by itself the ballots' authenticity and, for that reason, denied the motion and directed petitioner to file forthwith his formal offer of evidence.

Asserting his right to present evidence in his defense, petitioner filed on May 6, 2005 a motion for reconsideration of the April 25, 2005 order. In an order dated May 12, 2005, the Second Division denied the motion.

On June 4, 2005, petitioner filed an Ad Cautela (sic) Offer of Protestee's Evidence[5] as a precautionary measure against the foreclosure of his right to comply with the Second Division's April 25, 2005 order. Petitioner's evidence included: (1) provincial election supervisor Serrano's report that, at the time he took custody of the ballot boxes, their security seals bore signs of having been tampered with and (2) the affidavits of 157 BEI chairpersons who swore to the effect that the authenticating signatures on certain ballots[6] identified and enumerated in their affidavits (that is, signatures purporting to be theirs) were clear forgeries.

On June 15, 2005, petitioner filed in this Court a petition for certiorari[7] under Rule 65 of the Rules of Court (docketed as G.R. No. 1628253) assailing the April 25 and May 12, 2005 orders of the Comelec's Second Division for having been rendered with grave abuse of discretion. Petitioner complained, in substance, that the Second Division had, by these orders, denied him due process by effectively depriving him of a reasonable opportunity to substantiate with competent evidence his contention that the revised ballots were not the same ballots cast and counted during the elections, meaning, the revised ballots were planted inside the ballot boxes after the counting of votes (in place of the genuine ones) pursuant to a fraudulent scheme to manufacture grounds for a successful election protest.

Meanwhile, the Second Division continued with the proceedings and, following the submission of the parties' memoranda, considered EPC No. 2004-61 submitted for resolution.

In a resolution[8] dated January 23, 2006, the Second Division - then composed of only two sitting members, namely, Presiding Commissioner Mehol Sadain (now retired) and Commissioner Florentino Tuason, Jr. - declared private respondent Imperial the winning candidate for mayor of Legaspi City and ordered petitioner Rosal to vacate said office and turn it over peacefully to private respondent.

Commissioner Sadain, who wrote the main opinion, relied on the election return count only in precincts the ballot boxes of which were found to contain fake ballots notwithstanding petitioner's assertion that genuine but otherwise invalid ballots might have been switched with the ones actually cast in the elections. These numbered a mere 129 precincts. For the rest, he examined, appreciated and counted the ballots themselves, invalidating in the process over 14,000 ballots cast for petitioner for having been written by two persons or for being in groups written by one hand. Commissioner Sadain ended up crediting private respondent with 32,660 valid votes over 30,517 for petitioner.

Commissioner Tuason filed a separate concurring opinion[9] manifesting disagreement with Commissioner Sadain's appreciation of certain ballots but arriving at the same practical result.

On January 30, 2006, petitioner filed a motion for reconsideration of the Second Division's resolution. The motion was denied by the Comelec en banc in a resolution dated May 29, 2006.[10] In due time, petitioner came to this Court with a petition for certiorari and prohibition assailing the Comelec en banc resolution. The case was docketed as G.R. No. 172741 and consolidated with G.R. No. 168253.[11]

Interlocutory Orders And Rule 65

Before focusing on the merits of this case, the Court sees fit to address a procedural concern with respect to G.R. No. 168253. Private respondent has persistently thrust upon us the proposition that the April 25, 2005 order subject of the petition in G.R. No. 168253, being, as it is, an interlocutory order rendered by a division of the Comelec, cannot be assailed by means of a special civil action for certiorari, as only final orders of the Comelec en banc can be brought to the Supreme Court by that mode.

We disagree. Section 1, Rule 65 of the Rules of Court, which governs petitions for certiorari, provides that:

When any tribunal, board or officer exercising judicial or quasi-judicial functions has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction, and there is no appeal, or any plain, speedy, and adequate remedy in the ordinary course of law, a person aggrieved thereby may file a verified petition in the proper court, alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board or officer, and granting such incidental reliefs as law and justice may require.

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Under the foregoing provision, one may resort to a special civil action for certiorari under three conditions:

- (1) the petition must be directed against a tribunal, board or officer exercising judicial or quasi-judicial functions;
- (2) the tribunal, board or officer has acted without or in excess of jurisdiction, or with grave abuse of discretion amounting to lack or excess of jurisdiction; and
- (3) there is no plain, speedy and adequate remedy in the ordinary course of law.

