

MAYOR VIRGILIO P. VARIAS, PETITIONER, VS. COMMISSION ON ELECTIONS AND JOSE “JOY” D. PENANO, RESPONDENTS.

G.R. No. 189078. March 30, 2010

Ponente: BRION, J.

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BRION, J.:

Respondent Jose "Joy" D. Peñano (Peñano) asks us to reconsider our Decision of February 11, 2010 on the following GROUNDS:

3.1.1 The DECISION is in error in appreciating contentions of Varias that are clearly false or contrary to the case record in ruling that the Comelec committed grave abuse of discretion amounting to lack or excess of jurisdiction.

3.1.2 The DECISION failed to consider matters stressed by the trial court and the Comelec, and other evidence in the record of the case, in ruling that Comelec committed grave abuse of discretion amounting to lack or excess of jurisdiction.

3.1.3 The DECISION is in error in relying on the result of the canvass and in not considering the canvass result as inherently tainted, even though the canvass, as stipulated by both parties, showed an unexplained excess of 217 votes over the number of actual voters.

3.1.4 The DECISION is in error in finding that there was tampering of ballots and thereby disregarded the result of the recount, even though both the trial court and the Comelec conducted an examination, review and recount of the ballots and found Peñano to be the true winner of the mayoralty elections in Alfonso, Cavite last May 14, 2007.

3.1.5 The DECISION is in error in concluding that Comelec committed grave abuse of discretion amounting to lack or excess of jurisdiction because it failed to comply with the Rosal case, even if said public respondent discussed substantive compliance to the Rosal case.[1]

To better appreciate the case, a brief look at its background is in order. The present case involves the electoral contest between petitioner Virgilio "Ver" Varias (Varias) and respondent Peñano for the position of Mayor of the Municipality of Alfonso, Cavite in the May 14, 2007 elections. After the elections, Varias was proclaimed winner.

Peñano soon filed an election protest with the RTC,[2] alleging, among other issues, certain irregularities in the counting of votes. The RTC undertook a revision of the ballots wherein Peñano emerged the candidate who garnered the most number of votes. The change in the overall tally was attributed to major and significant changes in the tally of votes for four (4) precincts.[3] The protagonists, though, disagree on the authenticity of the ballots and moved, pursuant to the Rules on Electoral Contests[4], to have the ballots subjected to a technical examination. The RTC granted the joint motion and ordered the National Bureau of Investigation (NBI) to conduct the technical examination. The NBI submitted a Report, which contains the following findings:

1. 82 ballots out of 216 in favor of Peñano were written by one and the same person;2. The signature of the Chair of the Board of Election Inspectors in Clustered Precinct Nos. 90A/B appearing at the dorsal side of some of the official ballots in the precinct were not written by one and the same person;3. The signature of the Chair of the Board of Election Inspectors in Precinct No. 81A appearing at the dorsal side of some of the official ballots in the precinct were not written by one and the same person;4. The signature of the Chair of the Board of Election Inspectors in Precinct No. 92 A appearing at the dorsal side of some of the official ballots in the precinct were not written by one and the same person;5. The signature of the Chair of the Board of Election Inspectors in Precinct No. 102A appearing at the dorsal side of some of the official ballots in the precinct were not written by one and the same person;6. 29 ballots in the four precincts (87A, 90A/B, 92A and 102A) appear to have erasures of the petitioner's name and the corresponding superimposition of the respondent's name; 19 of them were written by one and the same person.[5]

The RTC and the COMELEC Rulings

Relying heavily on the results of the revision of ballots and its own consideration of the validity of some of the ballots,⁶ the RTC decided the protest in Peñano 3s favor. On the critical issue of whether the ballots were preserved in their truest form, the RTC said:

Prescinding from the above doctrinal principals [sic], we now determine if the ballots can still be considered as the best evidence in determining the results of the election for this precinct.

To begin with, the election protest has contained averments regarding the irregularities in its accomplishment during the May 14, 2007 elections. For clarity, and at the expense of redundancy, these allegations are as follows:

8.1 Votes correctly and properly cast in favor of the protestant were deliberately misappreciated and not credited to him by the corresponding board of election inspectors;

8.2. Votes correctly and properly cast in favor of the protestant were intentionally and unlawfully counted or tallied in the election returns as votes for the protestee;

x x x x

These allegations were corroborated by the testimony of Elvira Salcedo, poll watcher of the protestant who was presented as a witness for this precinct, x x x.

The ballots inside the ballot box for Precinct No. 87A echoes the allegations in the election contest and the testimony of Elvira further supports this claim. But the manner of preserving the ballots should also be inquired into so that they can be used to overturn the election return. The testimony of Elvira is wanting in this regard. However, we can see glimpses of the manner of preservation on the testimony of Nelson Dimapilis - a witness for the protestee who served at precinct 87A. He testified that after the ballots were counted, they arranged the arranged [sic] the paraphernalia used in the election in the ballot box and they brought the box in the municipal hall. As there was no evidence presented that the ballot box was not properly preserved or that it was molested after it was brought in the Municipal Hall, the court has no other option than to accept that the contents thereof remained the same while it was kept thereat. Moreover, the court sees no reason to doubt the manner of preserving of the ballot box since it was done substantially in compliance with law. At the same time, when the precautionary order was issued and during the time that the ballot box was brought before the court, the same was retrieved in the place where it is supposed to be found. Indeed, a grand conspiracy is needed in order to molest a ballot box. But since no evidence was presented to prove this, and there being (sic) as to who might have done such a thing, the court should hold that the duty of those who were tasked in the safekeeping of the ballot box was regularly done and that the ballot box was preserved in accordance with the election laws.

