

ENRIQUE SALVANI, PETITIONER, VS. HONORABLE LEONARDO GARDUNO, JUDGE OF FIRST INSTANCE OF THE SEVENTEENTH JUDICIAL DISTRICT, MAMERTO PORTILLO, RAMON MAZA, MANUEL PALACIOS AND ANGE...*G.R. No. 30578. January 28, 1929*

Ponente: STREET, J.

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This is an original application for the writ of mandamus by which the petitioner, Enrique Salvani, seeks to compel the respondent judge of the Seventeenth Judicial District to order the opening of the ballot boxes of the municipality of Caluya and also to receive the testimony of numerous witnesses who, waiving their privilege, are supposed to be ready to testify that they voted for the petitioner for the office of provincial governor in the eighth precinct of San Jose in the general election held on June 5, 1928,—all in connection with an election protest which, at the time this petition was filed, was being heard before the respondent judge, wherein Mamerto Portillo, one of the present respondents, is the protestant and Enrique Salvani, the present petitioner, is protestee.

It appears that after the last general election Enrique Salvani, the petitioner, was declared by the provincial board of canvassers to have been duly elected to the office of provincial governor of the Province of Antique, having received 2,934 votes, while Mamerto Portillo, his nearest competitor, received 2,925 votes, with a smaller number of votes for three other candidates. When the result of the election was proclaimed, Mamerto Portillo, on July 7, 1928, instituted a protest, containing numerous specifications of alleged irregularities, illegalities, and frauds, but for the purposes of this decision it is only necessary to note that he attacked the returns from the municipality of Caluya, and alleged, among other things, that, in the single precinct of said municipality, the inspectors rejected and refused to count for the protestant 85 valid ballots cast for the protestant for the office of governor. To this protest, the protestee, Enrique Salvani, answered with a general denial of all specifications and, by way of counter-protest, set up various irregularities, illegalities, and frauds which he asserted had been committed to his own prejudice in various precincts. However, none of the specifications of the counter-protest called in question the result in the returns from Caluya; but with respect to the eighth precinct of the municipality of San Jose, the protestee alleged, among other things, that the election inspectors illegally failed to count in favor of the protestee 30 votes lawfully cast in his favor and that, furthermore, said inspectors awarded to the protestant Portillo 32 votes that were invalid on account of the alleged illegibility of the name of the person voted for in said ballots.

The charges in the protest and counter-protest being of a nature to require the opening of many boxes from different precincts, the court appointed commissioners and the boxes were subsequently brought into court. However, when the time approached for opening the boxes from the municipality of Caluya, it appeared that witnesses needed by contestant in connection with the opening of these boxes had not arrived, owing apparently to difficulties of communication. The contestant therefore, in order, so the return of the respondent judge informs us, not to delay the proceedings, announced that he waived the opening of these boxes and would withdraw his allegations of errors and frauds with respect thereto. His motion to this effect was admitted by the court, with the

result that the boxes from Caluya were not opened. Against this action the attorney for the protestee Salvani objected, and insisted that the boxes from Caluya be opened and the votes recounted. But as the protestee had not inserted in his counter-protest any charges of irregularities or frauds with respect to the returns from Caluya, his Honor refused to order the opening of these boxes.

In the present proceeding the incident above detailed is made the basis of the first ground of action) stated in the petition; and it is here insisted that the court was bound to order the opening of these boxes and that the writ of mandamus is the proper remedy to compel him to make such order. This contention is not, in our opinion, well founded. It was without doubt proper for the court to permit the protestant Portillo to retire the charges made in his protest with respect to irregularities and fraud in the precinct of Caluya, and after that was done there was nothing in the protest or counter-protest which raised any question as to the regularity of the proceeding in this precinct. It was therefore discretionary with the court whether the boxes from this precinct should be opened. It is true that the statute permits the court of its own accord, if the interest of justice so requires, to order the opening of boxes (Election Law, sec. 479); but there is nothing requiring the court unconditionally to open boxes when there is nothing in the protest or counter-protest impugning the returns from a particular precinct. It is established doctrine here that when a judge of a Court of First Instance, in the exercise of his discretion, has refused to order the opening of ballot boxes, not challenged in the protest or counter-protest, such action will not be disturbed by us, in the absence of a showing that the discretion of the court has been abused. In the case before us there is nothing to indicate that an abuse of discretion was committed; and the circumstance that the boxes pertaining to Caluya had been previously brought to the court in this case, under an arrangement satisfactory to both parties, does not in our opinion materially affect the result. The first ground of action stated in the petition must therefore be considered ill-rounded.