Other than these three, the Supreme Court's jurisdiction over petitions for certiorari has no preset boundaries. Any act by an officer or entity exercising judicial or quasi-judicial functions, if done without or in excess of jurisdiction or with grave abuse of discretion, may be assailed by means of a special civil action for certiorari when no appeal or any other plain, speedy and adequate remedy in the ordinary course of law is available. In other words, no judicial or quasi-judicial act or order is excluded a priori from the ambit of the Supreme Court's power to correct through the writ of certiorari. It is therefore incorrect to say that interlocutory orders issued by a division of the Comelec, or by any judicial or quasi-judicial body for that matter, are beyond the reach of this Court.

That the Supreme Court has jurisdiction over petitions for certiorari assailing interlocutory orders rendered by a Comelec division from which no recourse to the Comelec en banc could be had was, in fact, acknowledged in *Kho v. Commission on Elections*.^[12] In that case, Kho, an election protestant, filed a petition for certiorari in the Supreme Court questioning the Comelec First Division's interlocutory orders relating to the admission of his opponent's belatedly filed answer.

One of the issues in *Kho* was whether the controversial orders should have first been referred to the Comelec en banc. Citing Section 5(c), Rule 3 of the Comelec Rules of Procedure which states that:

[a]ny motion to reconsider a decision, resolution, order or ruling of a Division shall be resolved by the Commission en banc except motions on interlocutory orders of the division which shall be resolved by the division which issued the order

this Court ruled that the authority to resolve such incidental matters fell on the division itself. The Court went on to say that:

where the Commission in division committed grave abuse of discretion or acted without or in excess of jurisdiction in issuing interlocutory orders relative to an action pending before it and the controversy did not fall under any of the instances mentioned in Section 2, Rule 3 of the COMELEC Rules of Procedure [which enumerates the cases in which the Comelec may sit en banc],[13] the remedy of the aggrieved party is not to refer the controversy to the Commission en banc as this is not permissible under its present rules but to elevate it to this Court via a petition for certiorari under Rule 65 of the Rules of Court.[14]

In fine, Kho tells us that an interlocutory order of a Comelec division should be challenged at the first instance through a proper motion, such as a motion for reconsideration, filed with the division that rendered the order. If that fails and no other plain, speedy and adequate remedy (such as recourse to the Comelec en banc) is available, the party aggrieved by the interlocutory order may elevate the matter to the Supreme Court by means of a petition for certiorari on the ground that the order was issued without or in excess of jurisdiction or with grave abuse of discretion.

Private respondent asserts, however, that Kho has been superseded by the more recent case of Repol v. Commission on Elections[15] from which he cites the dictum that:

[t]he Supreme Court has no power to review via certiorari an interlocutory order or even a final resolution of a Division of the COMELEC. Failure to abide by this procedural requirement constitutes a ground for dismissal of the action.[16]

Again, we disagree.

There is no contradiction between Kho and Repol that calls for the application of the doctrine that a later judgment supersedes a prior one in case of inconsistency. In Repol, the petitioner went directly to the Supreme Court from an interlocutory order of the Comelec First Division without first filing a motion for reconsideration with said division. That was properly a cause for concern inasmuch as failure to move for reconsideration of the act or order before challenging it through a petition for certiorari often constitutes a ground for dismissal for non-compliance with the condition in Rule 65: that resort to certiorari should be justified by the unavailability of an appeal or any other plain, speedy and adequate remedy in the ordinary course of law. In the end, however, the Court in Repol applied the ruling in ABS-CBN Broadcasting Corporation v. COMELEC[17] that an exception to the procedural requirement of filing a motion for reconsideration was warranted since there was hardly enough time to move for reconsideration and obtain a swift resolution in time for the impending elections.

A sensible reading of our decision shows that Repol was not a negation or repudiation of this Court's jurisdiction over petitions for certiorari from interlocutory orders rendered by a Comelec division. Had it been so, then we would have dismissed the petition on the ground that it was beyond our jurisdiction. Rather, this Court in Repol merely applied the rule that a petition for certiorari must be justified by the absence of a plain, speedy and adequate remedy in the ordinary course of law; we said that the rule had been satisfied inasmuch as a motion for reconsideration was not a plain, speedy and adequate remedy under the circumstances.