Indeed, the ballots in this instance are not the only mute witnesses of the result of the election. The testimony of Elvira as well as the fact that the ballot box was found in the proper place and in the custody of the proper custodian shows that the ballots retained their superior status as evidence as compared to the election return. Thus, the physical count of the ballots as made in the revision should be followed since the election return of this precinct does not reflect the choice of the voters in this precinct,[7] (emphasis provided)

Varias appealed the ruling with the Commission on Elections (COMELEC). The First Division agreed with the RTC and ruled on the pivotal issue as follows:

The above standards [referring to Rosal] burden the protestant of proving the integrity of the ballots before they can be used to overturn the official count. But how is integrity of the ballots established? Number 3 of the standards answers the question. If a law provides for the mode of preserving the ballots "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." The Court then mentioned the following provisions of the Omnibus Election Code ... for the safekeeping and preservation of ballots:

xxxx

Clearly, the integrity of the ballots being referred to that has to be proven by the protestant in an election protest refers to the integrity of the ballot boxes that contain the ballots in the place of storage, not the ballots per se.

It shall be recalled that as early as May 28, 2007, the court a quo issued a precautionary Order which directed the Municipal Treasurer and the Election Officer of Alfonso to take appropriate measures to protect the integrity of all election documents pertinent to the precincts protested by the protestant-appellee. Another precautionary Order was likewise issued on June 5, 2007 relative to the precincts counter-protested by protestee-appellant. On the same day of June 5, 2007, an Order was issued by the court a quo for the retrieval and delivery of the ballot boxes with their keys, list of voters with voting records and other documents or paraphernalia ... The retrieval and delivery are to be made by Sheriffs Noramado Mateo and Teodorico V. Cosare to be assisted by the Municipal Treasurer and Election Officer of Alfonso on June 12, 2007 at 8:30 a.m. The parties were told that they may send their representatives to witness the activity x x x.

The records of the case is bereft of any report that the ballot boxes were found in the place other than the place of storage so as to call the occasion for the protestant-appellee to prove that the same ballot boxes were under the custody of the Municipal Treasurer of Alfonso, Cavite.

The revision reports for the different precincts which are signed by the revisors of both parties also indicate the condition of the ballot boxes at the time they are "opened for revision purposes.

In the Revision Report for Precinct 79A (Brgy. Mangas I), the ballot box is with Serial No. CE01-056756. It is reported to have three Comelec padlocks, with three keys, Inner Metal Seal Nos. CE07-406141/CE07406140. As to the space for the "Outer Metal Seal Serial No.", it is filled with "NONE."

In the Revision Report for Precinct No 81 A/8 1B (Brgy. Mangas I), the ballot box is with Serial No. CE-01-056443. It is reported to have three Comelec padlock, with three keys. The outer metal seal has serial number CE-07-406144 and Inner Metal Seal No. CE-07 406145. As to the condition of the outer and inner metal seal, the Report indicated that they are properly attached and locked.

In the Revision Report for Precinct No 77A/77B (Brgy. Mangas I), the ballot box is with Serial No. CE-O1-O58-O33. It is reported to have three Comelec padlocks, with three keys. There is no outer metal seal and but with two (2) inner metal seals with numbers CE07406136 and CE07-406137.

In the Revision Report for Precinct No 86A/86B (Brgy. Marahan I), the ballot box is with Serial No.

CE-01-061579. It is reported that the ballot box is with three (3) Comelec padlocks and with three (3) keys. The outer metal seal is with serial number CE 07-406155 while the inner metal seal is with serial number CE07-406156. Said seals are found to be properly attached and have sealed the ballot box.

In the Revision Report for Precinct No 87A (Brgy. Marahan I), the ballot box is with Serial No. CE 01-063371. It is reported that the ballot box is with three (3) Comelec padlocks and with three (3) keys. The outer metal seal is with serial number CE 07 406158 and the inner seal is with serial number CE:07405157. Both outer and inner metal seals are properly locked.

In the Revision Report for Precinct No 89A/89B (Brgy. Marahan I), the ballot box is with Serial No. CE98-843512 with three Comelec padlocks with three (3) keys. The outer metal seal is with serial number CE07-406161 and the inner metal seal is with serial number CE07-406162. Both outer and inner metal seals are properly attached.

In the Revision Report for Precinct No 90A/90B (Brgy. Matagbak I), the ballot box is with Serial No. CE 01-064817 with three Comelec padlocks and three keys. The outer metal seal is with serial number CE01-64817 and the inner metal seal is with serial number CE:07406163. Both seals are properly attached.

In the Revision Report for Precinct No 95A/95B (Brgy. Marahan II), the ballot box is with serial number CE 98-044211 and with three Comelec padlocks and three keys. There is no outer metal seal but with two (2) inner metal seals with numbers CE0740674 and CE 07040673. The ballot box is properly locked.

In the Revision Report for Precinct No 91A/91B (Brgy. Marahan II), the ballot box is with serial number CE 01-065438. It has three (3) padlocks and three (3) keys. The outer metal seal is with serial number CE 07-406166 and the inner metal seal is with serial number CE 07-406165. The ballot box is in good condition and is properly locked.

In the Revision Report for Precinct No 92A (Brgy. Marahan II)3 the ballot box is with serial number CE 01-064891 with three (3) Comelec padlocks and three (3) keys. The ballot box has no outer metal seal but with two (2) inner metal seals with numbers CE007406167 and CE 007406168. The ballot box is properly locked.

