

NICETAS FELISILDA, PETITIONER, VS. CRISPULO ACHACOSO, RESPONDENT.*G.R. No. 21228. November 22, 1963*

Ponente: BARRERA, J.

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In the general elections of November 10, 1959, Nicetas Felisilda and Crispulo Achacoso were candidates for the position of municipal mayor of Duero, Bohol. From the canvass of the election returns by the Municipal Board of Canvassers, Felisilda appeared to have received a total of 1569 votes against Achacoso's 1509 votes and, consequently, was proclaimed elected with a plurality of 60 votes. Achacoso, in due time, filed an election protest in the Court of First Instance of Bohol (Case No. 1308), contesting the returns in precincts Nos. 1, 5, 6, 7-A, 14, and 16 wherein certain ballots alleged to be marked were counted in favor of the protestee. Felisilda, in his answer, counter-protested against the results in precincts Nos. 2, 3, 4, 7, 8, 10, and 12 on the ground, among others, that certain ballots containing identifying words and phrases, prefixes and suffixes, were counted for the protestant.

After trial, the court rendered a decision invalidating 31 ballots counted for protestant Achacoso and 187 ballots counted for protestee Felisilda, with the result that the former was declared elected with a plurality of 96 votes. On appeal by the protestee, the Court of Appeals modified the ruling of the court a quo by declaring the protestant Achacoso elected with 1,478 votes (as found by the lower court) against the protestee's 1,466 votes, or with a reduced plurality of 12 votes. Felisilda now comes to this Court claiming that the Court of Appeals erred, (a) in invalidating nine (9) ballots cast in his favor, for being marked; (b) in erroneously considering that three (3) ballots were counted in his favor by the trial court, when in fact they were disallowed and discounted from his votes; (c) in counting as valid votes some twenty-nine (29) ballots in favor of protestant; and (d) in not passing upon and counting in his favor thirty (30) ballots (not 31 as stated by him) which were disallowed by the lower court for containing prefixes allegedly intended to identify the same.

Before proceeding with the determination of the question raised by herein petitioner, it may be stated that although some testimonial evidence was introduced the trial court disregarded the same, because it was presented after the ballots were examined by the commissioners of the court and the parties, and, therefore, unreliable as it was apparent that the same was a mere after-thought to suit what appeared on the ballots.

The nine ballots in question are as follows:

Exhibit B-60 (Prec. 2), with prefix "Nong" before the name Nicetas Felisilda. It is true that during the hearing, Victorio Timbal was presented and testified that the ballot was his and the prefix was placed therein upon the instruction of one Dadoy Visande. But, as the trial court had observed, this evidence aliunde was presented after the ballots have been scrutinized by the commissioners of the court and the parties, and, hence, unreliable. Therefore, this vote is hereby admitted, there being no valid evidence aliunde to support the claim that it is marked ballot.

Exhibit B-205 (Prec. 6), the word "Parie" (mispelling of the contraction of compadre) was written on the left margin, before the name M. Peligro for councilor. There being no evidence aliunde, this word can not be taken as intended to mark the ballot.

Exhibit B-196 (Prec. 6), the word "Pri" was written on the left margin immediately before the name P. Salaga, voted for councilor, also is not considered as a mark.

Exhibit B-277 (Prec. 7-A), the word "dont" apparently a mispelling of Don) was written at the left margin, immediately before the name Filisilda. It can not, for the same reason, be considered as a mark.

Exhibit B-442 (Prec. 14), the prefix "Don" before Eco Felisilda can not, for the same reason, be considered as a mark.

Exhibits B-75 (Prec. 2) and B-429 (Prec. 14) were declared marked, because the prefixes "Señor" and "Sr." were written over the printed word "mayor" followed by the name of N. Felisilda. This is erroneous.

Exhibit B-395 (Prec. 12). The word "ter" was written before "Magsaysay". There being no evidence aliunde, the word can not be considered as a mark.

Exhibit B-138 (Prec. 5), the prefix "Mr." written before the number printed on the ballot preceding the voted candidate did not, by that fact alone, constitute an identifying mark.

As heretofore stated, no evidence aliunde was admitted by the lower court, because the testimonial evidence was presented after the ballots were examined by the parties. We find this action taken by the court a quo to be in order, for indeed, admission of testimonies presented after the ballots were scrutinized by the parties, and which may have been gathered to suit the particular circumstances and conditions of such ballots, can open the way to undesirable practices precisely sought to be avoided by the Election Code.

(b) The Court of Appeals did not pass upon Exhibits B-142, containing the word "Dolia" before candidate Salaga, and B-145, not B-148, allegedly with the prefix "Mr." before candidate Cadorniga, because according to the appellate court, the same were already allowed by the trial court in favor of the protestee. An examination of the trial court's decision, however, discloses that Exhibit B-142 was rejected by the lower court (see Decision, p. 28, Appendix to protestant's brief), while Exhibit B-145, with the prefix "Mr." before Cadorniga was also disallowed (p. 29, id.) Similarly, Ballot B-148, which contains the prefix "Sr." before Manglapus, for Senator, was disallowed by the trial court for being marked, and not counted for protestee as wrongly stated by the Court of Appeals. Hence, these three ballots correctly considered as valid by the Court of Appeals, should be counted in favor of protestee Felisilda.

(c) Going over the decision of the Court of Appeals here under review, it was also found that among the ballots contested therein by the protestee, but allowed by the appellate court in favor of the protestant, is Exhibit A-413 containing only the word "Polo" in the space or mayor. It having been established that "Polo" is only the nickname of protestant Achacoso, this ballot should have been disallowed and deducted from the votes obtained by the protestant, under Section 129(9) of the Revised Election Code, which provides that for the ballot containing the nickname of a candidate to be counted in his favor, the same must be accompanied by either his name or surname, unlike that of the Christian name or surname which will be considered valid vote for such candidate if there is no other candidate with the same name or surname for the same office. (See 129-1, Revised Election Code.)

The rest of the ballots questioned by the protestee are valid votes in favor of the protestant as the nickname "Polo" is accompanied by his correct surname Achacoso.

(d) Protestee in this appeal for the first time points out as error committed by the trial court and the Court of Appeals the fact that some 30 ballots in his favor were disallowed for containing prefixes similar to those admitted as valid by the appellate court. While the contention is seemingly meritorious, we find that this point was not raised in the Court of Appeals, as there was no assignment of error made in connection therewith. It is true that in an election protest, like in a criminal case, the appeal throws the entire case open before the appellate court, and any of the parties may discuss any matter without need of any specific assignment of error, yet it is the duty of the party interested to call the attention of the court to such matter in order to give the court opportunity to pass upon the same. The parties can not expect the appellate court *motu proprio* to search from the records grounds to support their respective theories and then assail for the first time the inaction of the Court in a petition for certiorari to the Supreme Court. The Court of Appeals must be given every opportunity to pass upon and determine any question before review thereof may be sought in this Court.

Recapitulating, we declare that nine ballots discussed under item (a) and the three ballots under item (b) or a total of twelve are valid votes for the protestee, and should be added to those adjudicated in his favor by the Court of Appeals, making a total of 1,478. On the other hand, ballot A-413 discussed under item (c) should be deducted from the votes counted for the protestant, giving him a total of 1,477 votes. Protestee Felisilda is, consequently, hereby declared elected with a plurality of one vote.

Wherefore, the decision of the Court of Appeals is hereby reversed, without costs. So ordered.

Bengzon, C. J., Padilla, Bautista Angelo, Labrador, Concepción, Reyes, J.B.L., Paredes, Dizon, Regala, and Makalintal, JJ., concur.

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