Repol therefore merely serves as a reminder that, in a petition for certiorari from an interlocutory order, the petitioner bears the burden of showing that the remedy of appeal taken after a judgment or final order (as opposed to an interlocutory one) has been rendered will not afford adequate and expeditious relief,[18] as it is often the better practice for a party aggrieved by an interlocutory order to continue with the case in due course and, in the event of an adverse decision, appeal from it and include the interlocutory order as one of the errors to be corrected by the reviewing body.

In this instance, petitioner filed a motion for reconsideration of the Second Division's order. When that failed, no other speedy and adequate remedy against the unpardonable vices attending the Second Division's treatment of

the election protest was left to him except recourse to this Court under Rule 65. Under the circumstances, he was without the shadow of a doubt justified in taking it.

ELECTION PROTEST AND BALLOTS AS EVIDENCE

It will be recalled that the Second Division had been apprised of the ballot boxes' impaired condition even prior to the commencement of the revision proceedings. This notwithstanding, it brushed aside petitioner's protestations that he was the victim of an ingenious post-election fraud involving infiltration of the ballot boxes and the clever switching of ballots actually cast with invalid ones to ensure his defeat in the election protest. The division ruled that:

mere allegations cannot suffice to convince this Commission that switching of ballots has occurred, absent any positive and direct evidence in the form of fake ballots themselves being found among genuine ballots. Regardless of any technical examination that may have been conducted or testimonial evidence presented, as emphatically moved by the protestee but denied by the Commission, the best proof of the alleged substitution of ballots is the ballots themselves. And the process by which this proof is established is by way of an evaluation of the ballots by the Commission itself during its appreciation of the revised ballots.[19]

On the basis of this reasoning, the Second Division proceeded with an appreciation and recount of the ballots from over 300 precincts and set aside the physical count of the revised ballots in favor of the election returns only in precincts the ballot boxes of which were found to contain spurious ballots.

In view of the facts of this case, the Court cannot but hold that the Second Division adopted a manifestly unreasonable procedure, one totally unfit to address the single most vital threshold question in an election protest, namely, whether the ballots found in the ballot boxes during the revision proceedings were the same ballots that were cast and counted in the elections.

The purpose of an election protest is to ascertain whether the candidate proclaimed elected by the board of canvassers is the true and lawful choice of the electorate.[20] Such a proceeding is usually instituted on the theory that the election returns, which are deemed prima facie to be true reports of how the electorate voted on election day[21] and which serve as the basis for proclaiming the winning candidate, do not accurately reflect the true will of the voters due to alleged irregularities that attended the counting of ballots. In a protest prosecuted on such a theory, the protestant ordinarily prays that the official count as reflected in the election returns be set aside in favor of a revision and recount of the ballots, the results of which should be made to prevail over those reflected in the returns pursuant to the doctrine that "in an election contest where what is involved is the number of votes of each candidate, the best and most conclusive evidence are the ballots themselves." [22]

It should never be forgotten, though, that the superior status of the ballots as evidence of how the electorate voted presupposes that these were the very same ballots actually cast and counted in the elections. Thus, it has been held that before the ballots found in a box can be used to set aside the returns, the court (or the Comelec as the case may be) must be sure that it has before it the same ballots deposited by the voters.[23]

POCEDURES TO ADDRESS POST-ELECTION FRAUD

How, then, can one establish that the ballots sought to be revised are the same ballots cast by the voters during the elections? Obviously, the proof cannot be supplied by an examination of the ballots themselves, their identity being the very fact in dispute. Answers may be found in abundance in the early case of *Cailles v. Gomez*[24] in which the following doctrines were quoted with favor:

In an election contest the ballots cast by the voters is the primary and best evidence of the intention of the voters, but the burden of proof is on the contestor to show that the ballots have been preserved in the manner provided by law and have not been tampered with, and the fact that the ballots have been in the custody of the proper officers from the time of the canvass to the time of the recount is only prima facie and not conclusive proof of their integrity.

In an election contest the rule that as between the ballots and the canvass of them, the ballots control, has no application where the ballots have been tampered with. The court must be sure that it has before it the identical and unaltered ballots deposited by the voters before they become controlling as against the certificate of the election officers of the result of the canvass.