In the Revision;Report for Precinct No. 102A (Brgy. Matagbak II), the ballot box is with Serial No. CE 98-044852 with three Comelec keys (sic) and three keys, the outer metal seal has Serial No. CE 07-406187 while the inner metal seal is with Serial No. CE 07-406188. The ballot box is properly locked, the outer metal seal is properly attached but the inner metal seal is already "opened."

In the Revision Report for Precinct No. 101A (Brgy. Matagbak II), the ballot box is with Serial No. CE 98-047462 with three Comelec padlocks and keys. The outer metal seal is with serial number CE 07-406186 and an inner metal seal is with serial number CE 07-406165. The ballot box is properly locked and the metal seals properly attached.

In the afore-mentioned revision reports, the metal seals for the precincts 79A, 77A/77B, 78A/78B, 95A/95B and 92A, are not properly attached. The two (2) seals are both attached on the holes provided for inner metal seals. Likewise, in Precinct No. 102A, the inner metal seal is "opened." Considering that the Comelec padlocks locked these ballot boxes and the two seals has sealed the inner part of the ballot boxes, the mistake on the placing of the seals, by reasonable inference, can be said to have been made at the lime the ballot boxes were closed at the precinct level on election day and not done after the election. As to Precinct No. 102A, although the inner metal seal is "opened," the outer metal seal and the padlocks were properly attached.

From the foregoing, it can be reasonably said that there was substantial compliance with statutory safety measures to prevent reasonable opportunity for tampering with their contents. Thus, the burden of proving that actual tampering with the contents of the ballot boxes shifted to the protestee-appellant.

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.

To prove that ballots particularly in Precincts 87A, 90A/B, 92A and 102A are tampered, the protestee-appellant points out the following:

1. The envelopes containing the ballots in the Precinct 87A, 90A/B, 92A and 102A are partially torn and that the inner metal seal of the ballot box in Precinct 102A is already broken;
2. The ballots in precinct Nos. 87-A, 90-A/B, 92A and 102A are fabricated and substituted as they have different textured and had signatures at their dorsal portion which are significantly different from the signatures of the chairmen as found in other election documents;
3. The findings of the NBI Questioned Documents Division corroborated the observations of the revisors. It found eighty two (82) ballots filled-up by one person and that twenty-nine (29) ballots contain superimpositions of the votes for the protestant and nineteen (19) among them were made by one person;
4. At the time the election protest was filed, protestee-appellant [sic] was still the sitting mayor who had control of the affairs in the municipal hail of Alfonso where the ballot boxes were stored; and
5. The ballots in Precincts 87-A, 90-A/B, 92A and 102A lack the security marking, the signatures of the BEI chairmen are likewise forged and that the name "Peñano" is superimposed on the name "Varias." Protestee-appellant asserts that these are pieces of evidence that proves election fraud and the lower court, therefore, erred when it preferred the ballots over the election returns.

The fact that the envelopes x x x are partially torn does not by itself prove that there was indeed tampering of the ballots, especially when the report does not indicate with specification the size and the manner the tearing was done and when the statutory safety measures are substantially complied with.

However, an examination of the envelopes pertaining to the aforesaid four precincts submitted to this Commission discloses that the torn portions are on the longer sides of the long brown envelopes. Likewise, the irregular manner by which the envelopes were torn suggests that they occurred while they are inserted into the ballot boxes.

Although the inner metal seal of Precinct No. 102A have (sic) been broken, the Report indicates that the outer metal seal and the Comelec padlocks were attached and intact at the time the ballot box for said precinct was opened.

The result of [he thorough examination conducted by this Commission on all the ballots in Precincts 87A, 90A/B, 92A and 102A pertaining to the confidential security features belies the claim of the protestee-appellant that said ballots lack the security markings. This Commission, aided by the use microscope and ultra-violet light, found that ALL the ballots in the said precincts contain ALL the hidden security features. Thus, the ballots are not spurious and cannot be rejected on lack of the security features.

On the findings of the NBI Questioned Documents Division, the same should be the proper subject of appreciation. The fact that the name Peñano is superimposed on the name "Varias" does not conclusively prove the presence of an election fraud. The same can be said of the ballots allegedly filled up by one ant! the same person.

The protestee appellant also fails to show proof that the protestant-appellee, while sitting as (lie mayor of Alfonso, tampered or caused the tampering of the ballots.

In all, the lower court did not err in relying on the ballots over the election returns.[8] (emphasis and underscoring provided) Annex "A," of the Petition; id. at 63-277, 80, 85-92.

Varias' attempt to have this ruling reconsidered by the COMELEC en banc also failed.

We significantly note at this point that both the RTC and the COMELEC alluded to, and actually ruled based on, the Rosal doctrine.[9]

Varias' petition and our riding subject of the motion

Varias came to us on a Rule 65 certiorari petition, alleging grave abuse of discretion on the part of the COMELEC when, among other things:

- It did not require the protestant to prove that the integrity of the ballot boxes was preserved;
- It relied on the physical count of the ballots in precincts 87A, 90A/B, 92A and 102A instead of the election returns despite overwhelming evidence that the ballot boxes were no longer intact and that there were v regularities in the examined ballots;[10]

Varias also raised other issues, which significantly did not fall within the Court's certiorari jurisdiction - i.e., appreciation of evidence issues. We did not rule on these issues.