The second cause of action is concerned with the proceedings with respect to the allegations of the counter-protest concerning the eighth precinct of the municipality of San Jose. In this connection it appears that when the commissioners came to open the box of used ballots from this precinct, it was found that the ballots and other papers contained in the box had been destroyed by any and some corrosive substance to the extent that only 9 ballots for the Protestant and 1 ballot for the protestee could be made out, while these ballots were partially destroyed by the same agencies. These facts were made to appear in a report which the commissioners submitted to the court on September 25, 1928. Thereupon the attorney for the protestee submitted to the court a proposed amendment to his counter-protest, in which it was alleged that the contents of this box had been destroyed by the protestant or persons acting in his interest for the criminal purpose of making impossible the examination of the ballots and the consequent discovery of the frauds which the protestee claimed had been committed in said precinct. The admission of this amendment was opposed by the attorney for the protestant; and when this matter came to the attention of the court, his Honor, the trial judge, inquired of the attorney for the protestee whether he had any proof to show that the destruction of the ballots was due to the criminal manipulations alleged in the amendment. To this the attorney for the protestee replied that he had present sixty-three witnesses, residents of the eighth precinct of San Jose, who would waive their privilege of secrecy and testify in court that they had voted for the protestee in the election in question, and the attorney submitted that, in view of the fact that the election returns from this precinct conceded only 37 votes to the protestee, the testimony of the sixty-three witnesses should be accepted by the court as sufficient to show that the frauds alleged had been committed. It was furthermore indicated at this hearing that the proof referred to was offered for the purpose of showing that the election returns were false and dishonest and that inasmuch as the ballots themselves had been destroyed, it was the contention of the protestee that the returns from this precinct should be disregarded altogether.

Upon consideration of the matter the court refused to allow the amendment and ruled that the testimony of the alleged sixty-three voters, who would testify that they had voted for the protestee, could not be received. Upon

this incident the second cause of action of the present petition is based.

We see no good reason for rejecting the proposed amendment, because it was based upon facts that could only be known when the box whose contents had been destroyed was opened, and the amendment was submitted promptly thereafter. It is probable that the amendment was not in fact necessary, because the proof with which we are here concerned would apparently have been admissible in evidence upon the issue already made of fraud in the returns from this precinct. Nevertheless, as the amendment was in fact offered and submitted promptly after the discovery of the facts with which the amendment was chiefly concerned, it should have been admitted by the court.

The main point to be considered, as we conceive it, is whether, when the ballots are found to have been destroyed, the returns may be impeached by submitting the testimony of voters as to how they voted. The trial court was of the opinion that such testimony is not admissible unless it is shown by some proof, independent of the testimony of the voters, that the destruction of the ballots was due to criminal intervention proceeding from the adversary candidate or his partisans. In support of this proposition reliance is placed upon *Cecilio vs. Belmonte* and Court of First Instance of Nueva Ecija (48 Phil., 243), where it is said that while the testimony of the voters is admissible to rehabilitate the returns, yet such testimony cannot be conceded greater weight than the official returns, unless it is shown that the returns are false. This statement suggests the necessity for independent proof of fraud. Also in *Valenzuela vs. Carlos and Lopez de Jesus* (42 Phil., 428), this court guardedly said that testimony of the character of that offered in this case could be admitted for the purpose of rehabilitating the returns, when the ballots, which are of course the best evidence, have been destroyed. But it was not stated in that case that such testimony would be admissible to impeach the returns. In *Dayrit vs. San Agustin and Valdez* (40 Phil., 782), it was held that the testimony of individual voters could be received to sustain the official returns. That case was one where the controversy was upon the point whether the ballots which had in fact been used in the election the spurious ballots; and the testimony tended to show that the ballots were at any rate those that had been supplied to the voters by the election officials.

This court is no friend of artificial exclusionary rules of evidence, and upon considering the point in all its bearings, we are of the opinion that the testimony offered should, under the circumstances, have been received. If it is permitted to one of the candidates to submit such evidence to maintain the integrity of the returns, as was done in *Valenzuela vs. Carlos and Lopez de Jesus*, supra, we see no reason why, under similar circumstances, the same proof should not be admitted when offered for the purpose of impeaching the returns. Of course the ballot box, in case of a contest over the returns, supplies the best evidence as to persons for whom the votes were cast; but when the ballots have been destroyed, the parties interested must be permitted to resort to other proof, and the testimony of the voters is admissible, we think, without any independent proof that the ballots were destroyed by the criminal manipulation of the candidate who is supposed to have profited by the fraud. It is true that the testimony of persons who, after an election, may claim that they voted for a certain candidate, should be received with caution, but after all it must be weighed by the same principles that govern the appreciation of testimony of all kinds.

From what has been said it follows that the petition must be denied in so far as it seeks to compel the opening of the election boxes of the precinct of Caluya, constituting the subject matter of the first cause of action; but the petition will be granted with respect to the second cause of action, and the respondent judge is directed to allow the proffered amendment to the counter-protest relative to precinct No. 8 of the municipality of San Jose and to grant a further supplemental hearing to the parties at which the petitioner will have an opportunity to present the proof heretofore offered by him, consisting of the testimony of voters, to establish the facts expressed in the amendment and offer of proof. So ordered, without costs.

Johnson, Malcolm, Villamor, Johns, Romualdez, and Villa-Real., JJ., concur.

DISSENTING

OSTRAND, J.:

I dissent from the ruling of the court upon the second cause of action.

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