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Where an official count has been made, it is better evidence of who was elected than the ballots, unless he who discredits the count shows affirmatively that the ballots have been preserved with a care which precludes the opportunity of tampering and all suspicion of change, abstraction or substitution.

The law is well settled that the burden of proof is on the plaintiff, when he seeks to introduce the ballots to overturn the official count, to show affirmatively that the ballots have not been tampered with, and that they are the genuine ballots cast by the voters.

In an action to contest the right of a party to an office to which he has been declared elected, the returns of the election boards should be received as prima facie true. In order to overcome this evidence by a recount of the ballots cast at the election, the contestant must affirmatively prove that the ballots have not been tampered with, and that they remained in the same condition as they were when delivered to the proper custody by the judges of election. If it appear to the satisfaction of the court that the ballots have not been tampered with, it should adopt the result as shown by the recount, and not as returned by the election board.

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The principles of law and the rules of evidence governing cases such as this have been so often declared that a review of the many authorities is unnecessary. Those curious or interested in pursuing the subject will find in the reporter's notes, preceding, many instructive cases collated by the industry of counsel. Suffice it here to say that, while the ballots are the best evidence of the manner in which the electors have voted, being silent witnesses which can neither err nor lie, they are the best evidence only when their integrity can be satisfactorily established. One who relies, therefore, upon overcoming the prima facie correctness of the official canvass by a resort to the ballots must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute proof must be made of a substantial compliance with the requirements of that mode. But such requirements are construed as directory merely, the object looked to being the preservation inviolate of the ballots. If this is established it would be manifestly unjust to reject them merely because the precise mode of reaching it had not been followed.

So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestee of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by a naked showing that it was possible for one to have molested them. The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one.

The probative value of the result of the return made by the board of inspectors is a question already settled at various times by the courts of the United States. In the case of *Oakes vs. Finlay*, the following doctrine was laid:

"The returns of an election board, when legally and properly authenticated, are not only conclusive upon the

board of canvassing officers, but are also prima facie evidence of the number of votes cast, in a proceeding to contest the election; and the burden of proof is upon the person who assails the correctness of these returns."

In the case of *Stafford vs. Sheppard*, the court said:

"Certificates of the result of an election, made by the commissioners at the precincts, are prima facie evidence of the result of the election. The ballots, if identified as the same cast, are primary and higher evidence; but, in order to continue the ballots as controlling evidence, it must appear that they have been preserved in the manner and by the officers prescribed by the statute, and that, while in such custody, they have not been changed or tampered with." (internal citations omitted)[25]

We summarize the foregoing doctrines: (1) the ballots cannot be used to overturn the official count as reflected in the election returns unless it is first shown affirmatively that the ballots have been preserved with a care which precludes the opportunity of tampering and all suspicion of change, abstraction or substitution; (2) the burden of proving that the integrity of the ballots has been preserved in such a manner is on the protestant; (3) where a mode of preserving the ballots is enjoined by law, proof must be made of such substantial compliance with the requirements of that mode as would provide assurance that the ballots have been kept inviolate notwithstanding slight deviations from the precise mode of achieving that end; (4) it is only when the protestant has shown substantial compliance with the provisions of law on the preservation of ballots that the burden of proving actual tampering or the likelihood thereof shifts to the protestee and (5) only if it appears to the satisfaction of the court or Comelec that the integrity of the ballots has been preserved should it adopt the result as shown by the recount and not as reflected in the election returns.

Our election laws are not lacking in provisions for the safekeeping and preservation of the ballots. Among these are Sections 160, 217, 219 and 220 of the Omnibus Election Code[26] which provide:

SECTION 160. Ballot boxes. - (a) There shall be in each polling place on the day of the voting a ballot box one side of which shall be transparent which shall be set in a manner visible to the voting public containing two compartments, namely, the compartment for valid ballots which is indicated by an interior cover painted white and the compartment for spoiled ballots which is indicated by an interior cover painted red. The boxes shall be uniform throughout the Philippines and shall be solidly constructed and shall be closed with three different locks as well as three numbered security locks and such other safety devices as the Commission may prescribe in such a way that they can not be opened except by means of three distinct keys and by destroying such safety devices.