The question we resolved in our Decision was whether the COMELEC correctly found that the ballots were kept intact so that their revision, rather than the count at the precinct level after elections as stated in the election returns, may be considered to be reflective of the true will of the people. To be sure, the importance of this preliminary question cannot be overemphasized for, in the whole election protest scheme, a revision of the ballots becomes a useless ceremony if their integrity has been compromised. All these were explained in Rosal. It is for this reason that the COMELEC's treatment of an issue as delicate as this, if indeed erroneous, does not only amount to a mere error of judgment but also to grave abuse of discretion; thus, when the conclusion on this point is entirely based on erroneous considerations, what results is a finding of grave abuse of discretion.

In finding that the COMELEC gravely abused its discretion, we said:

For emphasis and ease of reference, we summarize COMELEC's reasons for relying on the results of the revision of ballots:

- The RTC issued precautionary orders and allowed the parties, if they so desired, to witness the delivery and transfer of the custody of the ballots from the Municipal Treasurer's Office to the RTC.
- The ballot boxes were found in no other place than their designated place of storage.
- There was substantial compliance with the statutory safety measures to prevent reasonable opportunity for tampering; this conclusion is based on the Revision Reports showing the condition of the ballot boxes in the individual precincts when the ballot boxes were opened for revision.

In comparison, COMELEC rejected Varias' claimed tampering on the following reasoning:

- The irregular manner in which the envelopes containing the ballots were torn suggests that this incident occurred when the envelopes were inserted in the ballot boxes.
- As regards the broken inner metal seal of Precinct 102A, the Report of the Revision Committee shows that the outer metal seal and the COMELEC padlocks were attached and intact at the time the ballot box was opened.
- All the ballots in Precincts 87A, 90A/B, 92A and 102A contain all the hidden security features. They are not therefore spurious.
- "On the findings of the NBI Questioned Documents Division, the same should be the proper subject of

appreciation. The fact that the name "Peñano" is superimposed on the name "Varias" does not conclusively prove the presence of an election fraud. The same can be said of the ballots allegedly filled up by one and the same person."

- Varias Sailed to show proof that Peñano, while sitting as Mayor of Alfonso, tampered or caused the tampering of the ballots.

For these reasons, the COMELEC concluded that the RTC did not err in relying on the ballots.

While parts (a), (b) and (c) of the COMELEC ruling above may arguably be reasonable, we find the COMELEC's dismissive approach to the NBI Report unacceptable. We note that the NBPs technical examination of the ballots was made upon the parties' motion. More importantly, the technical examination was undertaken pursuant to the provisions of the Electoral Contest Rules. These findings, too, are based on physical evidence and speak for themselves in demonstrating the discovered irregularities. Under these circumstances, we can only characterize the COMELEC's misappreciation and treatment of the Report as a triviality to be gross and inexcusable.

Correctly appreciated, the NBI Report is part of a chain of facts and circumstances that, when considered together, lead to the conclusion that there was, at the very least, the likelihood of ballot tampering. That there are superimpositions of names in the ballots or that various sets, of ballots were written by one person indicate that the ballots had not been preserved in the manner Rosal mandated. The COMELEC, as we quoted above, took these indicators very lightly and simply concluded that they do not conclusively prove the presence of an election fraud. The COMELEC, in short, considered as insignificant the finding that there had been superimpositions or that sets of ballots were written by one person.

We add to these circumstances the NBI's expert finding that the ballots in each of the four precincts contained signatures different from those of their respective BEI Chairs. This additionally raises questions on whether these were indeed the ballots that were previously counted at the precinct level after voting. Why the COMELEC never mentioned that the NBI Report contained this finding is lost on us, and we cannot accept as correct a ruling that entirely disregarded a consideration as significant as this.

We agree with Varias that, other than the NBI Report, there was a systematic pattern of post-election ballot tampering, which arguments Peñano never substantially countered. As we stated above, the dramatic changes in the tally occurred only in four out of the 14 protested precincts, yet the shaving off of Varias' lead and accompanying additions to Peñano's - a classic case of dagdag-bawas - in these four precincts were more than enough to alter the results. If votes for Peñano were indeed erroneously and deliberately credited to Varias at the precinct level, we agree with Varias that an irregularity of this magnitude could not have escaped the attention of Peñano's poll watchers. We significantly note in this regard that the Minutes of Voting and Counting do not contain any report of any incident of this nature. The Electoral Contest Rules presumes that the Minutes of Voting and Counting contain all the incidents that transpired before the Board of Election Inspectors. To our mind, this presumption cannot be rebutted by a mere claim that the BEI refused to enter the objections of Peñano's poll watchers; the disproportion between this claim and the magnitude of the supposed error at the precinct level is simply too great for this claim to be believed. Under the circumstances, we can reasonably conclude that there were changes in the entries in the ballots after they were counted at the precinct level.

Varias therefore presented - via a combination of related circumstances - more than enough substantial evidence to prove that the otherwise invisible and supposedly impenetrable shield protecting the integrity and sanctity of the ballots has been pierced. While these facts and circumstances, when treated separately, do not directly prove ballot tampering, a combined consideration thereof indicates otherwise and unmistakably point to the conclusion that the integrity of the ballots has been compromised. Faced with conflicting results between a revision of questionable ballots and the official tally reflected in the election results, a reasonable mind would immediately conclude that the revision results cannot prevail over the election returns. Rosal instructs us to so

rule.[11] (emphasis and underscoring provided)

OUR RULING ON THE MOTION

We find the motion unmeritorious. The arguments raised in the motion relate to issues we previously considered and passed upon in our Decision. The respondent simply failed to raise substantial arguments that will merit reconsideration/

To leave no stones unturned, however, we again look at the most salient points and most critical issues of the case.

First, the respondent claims in his motion for reconsideration that we appear to have disregarded his compliance with the Rosa! requisites and A.M. No. 07-4-15-SC on his burden to preliminarily prove that the ballots have been preserved.

