

ANTONIO S. SAN AGUSTIN, PETITIONER, VS. CONRADO BARRIOS, JUDGE OF FIRST INSTANCE OF ILOILO, ET AL., RESPONDENTS.

G.R. No. 46196. September 12, 1938

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

This is an original petition for certiorari instituted by Antonio S. San Agustin against the Honorable Conrado Barrios, Judge of First Instance of Iloilo, and others, wherein, on the facts alleged therein, it is prayed that, after proper proceedings, a decision be rendered reversing that entered by the respondent judge and declaring him councilor elect of the City of Iloilo with a majority of 3 votes over the respondent Crispino Melocoton, with the costs to the latter.

On December 31, 1937, the herein petitioner, Antonio S. San Agustin, who was one of the candidates for councilor of the City of Iloilo in the general elections held on December 14, 1937, filed his protest with the Court of First Instance of Iloilo against the election of Eulogio Garganera, Serapion C. Torre, Evelino Zaldivar, Fortunato R. Ybiernas, Serafin de la Cruz, Leopoldo Ganzon and Crispino Melocoton, wherein, among other things, he asked that he be declared one of the candidates elected to the office of councilor of the City of Iloilo. After the corresponding trial, the respondent judge, Honorable Conrado Barrios, on March 29, 1938, rendered his decision the dispositive part of which reads:

"In view thereof, the court declares Messrs. Eulogio Garganera, Serapion C. Torre, Fortunato R. Ybiernas, Evelino Zaldivar, Serafin de la Cruz, Leopoldo Ganzon and Crispino Melocoton legally elected councilors of the City of Iloilo, Province of Iloilo, Philippines, having obtained a greater number of votes than the petitioner, Dr. Antonio San Agustin, the respondent Melocoton, who obtained the least number of votes among the six already mentioned, having obtained a plurality of 15 votes over the petitioner, Dr. San Agustin, with the right to remain as councilors of the City of Iloilo. The protest of the petitioner, Dr. Antonio San Agustin, is accordingly dismissed, with the costs."

In considering the contents of the ballot boxes of precinct No. 32 of Iloilo, which were opened during the trial, the lower court said:

"Upon opening the white box for valid ballots there were found 783 used ballots, and according to the minutes Exhibit R, 802 electors voted in this precinct, hence, a difference of 19 ballots. The red box in this same precinct was revised and inside thereof were found open, aside from the 30 ballots with stubs which are spoiled ballots, 20 stubless ballots (Exhibits 37 to 56), plus 18 more ballots (Exhibits X, Y, Z, AA to OO) claimed by the petitioner, or a total of 38 ballots, giving an excess of 19 ballots.

"According to the evidence, the ballots introduced by the inspectors in these precincts, 27 and 32, with the exception of the 30 ballots with stubs, were deposited in the red boxes thereof by the inspectors during the canvass, because they found, in the opinion of the majority of the board of inspectors, that the same were marked or countersigned and, hence, spoiled."

And resolving the question of whether or not the ballots found in the red box should be counted, it said:

"Considering these facts and the legal provisions applicable to the case, the court is of the opinion that none of the ballots found in the red boxes for spoiled ballots in precincts 27 and 32, whose number exceeds that of the voters in each of these two precincts, should be counted as valid; because it cannot be determined which thereof should be excluded as excess ballots and which should be counted in favor of the different candidates.

"In view of the foregoing considerations, the court is of the opinion that the 35 stubless ballots found in the red box of precinct 27, as well as the 38 stubless ballots found in the red box of precinct 32, should not be counted for any candidate."