(b) In case of the destruction or disappearance of any ballot box on election day, the board of election inspectors shall immediately report it to the city or municipal treasurer who shall furnish another box or receptacle as equally adequate as possible. The election registrar shall report the incident and the delivery of a new ballot box by the fastest means of communication on the same day to the Commission and to the provincial election supervisor.

SECTION 217. Delivery of the ballot boxes, keys and election supplies and documents. - Upon the termination of the counting of votes, the board of election inspectors shall place in the compartment for valid ballots, the envelopes for used ballots hereinbefore referred to, the unused ballots, the tally board or sheet, a copy of the election returns, and the minutes of its proceedings, and then shall lock the ballot box with three padlocks and such safety devices as the Commission may prescribe. Immediately after the box is locked, the three keys of the padlocks shall be placed in three separate envelopes and shall be sealed and signed by all the members of the board of election inspectors. The authorized representatives of the Commission shall forthwith take delivery of said envelopes, signing a receipt therefor, and deliver without delay one envelope to the provincial treasurer, another to the provincial fiscal and the other to the provincial election supervisor.

The ballot box, all supplies of the board of election inspectors and all pertinent papers and documents shall

immediately be delivered by the board of election inspectors and the watchers to the city or municipal treasurer who shall keep his office open all night on the day of election if necessary for this purpose, and shall provide the necessary facilities for said delivery at the expense of the city or municipality. The book of voters shall be returned to the election registrar who shall keep it under his custody. The treasurer and the election registrar, as the case may be, shall on the day after the election require the members of the board of election inspectors who failed to send the objects referred to herein to deliver the same to him immediately and acknowledge receipt thereof in detail.

SECTION 219. Preservation of the ballot boxes, their keys and disposition of their contents. - (a) The provincial election supervisor, the provincial treasurer and the provincial fiscal shall keep the envelope containing the keys in their possession intact during the period of three months following the election. Upon the lapse of this period, unless the Commission has ordered otherwise, the provincial election supervisor and the provincial fiscal shall deliver to the provincial treasurer the envelope containing the keys under their custody.

(b) The city and municipal treasurer shall keep the ballot boxes under their responsibility for three months and stored unopened in a secure place, unless the Commission orders otherwise whenever said ballot boxes are needed in any political exercise which might be called within the said period, provided these are not involved in any election contest or official investigation, or the Commission or other competent authority shall demand them sooner or shall order their preservation for a longer time in connection with any pending contest or investigation. However, upon showing by any candidate that the boxes will be in danger of being violated if kept in the possession of such officials, the Commission may order them kept by any other official whom it may designate. Upon the lapse of said time and if there should be no order to the contrary, the Commission may authorize the city and municipal treasurer in the presence of its representative to open the boxes and burn their contents, except the copy of the minutes of the voting and the election returns deposited therein which they shall take and keep.

(c) In case of calamity or fortuitous event such as fire, flood, storm, or other similar calamities which may actually cause damage to the ballot boxes and/or their contents, the Commission may authorize the opening of said ballot boxes to salvage the ballots and other contents by placing them in other ballot boxes, taking such other precautionary measures as may be necessary to preserve such documents.

SECTION 220. Documents and articles omitted or erroneously placed inside the ballot box. - If after the delivery of the keys of the ballot box to the proper authorities, the board of election inspectors shall discover that some documents or articles required to be placed in the ballot box were not placed therein, the board of election inspectors, instead of opening the ballot box in order to place therein said documents or articles, shall deliver the same to the Commission or its duly authorized representatives. In no instance shall the ballot box be reopened to place therein or take out therefrom any document or article except to retrieve copies of the election returns which will be needed in any canvass and in such excepted instances, the members of the board of election inspectors and watchers of the candidates shall be notified of the time and place of the opening of said ballot box: Provided, however, That if there are other copies of the election returns outside of the ballot box which can be used in canvass, such copies of the election returns shall be used in said canvass and the opening of the ballot box to retrieve copies of the election returns placed therein shall then be dispensed with.

Additional safeguards were provided for in Comelec Resolution No. 6667 (General Instructions for the Boards of Election Inspectors on the Casting and Counting of Votes in Connection with the May 10, 2004 National and Local Elections) which laid down the following directives:

Section 50. Disposition of ballot boxes, keys, election returns and other documents. - Upon the termination of the counting of votes and the announcement of the results of the election in the precinct, the BEI shall:

- Place the following documents inside the compartment of the ballot box for valid ballots.