If only the respondent bothered reading our Decision closely, our ruling does not concern itself with his burden to preliminarily prove the integrity of the ballots; this is in fact a point so conceded. The unmistakable focus of the Decision is that part of Rosa! that states that the burden shifts to the protestee after a preliminary showing of substantial compliance with the provisions of the law on the preservation of ballots. Given that the documentary and object evidence on record and Varias' various submissions show that he discharged the burden of evidence that shifted to him, what should be inevitably applied is the Rosa! dictum that 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.

Second, the respondent claims that the COMELEC addressed Varias' concerns regarding the four precincts, i.e., the questions as to the integrity of the ballots; thus, the COMELEC was not entirely silent regarding Varias' objections.

We quoted in full the salient portions of the RTC and the COMELEC rulings to show that both the RTC and the COMELEC completely ignored or glossed over Varias' submitted physical and documentary evidence (i.e. Jhe NBF Report) on the question regarding the integrity of the ballots.

More importantly, under our scrutinizing lens is the COMELEC action which, no matter how we sugarcoat it with the rhetoric of being entitled to great weight and respect as a matter of procedure, does not satisfy the test of reasonableness. What the COMELEC simply did in this case was to sweep under the rug, so to speak, the indubitable possibility of ballot tampering. It never said anything substantial about the NBI Report, except the sweeping conclusion quoted above.

The COMELEC was completely silent about the dramatic changes and discrepancy between the count during revision and that reflected in the election returns for the four precincts. The record stubbornly tells us that the COMELEC simply did not consider the NBI Report worthy of evaluation.

As we pointed out in our Decision, the NBI Report forms part of a chain of established facts and information that, when combined together, indicate the likelihood of ballot tampering. It is a significant part of the evidence and the record of the case that cannot simply be ignored, especially in determining the reliability of the ballots subject of a revision.

In his motion for reconsideration, the respondent now additionally asserts that the NBI Report does not comply with Section 2(d), Rule 14 of A.M. No. 07-4-15-SC. We significantly note, however, that the requirements of the cited provisions apply to the court deciding the election protest and not to the NBI, as Section 2(d), Rule 14 specifically states the requirement as to the form of the decision in election protests.

Third, in an attempt to convince us that the election returns that were canvassed and that served as Varias' proclamation manifested a basic flaw -that the total number of votes for the position of Mayor exceeded the number of voters who actually voted, Peñano presented to us, for the very first time, the preliminary conference order that contained Varias' admission.

We reiterate that this is an issue that is badly misplaced in the present petition where Varias, through a Rule 65 certiorari petition, asks us for the affirmative relief of nullifying the COMELEC rulings on limited jurisdictional grounds. As a Rule 65 certiorari review is limited in scope and character, we must confine ourselves within the ambit of this limited jurisdiction, lest we ourselves commit grave abuse of discretion.

In sum, we find no reason to modify or reverse our Decision.

WHEREFORE, premises considered, we DENY the motion for reconsideration for lack of merit.

SO ORDERED.

Carpio[**], Corona, Carpio Morales, Nachura, Leonardo-De Castro, Peralta, Bersamin, Del Castillo, Abad, Villarama, Jr., Perez, and Mendoza, JJ., concur.

Puno[*], C.J., on wellness and sabbatical leave.

Velasco, Jr., J., please see dissenting opinion.

[*] On wellness and sabbatical leave from March 18 to 30, 2010.

[**] Designated Acting Chief Justice effective March 18, 2010, per Special Order No.1826 dated March 16, 2010.

[1] Motion for Reconsideration with Motion for the Reinstitution of Respondent to the Mayoral Office, p. 2-rollo, p. 782.

[2] Regional Trial Court, Branch IS, Tagaytay City.

[3] Precincts/Clustered Precincts 87A, 90A/B, 92A and 102A.

[4] A.M. No. 07-4-15-SC entitled the Riues of Procedure in Election Contests Before the Courts Involving Elective Municipal and Earangay Officials.

[5] Annex "D," of the Petition; rollo, pp. S22-367.

[6] On the issues of whether set(s) of ballots were written by one person (WBO); entries in a single ballot were written by two persons (WBT); or a baliot had been marked (MB).

[7] Annex "E," of the Petition; rollo, pp. 368-408, 400-401.

[8] Annex "A," of the Petition; id. at.63-277, 80, 85-92.

[9] Rosal v. Commission on Elections instructively tells us how to appreciate revision of ballot results as against election returns in an electoral contest, as follows:

(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.

[10] See our Decision, p. 13; rollo, pp. 734-760, 746.

[11] Id. at 754-757.

DISSENTING OPINION

VELASCO, JR., J.:

In my dissent to the February 11, 2010 Decision, I demurred to the majority's decision overturning, in a certiorari proceeding, the determination and conclusions of the Commission on Elections (COMELEC) on contentious factual issues arising from the appreciation and counting of ballots and evaluation of evidence on election irregularities. Subject to well-defined exceptions, factual findings of the COMELEC on matters falling under its jurisdiction and particular expertise as the agency charged with the enforcement and administration of all election laws, rules and regulations, ought not to be disturbed by the Court. The Court is neither a trier of facts nor well equipped to flesh the truth out of factual allegations.

As follows are the relevant antecedent facts and proceedings in brief:

After the canvas of all election returns in the May 14, 2007 elections for the position of municipal mayor of Alfonso, Cavite, petitioner Varias was proclaimed mayor-elect of that town. Shortly thereafter, Peñano filed an election protest with the Regional Trial Court (RTC) in Tagaytay City alleging the commission of irregularities in several precincts.