From the above it is seen that the trial court refused to count the 38 stubless ballots found in the red box of precinct No. 32, because in its opinion it could not be determined which thereof should be excluded as excess ballots and which should be counted in favor of the various candidates. It is a fact that the said 38 ballots—20 without stubs (Exhibits 37 to 56) and 18 (Exhibits X, Y, Z, AA to OO), with the note "marked" on the back or with blemishes—were deposited in the red box, because in the opinion of the majority of the board of inspectors, the soiled ballots were spoiled because marked or countersigned. The presumption is that ballots found in a red box have been spoiled, particularly if they bear the word "inutilizada" or "spoiled"; however, this is not a presumption *juris et de jure* impervious to attack, but one *juris tantum* which yields to contrary proof. (*Ditching vs. Jalandoni*, 52 Phil., 796, citing approvingly *Lucero vs. De Guzman*, 45 Phil., 852; *Bulan vs. Gaffud*, 49 Phil., 906; *Mandac vs. Samonte*, 49 Phil., 284; *Valenzuela vs. Carlos and Lopez de Jesus*, 42 Phil., 428; *Domalaon vs. Estrellado*, G. R. No. 36284 [56 Phil., 840]; *Oliveros vs. Santos*, G. R. No. 36273 [56 Phil., 849]; *Ignacio vs. Navarro*, G. R. No. 37401 [57 Phil., 1000, 1011], and *Balatan vs. Beltran*, G. R. No. 30670, promulgated on July 22, 1929.)

The fact that the 38 stubless ballots were found in the red box is, therefore, no bar to their being reckoned with. Neither does such fact preclude the determination of which of said ballots were excess ballots and which were rejected because marked or countersigned. The excess ballots had to be dropped out from the white box of useful ballots before going forward with the canvass, under section 462 of the Election Law; wherefore, they would not bear on the back the note "spoiled" or "marked ballot"; whereas those turned down by the majority of the board of inspectors during the canvass would disclose the note "marked ballot" or "balota marcada". It was, consequently, easy to ascertain those which had been eliminated from the white box as excess ballots before the canvass and those which had been rejected thereat because marked or countersigned. The placing of the excess ballots and those rejected as allegedly marked or countersigned in the red box, instead of in the white box where they originated, as ordered respectively by sections 462 and 463 of the Election Law, was a mistake of the inspectors and should not prejudice the candidate. Having the said 38 ballots before him, among which were found those missing in the white box of precinct No. 32, which the petitioner, as protestant, claimed to be valid and to have been cast in his favor, it was the duty of the honorable respondent judge to consider and examine said 38 ballots and to determine which thereof were excess and which were spoiled because marked or countersigned, and whether or not their rejection was erroneous. In refusing to do this, the trial court failed to comply with an imperative judicial duty.

As the Election Law does not authorize an appeal from a decision in an election protest questioning the validity of the election of municipal councilors, and as there is no other adequate and speedy remedy to compel the respondent judge to comply with the said duty, except by mandamus, the latter remedy lies. Altho the petition before us is one for certiorari, it appearing from the facts alleged in the petition that the error sought to be corrected consists in the non-compliance with an imperative judicial duty, we shall consider the same as if it were one for mandamus and act upon it accordingly. (*Guzman vs. Lichauco*, 42 Phil., 291; *People vs. Concepcion*, 55 Phil., 485.)

In view of the foregoing, we are of the opinion and so hold: (1) that when in a red box are found excess ballots taken before the canvass from the white box, together with ballots which were rejected by the board of inspectors during the canvass because marked or countersigned, the judge who hears the protest should, at the instance of a party, consider them and determine which thereof are excess and which are rejected because marked or countersigned, and whether or not their rejection was erroneous; and (2) that altho the petition filed is one for certiorari, if the facts alleged make out a petition for mandamus, the latter remedy will be granted.

Wherefore, the decision of the honorable respondent judge is reversed and set aside, and he is ordered to reopen the election protest and to consider the 38 stubless ballots found in the red box of precinct No. 32 of the City of Iloilo, Province of Iloilo, to separate the excess ballots from those which were rejected by the majority of the board of canvassers as marked or countersigned, and to determine if their rejection was erroneous or not, thereafter rendering another decision, without special pronouncement as to costs. So ordered.

Abad Santos, Imperial, Diaz, Laurel, and Concepcion, JJ., concur.

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