- Envelope containing used/counted official ballots;
 - Envelope containing excess/marked/spoiled/half of torn unused official ballots;
 - Envelope containing the copy of the election returns for the ballot box;
 - Envelope containing one copy of the Minutes of Voting and Counting of Votes (copy for the ballot box);
 - Tally Board; and
 - Stubs of used pads of official ballots.
- Close the inner compartments of the ballot box, lock them with one (1) self-locking fixed-length seal and then lock the outer cover with the (3) padlocks and one (1) self-locking fixed-length seal. The three keys to the padlocks shall be placed in separate envelopes which shall be sealed and signed by all members of the BEI;
- Deliver the ballot box to the city or municipal treasurer. In case the ballot box delivered by the BEI was not locked and/or sealed, the treasurer shall lock and/or seal the ballot box. The treasurer shall include such fact, including the serial number of the self-locking fixed-length seal used, in his report to the Commission;
- Deliver to the Election Officer:

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5. Three (3) envelopes, each containing a key to a padlock of the ballot box which shall be delivered, under proper receipt, by the election officer to the provincial election supervisor, the provincial prosecutor and the provincial treasurer. In the case of cities whose voters do not vote for provincial officials, and municipalities in the National Capital Region, the election officer shall retain one envelope and distribute the two other envelopes to the city/municipal prosecutor and city/municipal treasurer, as the case may be.

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The ballot box, all supplies of the BEI and all pertinent papers and documents shall immediately be delivered by the BEI, accompanied by watchers, to the city/municipal treasurer. For this purpose, the city/municipal treasurer shall, if necessary, keep his office open all night on the day of the election and shall provide the necessary facilities for said delivery at the expense of the city/municipality.

Section 52. Omission or erroneous inclusion of documents in ballot box. - If after locking the ballot box, the BEI discovers that some documents or articles required to be placed in the ballot box were not placed therein, the BEI, instead of opening the ballot box in order to place therein said documents or articles, shall deliver the same to the election officer. In no instance shall the ballot box be reopened to place therein or to take out therefrom any document or article except in proper cases and with prior written authority of the Commission, or its duly authorized official, to retrieve copies of the election returns which will be needed in any canvass. In such instance, the members of the BEI and the watchers shall be notified of the time and place of the opening of said ballot box. However, if there are other copies of the election returns outside of the ballot box which can be used in the canvass, such copies of the election returns shall be used in said canvass and the opening of the ballot box to retrieve copies of the election returns placed therein shall then be dispensed with.

In case the BEI fails to place the envelope containing the counted ballots inside the ballot box, the election officer shall, with notice to parties, deposit said envelopes in a separate ballot box which shall be properly sealed, padlocked and stored in a safe place in his office. Said ballot boxes shall remain sealed unless otherwise ordered by the Commission.

As made abundantly clear by the foregoing provisions, the mode of preserving the ballots in this jurisdiction is for

these to be stored safely in sealed and padlocked ballot boxes which, once closed, shall remain unopened unless otherwise ordered by the Comelec in cases allowed by law. The integrity of the ballots and therefore their probative value, as evidence of the voters' will, are contingent on the integrity of the ballot boxes in which they were stored. Thus, it is incumbent on the protestant to prove, at the very least, that the safety features meant to preserve the integrity of the ballot boxes and their contents were installed and that these remained in place up to the time of their delivery to the Comelec for the revision proceedings. If such substantial compliance with these safety measures is shown as would preclude a reasonable opportunity of tampering with the ballot boxes' contents, the burden shifts to the protestee to prove that actual tampering took place. If the protestee fails to discharge this burden, the court or the Comelec, as the case may be, may proceed on the assumption that the ballots have retained their integrity and still constitute the best evidence of the election results. However, where a ballot box is found in such a condition as would raise a reasonable suspicion that unauthorized persons could have gained unlawful access to its contents, no evidentiary value can be given to the ballots in it and the official count reflected in the election return must be upheld as the better and more reliable account of how and for whom the electorate voted.