The election protest proceeded in due course and the revision of ballots and reception of evidence were set and conducted. Forthwith, the two rivals moved for and agreed to a technical examination of the contested ballots to be undertaken by the National Bureau of Investigation (NBI), which would later submit its report.

Following the appreciation of the contested ballots, the RTC rendered judgment finding Peñano the winning mayoralty candidate. In that decision, the court found four (4) of the protested precincts as swing voting centers in view of the significant difference between the ballot count results and the election returns tally in the corresponding precinct in question. In its decision, the RTC invoked the Court's holding in *Rosal v. COMELEC*.^[1] Rosal summarized the principles to be followed in an election contest predicated on the theory that the election returns—which are prima facie deemed to be the true reports of how the electorate voted on election day^[2]—did not accurately reflect the true will of the voters due to alleged irregularities in the appreciation and counting of ballots. These guiding principles are:

(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 were actually cast and counted] 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.

Parenthetically, Rosal was promulgated on March 16, 2007. Two months thereafter, or on May 15, 2007, A.M. No. 07-4-15-SC took effect, adopting the Rules of Procedure in Election Contests Before the Courts Involving Elective Municipal and Barangay Officials (Election Contest Rules or Rules, for short), therein providing that the Rules shall apply to election protests pending after their effectivity.[3]

Section 6, Rule 13 of the Rules provides:

Sec. 6. Disputable presumptions.—The following presumptions are considered as facts, unless contradicted and overcome by other evidence:

x x x x

(b) On election paraphernalia:

(1) Ballots and election returns that bear the security markings and features prescribed by the Commission on Elections are genuine; xxx

(c) On appreciation of ballots:

(1) A ballot with appropriate security markings is valid.

On appeal, the First Division of the COMELEC dismissed Vanas' appeal. The en banc Commission would subsequently deny Varias' motion for reconsideration. Like the RTC, the COMELEC found the ballot boxes in the aforesaid four (4) contested precincts to have been preserved with care, negating post-election ballot and ballot box tampering.

By Decision of February 11, 2010, however, the Court granted Varias³ petition for certiorari and, accordingly, nullified the interrelated COMELEC First Division decision and the en banc's resolution on the ground that grave abuse of discretion attended their issuance.

In my dissent to the majority's February 11, 2010 Decision, I voted to deny Varias' petition on the postulate that the COMELEC's assailed action did not amount to grave abuse of discretion subject to a certiorari review by the Court.

I maintain my position that the COMELEC's assailed decision and resolution—affirmatory of the RTC's decision—and the logic and premises holding it together should be left undisturbed.

On the stated premise that a revision of the ballots becomes a useless ceremony if their integrity has been compromised, the majority declares that the COMELEC erred when it "correctly found that the ballots were kept intact so that their revision, rather than the count at the precinct level after the elections as stated in the election

returns, may be considered to be reflective of the true will of the people." [4] The COMELEC's erroneous treatment of an issue as delicate as this, so the majority asserts, amounts to grave abuse of discretion, adding as a corollary that "when the conclusion on this point is entirely based on erroneous considerations what results is a finding of grave abuse of discretion." [5] (Emphasis added.)

To be sure, the above arguments of the majority are not easy to follow. But its arguments are deducible in that the majority wishes to drive home two (2) things: first, that the COMELEC looked at and used the wrong considerations and simply dismissed Varias' allegations of post-election ballot/ballot box tampering in resolving the protest; and second, that the COMELEC (or the RTC) did not consider the condition of the ballot boxes in question and the possibility that their security features have been undermined before the revision proceedings.

I remain unconvinced.

As I made it plainly clear and discussed in my previous dissent, COMELEC had taken into account what the majority viewed as the "correct and relevant considerations," referring to the totality of the circumstances supposedly indicating that the ballot boxes in the four (4) precincts and the ballots they contained have been violated. The circumstances summarized in the original ponencia are as follows: (1) the forced opening of the padlocks of the ballot boxes of the four controversial precincts; (2) the irregular serial numbers of the metal seals; (3) the substantial variance of the votes of the parties in the election- returns and the physical count; and (4) the different signatures at the back of the ballot and incidents of superimpositions, as indicated in the NBI report. As I also wrote in my dissent, the poll body found this mix of circumstances insufficient to support a finding of postelection fraudulent tampering—one that impaired the integrity of the four (4) protested ballot boxes and their contents as to preclude their use to determine the will of the voters.

Relatedly, the majority faults the COMELEC for turning a blind eye on evidence on record and Varias' submissions that indicated the possibility of ballot tampering. But a refusal to look at and consider a certain relevant matter when so required and the inability to accord such matter the desired weight and credit, as was the COMELEC's bent in this case, are entirely dissimilar concepts. That the COMELEC considered Varias' manifest concerns about the condition of the ballot boxes for the four precincts and the possibility that their security features have been compromised before the revisions proceedings may be gleaned from the COMELEC First Division's resolution, excerpts of which have been quoted in my dissent.

The COMELEC's decision to rely on the revised ballot count in light of the alleged irregularities in the appreciation and counting of ballots immediately after the voting exercises cannot hastily be brushed aside on Varias' pretense that a reasonable suspicion exists that tampering of the ballots, and necessarily of the ballot boxes, occurred. It is unfortunate that the majority took that path and swallowed hook, line and sinker a stereotypical claim in election protest cases. As between the findings of the COMELEC and the self-serving allegations of Varias on the fact of tampering, the choice should have been clear, easy, and simple. After all, the finding was made by an agency having jurisdiction over and expertise on fraudulent election practices and enjoying the presumption of regularity, besides.