The procedure adopted by the Second Division was a complete inverse of the one outlined above and was contrary to reason. There was complete arbitrariness on its part.

First, there was no indication at all that it ever considered the condition of the ballot boxes at the time they were delivered to the Comelec for revision. We find this rather puzzling, considering that it had been apprised of such information even before revision and even its own Rules of Procedure on election protests requires the revision committee to "make a statement of the condition in which the ballot boxes and their contents were found upon the opening of the same"[27] - in recognition of the vital significance of such facts.

Second, it placed the burden of proving actual tampering of the ballots on petitioner herein (the protestee below) notwithstanding private respondent's previous manifestation that most of the ballot boxes bore "overt signs of tampering"[28] and only 79 ballot boxes were found intact.

Third, instead of diligently examining whether the ballot boxes were preserved with such care as to preclude any reasonable opportunity for tampering with their contents, the Second Division made the probative value of the revised ballots dependent solely on whether spurious ballots were found among them. It failed to recognize that, in view of reports that the ballot boxes had been tampered with and allegations that their contents had been switched with genuine but invalid ballots, the question of whether the revised ballots could be relied on as the same ones cast and counted during the elections could not obviously be settled by an examination of the ballots themselves. Clearly, the time when these were deposited in the ballot boxes - a detail of utmost importance - could not possibly have been determined by that means.

These errors on the part of the Second Division were infinitely far from harmless; the proper legal procedure could have made a substantial difference in the result of the election protest and most certainly could have led to a better approximation of the true will of the electorate. This, in the final analysis, is what election protests are all about.

Under the circumstances, the question as to who between the parties was duly elected to the office of mayor cannot be settled without further proceedings in the Comelec. In keeping with the precepts laid down in this decision, the Comelec must first ascertain, after due hearing, whether it has before it the same ballots cast and counted in the elections. For this purpose, it must determine: (1) which ballot boxes sufficiently retained their integrity as to justify the conclusion that the ballots contained therein could be relied on as better evidence than the election returns and (2) which ballot boxes were in such a condition as would afford a reasonable opportunity

for unauthorized persons to gain unlawful access to their contents. In the latter case, the ballots must be held to have lost all probative value and cannot be used to set aside the official count reflected in the election returns.

WHEREFORE, the petitions are GRANTED. The April 25 and May 12, 2005 orders and the January 23, 2006 resolution of the Commission on Elections Second Division and the May 29, 2006 resolution of the Commission on Elections en banc in EPC No. 2004-61 are hereby declared NULL and VOID. The Commission on Elections is hereby DIRECTED to determine, with utmost dispatch and all due regard for the parties' right to be heard, the true result of the 2004 elections for mayor of Legaspi City. To this end, it shall:

(1) identify the precincts the ballot boxes of which were found intact with complete and undamaged seals and padlocks or were otherwise preserved with such substantial compliance with statutory safety measures as to preclude a reasonable opportunity for tampering with their contents. The ballots from these precincts shall be deemed to have retained their integrity in the absence of evidence to the contrary and the Commission on Elections may consider them in the recount.

(2) ascertain the precincts the ballot boxes of which were found in such a condition as would afford a reasonable opportunity for unlawful access to their contents. The Commission on Elections shall exclude from the recount the ballots from these precincts and shall rely instead on the official count stated in the election returns.

The status quo ante order issued by this Court on June 7, 2006 is, for all intents and purposes consistent with this decision, hereby MAINTAINED.

SO ORDERED.

Puno, C.J., Quisumbing, Ynares-Santiago, Sandoval-Gutierrez, Austria-Martinez, Carpio-Morales, Azcuna, Tinga, Chico-Nazaro, Garcia, and Velasco, Jr., JJ., concur.

Carpio, J., see separate concurring opinion.

Callejo, Sr., J., on leave.

Nacura, J., no part.

[1] Docketed as SPC No. 04-196 and raffled to the First Division of the Commission on Elections.

[2] Rollo (G.R. No. 172741), p. 555.

[3] According to the resolution penned by Commissioner Sadain in EPC 2004-61, the date set for the commencement of revision was January 17, 2005 but petitioner asserts in his pleadings that revision actually began on January 15, 2005.

[4] Rollo (G.R. No. 168253), pp. 204-205.

[5] Id., pp. 114-190.