We can concede, purely for argument, that the COMELEC flubbed in not lending credence to Varias' submission and evidence tending to prove, as claimed, the possibility of ballot and ballot box molestation after the precinct counting. But if the COMELEC, in the process, erred in concluding that there was no such tampering, a conclusion which, in turn, is attributable to an error in its (1) estimation of the condition of the ballots and ballot boxes in the protested precincts and (2) evaluation and appreciation of certain evidence and submission of the parties, then the error is, at most, one of judgment, not of jurisdiction correctible by certiorari. The appreciation of election documents and/or the integrity of election paraphernalia involves a question of fact best left to the

determination of the COMELEC, a specialized and independent constitutional agency charged with the enforcement of election laws and the supervision of elections.[6] Its findings of fact, when supported by substantial evidence, are final.[7] What the Court said in *Typoco v. Commission on Elections* is as instructive as it is timely:

The Court does not find merit in petitioner's argument. As stated at the outset, the appreciation of election documents involves a question of fact best left to the determination of the COMELEC, a specialized agency tasked with the supervision of elections all over the country. The finding of facts of administrative bodies, when supported by substantial evidence, are final and nonreviewable by courts of justice. This principle is applied with greater force when the case concerns the COMELEC, because the framers of the Constitution intended to place the poll body - created and explicitly made independent by the Constitution itself- on a level higher than statutory administrative organs.

To repeat, the Court is not a trier of facts. The Court's function, as mandated by the Constitution, is merely to check whether or not the governmental branch or agency has gone beyond constitutional limits of its jurisdiction, not that it simply erred or has a different view. Time and again, the Court has held that a petition for certiorari against actions of the COMELEC is confined only to instances of grave abuse of discretion amounting to patent and substantial denial of due process, because the COMELEC is presumed to be most competent in matters falling within its domain.[9]

It bears repeating that the RTC and the COMELEC have similarly determined that the protested ballots (found by the COMELEC as containing all the hidden security features[10]) have not been fraudulently altered after the voting and physical count, indubitably implying that they have remained in the same condition as when they left the voting place for delivery to Alfonso, Cavite's municipal treasurer, as official custodian of ballot boxes and their contents. I quoted in my dissent the relevant portions of the RTC's ruling setting forth the underlying reasons why the ballots should be followed in determining the election results, and to belie Varias' allegations of post-canvass tampering. Some highlights:

Indeed the ballots in this instance are not the only mute instances of the result of the election. The testimony of Elvira as well as the fact that the ballot box was found in the proper place and in the custody of the proper custodian shows that the ballots retained their superior status as evidence compared to the election return. Tims the physical count of the ballots as made in the revision should be followed since the election return for this precinct does not reflect the true choice of the voters in this precinct.[11]

I also made reference to the COMELEC's finding that there had been substantial compliance with statutory[12] and administrative[13] prescriptions on the mode of preserving the ballots as would provide assurance of the ballots having been kept inviolate. In this regard, it is worthy to note that the RTC, citing the testimony of one Nelson Dimapilis, a witness for Varias, stated that there is "no reason to doubt the manner of [preserving] the ballot box since it was done substantially in compliance with law." Of similar vein is this premised observation of the COMELEC' First Division: "there was substantial compliance with statutory safety measures to prevent reasonable opportunity for tampering with their contents." [14] Item No. 3 of the *Rosa!* doctrine provides that if a law sets forth the mode of preserving the ballots,, proof must be made of such substantial compliance with the requirements of that mode as would provide assurance of the ballots having been kept inviolate, albeit there might have been slight deviations from the exercise of achieving that end.

Given the foregoing premises, the COMELEC's determination as to the absence of tampering of ballot boxes and their contents is not without adequate substantiation.

According to the majority, the evidence on record and Vanas' submissions show him as having discharged the burden of evidence that shifted to him of proving tampering. Withal, what should apply is the *Rosal* dictum that

"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 results as shown by the recount and not as reflected in the election returns."

I disagree with this disturbing pronouncement. I distinctly note that the COMELEC First Division had determined, even if only impliedly, that Varias, on the basis of the evidence on record and his submissions, failed to discharge his burden satisfactorily. How such determination, as a necessary consequence of COMELEC's appreciation of evidence, could constitute grave abuse of discretion on its part escapes me.

There is grave abuse of discretion when an act (1) is done contrary to the Constitution, law, or jurisprudence;^[15] or (2) is executed whimsically, capriciously, or arbitrarily out of malice, ill will, or personal bias;¹⁶ the abuse must be so patent and gross as to amount to an evasion of a positive duty or a virtual refusal to perform a duty enjoined by law, or to act at all in contemplation of law.^[17]

There can be serious argument that this case does not involve a violation of any legal provision. If jurisprudence has been breached, then it can only be the doctrine enunciated in *Rosal*. *Rosal* proscribes in esse the use of the ballots to overturn the official count reflected in the election returns, unless it appears to the satisfaction of the court or COMELEC that the ballots to be recounted and ballot boxes containing them had been kept inviolate^[18] and/or that their integrity has been preserved with such care which precludes tampering and all suspicions of change or abstraction.

Judging from the factual antecedents and attendant circumstances of this case, the RTC and the COMELEC proceeded with the ballot recount after satisfying themselves that the protested ballots were in the same condition as when they left the voting centers following the counting, meaning that they have not been fraudulently altered. COMELEC did not act contrary to or deviated from the spirit of *Rosal*.