[6] Per Comelec Resolution No. 6667 (General Instructions for the Boards of Election Inspectors on the Casting and Counting of Votes in Connection with the May 10, 2004 National and Local Elections), BEI chairmen are supposed to authenticate each ballot with their signature. Section 27 thereof reads:

Authentication of ballot. - In every case, the chairmen of the BEI shall, in the presence of the voter, affix his signature at the back of the ballot before issuing it to the voter.

Failure to authenticate the ballot shall constitute an election offense.

[7] Id., pp. 3-44.

[8] Rollo (G.R. No. 172741), pp. 97-449.

[9] Id., pp. 450-478.

[10] Id., pp. 75-96. Penned by Commissioner Resurreccion Z. Borra with the concurrence of Chairman Benjamin Abalos, Sr. and Commissioners Romeo A. Brawner and Florentino A. Tuason, Jr. Commissioner Rene V. Sarmiento took no part in the resolution.

[11] Per Resolution dated June 20, 2006. Id., p. 542.

[12] 344 Phil. 878 (1997).

[13] SEC. 2. The Commission En Banc. - The Commission shall sit en banc in cases hereinafter specifically provided, or in pre-proclamation cases upon a vote of a majority of the members of the Commission, or in all other cases where a division is not authorized to act, or where, upon a unanimous vote of all the Members of a Division, an interlocutory matter or issue relative to an action or proceeding before it is decided to be referred to the Commission en banc.

[14] Id., p. 888.

[15] G.R. No. 161418, 28 April 2004, 428 SCRA 321.

[16] Id., p. 330.

[17] 380 Phil. 780 (2000).

[18] Chan v. Regional Trial Court of Zamboanga del Norte in Dipolog City, Br. 9, G.R. No. 149253, 15 April 2004, 427 SCRA 796.

[19] Rollo (G.R. No. 172741), pp. 102-103.

[20] De Castro v. Ginete, 137 Phil. 453 (1969).

[21] Lerias v. House of Representatives Electoral Tribunal, G.R. No. 97105, 15 October 1991, 202 SCRA 808.

[22] Id., p. 822.

[23] Valenzuela v. De Jesus, 42 Phil. 428 (1921).

[24] 42 Phil. 496 (1921).

[25] Id., pp. 505-508.

[26] BP 881.

[27] COMELEC Rules of Procedure, Rule 20, Sec. 11.

[28] Supra note 2.

CONCURRING OPINION

CARPIO, J.:

I concur with the ponencia of Justice Renato C. Corona in granting the petition on the ground that the ballots cannot be used to overturn the official count as reflected in the election returns unless it is first shown that the

ballots have been preserved to preclude tampering.

However, I believe that there is no need to rule on whether the facts in these consolidated cases justify petitioner's action in questioning before this Court via a petition for certiorari under Rule 65 the interlocutory orders of the COMELEC Second Division. First, the main case as decided by the COMELEC En Banc is now before this Court in these consolidated cases under Rule 64. This renders moot the issue of the propriety of the petition for certiorari under Rule 65.

Second, *Repol v. COMELEC*[1] is not applicable because in *Repol* what was before this court was only the petition for certiorari under Rule 65 since the main case was still with the COMELEC First Division. In *Repol*, what was assailed was a status quo order without any time limit, and more than 20 issuing a writ of preliminary injunction.

The rule prohibiting petitions for certiorari under Rule 65 to this Court from an order or decision of a Division of the COMELEC is laid down in *Ambil, Jr. v. COMELEC*,[2] thus:

Under the existing Constitutional scheme, a party to an election case within the jurisdiction of the COMELEC in division can not dispense with the filing of motion for reconsideration of a decision, resolution or final order of the Division of the Commission on Elections because the case would not reach the COMELEC en banc without such motion for reconsideration having been filed x x x.

The rule in *Ambil* implements Section 7 of Article IX-A and Section 3 of Article IX-C of the 1987 Constitution prescribing the power of the Supreme Court to review decisions of the COMELEC.

I believe that this Court should not carve out more exceptions to the rule in *Ambil* than absolutely necessary.

(SGD.) ANTONIO T. CARPIO

Associate Justice

[1]G.R. No. 161418, 28 April 2004, 428 SCRA 321.

[2]398 Phil. 257, 276 (2000).

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