That the COMELEC took "very lightly" what, to the majority, are indicators of possible tampering does not amount to grave abuse of discretion. If at all COMELEC misappreciated the evidence thus adduced in the case, resulting merely in an error in its factual finding, or a lapse of judgment which is beyond the hand of certiorari to correct.

One of the indicators adverted to and referred to at every turn by the majority is the NBI Report on the handwriting and other entries on the ballots. The unstated premise of the majority's line of reasoning is that COMELEC is duty bound to consider, without hesitation¹, what the report contained. This contention is incorrect. As intimated in my dissent, the RTC and the COMELEC have their reason for rejecting some of the NBI findings.

And what is more, the COMELEC, not the NBI, is the agency that has the competence to determine the genuineness of election documents.^[19] The determination of whether or not a ballot is authentic and valid should be left to the trial court or electoral tribunal taking cognizance of the election case on the basis of what appears on the face of the ballot.^[20] It is established doctrine in this jurisdiction that opinions of handwriting experts are not binding on the court or COMELEC. Hence, it may accept totally or in part or even dispense with the NBI findings and conclusions and conduct its own examinations of the questioned handwriting.^[21] Verily, the opinions of handwriting experts, while helpful in the examination of forged documents owing to the technical procedure involved in the analysis, are not binding on the courts.^[22] As a logical corollary, a finding of forgery does not depend entirely on the testimonies of handwriting experts, as the judge must conduct an independent examination on the questioned signature or entry to arrive at a reasonable conclusion as to its authenticity.^[23]

In light of the foregoing doctrinal teachings, grave abuse of discretion cannot plausibly be imputed on the COMELEC for the evidentiary treatment it gave, under the premises, to the NBI report.

The First Division of the COMELEC devoted, as it were, 180 pages of its Resolution to the examination of the

ballots cast in the four (4) contested precincts. It explained why each particular contested ballot was interpreted in the particular way that it was. This effort on the part of COMELEC, even if viewed in isolation, argues against the notion of arbitrariness on its part.

In the final reckoning, the crucial and critical issue in this case resolves itself into the question of whether or not the COMELEC committed grave abuse of discretion in not appreciating in favor of protestee Varias the evidence and submissions tending to prove the probability of tampering of ballots cast in the four precincts in question, paving the way for a mayoralty proclamation based on the results of the revision of ballots.

As explained earlier, grave abuse of discretion cannot be ascribed on the poll body for rejecting, for reasons articulated in its First Division's decision, what was earlier referred to as indicators of possible tampering. As the Court said in *Rosal*, quoting a passage from *Tebbe v. Smith*:^[24]

So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestant 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 rendered upon one. (Emphasis added.)

In closing, I hark back to what I said in my original dissent:

The binding effect, even on this Court, of the factual determinations of the Comelec, exercising particular expertise in its field of endeavor, such as appreciation of ballots and evaluation of evidence on election irregularities, is firmly established. Hence, any attempt to overturn, on a petition for certiorari, factual determinations and conclusion of the Comelec would very well wreak havoc on well-settled jurisprudence. Yet, wittingly or unwittingly, this seems to be what the ponencia intends to accomplish in this case, x x x

Accordingly, I maintain my position and respectfully vote to grant the motion of Pefiano for reconsideration, deny the petition of Varias, and affirm the assailed decision and resolution of the COMELEC.

[1] G.R. No. 168253, March 16, 2007, 518 SCRA 473.

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

[3] Rule 16, Sec. 1.

[4] Resolution, p. 8.

[5] *Id.*

[6] *Punzalan v. COMELEC*, G.R. No. 126669, April 27, 1998, 289 SCRA 702.

[7] *Idulza v. Commission on Elections*, G.R. No. 160130, April 14, 2004, 427 SCRA 701.

[8] *Typoco v. COMELEC*, G.R. No. 186359, March 5, 2010.

[9] Penned by Associate Justice Nachura and concurred in by Chief Justice Puno and Associate Justices Carpio, Corona, Carpio Morales, Leonardo-De Castro, Brion, Peralta, Bersamin, Abad Villarama, Perez, and Mendoza.

[10] *Rollo*, p. 91.

[11] *Id.* at 400-401.

[12] OMNIBUS ELECTION CODE, Sees. 160, 217, 219 & 220.

[13] COMELEC Resolution No. 6667.

[14] Rollo, p. 89.

[15] Information Technology Foundation of the Philippines v. COMELEC, G.R. No. 159139, January 13, 2004, 419 SCRA 141, 148; citing Republic v. Cocofed, December 14, 2001, 372 SCRA 462, 493.

[16] Tañada v. Angara, G.R. No. 118295, May 2, 1997, 272 SCRA 18.

[17] Sen. Defensor Santiago v. Sen. Guingona, Jr., 359 Phil. 276 (1998).

[18] Eriguel v. COMELEC G.R. No. 190526, February 26, 2010.

[19] Typoco v. COMELEC, *supra*.

[20] Malaluan v. COMELEC, G.R. No. 120193, March 6, 1996, 254 SCRA 397.

[21] Punzalan v. Commission on Elections, G.R. Nos. 126669, 127900, 128800 & 132435, April 27, 1998, 289 SCRA 702; Sec. 22, Rule 132 of the Rules of Court explicitly authorizes the court (public respondent in this case) to make itself the comparison of the disputed handwriting "with writings admitted as genuine by the party whom the evidence is offered."

[22] Gimenez v. Commission on Ecumenical Mission and Relations of the United Presbyterian Church in the USA, 432 Phil. S95 (2002).

[23] G.M. Philippines, Inc. v. Cuambot, G.R. No. 162308, November 22, 2006, 507 SCRA 552.

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