

**ANTONIO S. SANAGUSTIN, PETITIONER, VS. CONRADO BARRIOS,
JUDGE OF FIRST INSTANCE OF ILOILO, EULOGIO GARGANERA,
SERAPION C. TORRE, EVELIO ZALDIVAR, FORTUNATO R. YBIERNAS,
SERAFIN ...**

G.R. No. 46497. September 18, 1939

Ponente: LAUREL, J.

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LAUREL, J.:

On December 31, 1937, the herein petitioner Antonio S. Sanagustin, one of the candidates for the office of councilor of the City of Iloilo in the election held on December 14, 1937, filed in the Court of First Instance of Iloilo a protest against the proclaimed election of the herein respondents other than the respondent judge as councilors of said city. After hearing the protest, the respondent judge rendered a decision confirming the disputed election and finding the votes received by each candidate to be as follows:

Eulogio Garganera 5737

Serapion Torre 5295

Fortunato R. Ybiernas 5198

Evelio Zaldivar 5174

Serafin de la Cruz 5032

Leopoldo Ganzon 4551

Crispino Melocoton 4222

Antonio Sanagustin 4207

In case G. R. No. 46196, an original action instituted by the herein petitioner for the purpose of securing a reversal of the aforesaid decision together with a declaration that he was elected a councilor of the City of Iloilo, with a plurality of three votes over the herein respondent Crispino Melocoton, this court, on September 12, 1938, rendered judgment the dispositive part of which is worded as follows:

"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."

In pursuance of the decision of this court, the respondent judge reopened the election proceedings in question and, after due trial, decreed:

"Por lo tanto, el Juzgado falla de nuevo este expediente, reiterando su fallo anterior de 29 de marzo, 1938, y declara a los Sres. Eulogio Garganera, Serapion Torre, Fortunato R. Ybiernas, Evelio Zaldivar, Serafin de la Cruz, Leopoldo Ganzon y Crispino Melocoton, concejales legalmente electos de la Ciudad de Iloilo, Provincia de Iloilo, Filipinas, por haber obtenido mayor numero de votos que el recurrente Dr. Antonio Sanagustin, con exceso de 15 votos el recurrido Melocoton que es el que obtuvo menor numero de votos entre los seis ya mencionados, sobre el recurrente Dr. Antonio Sanagustin, y tienen derecho a permanecer como concejales de la Ciudad de Iloilo. Y sobresee la protesta del recurrente Dr. Antonio Sanagustin, con costas."

The present petition for certiorari was brought by the herein petitioner with a view to obtaining a revocation of the last decision of the respondent judge and having this court order said respondent to comply with its decision of September 12, 1938, it being contended that the respondent judge had not properly segregated the excess ballots from those held by the board of canvassers to be marked and had failed to decide whether the rejection by the board of said marked ballots was right or not.

We are of the opinion and so hold that these contentions are groundless. The respondent judge, in the decision herein complained of, set forth the following pronouncements:

"Examinadas las 38 balotas del precinto 32, ambas partes concurrieron en que las balotas Exhibits 37, 38 y 39 deben considerarse 'balotas sobrantes', y sometieron el expediente para el fallo del juzgado.

* * * * *

"El acta electoral (tres ejemplares) del precinto No. 32 de la Ciudad de Iloilo (Exhibit R), referente a las elecciones de diciembre 14, 1937, esta fechada en diciembre 15, 1937 y firmada en cada ejemplar por el presidente e inspectores de eleccion, Walfredo J. Jaranilla, M. J. Obregon y J. M. Dizon. Segun dicha acta votaron 802 personas, y las balotas usadas y encontradas en la urna de balotas utiles fueron asimismo 802, con diez balotas mas o menos sobrantes que fueron retiradas sin abrirlas y marcadas como 'balotas sobrantes'. Esta acta Exhibit R ha sido admitida sin discusion, por tanto, su valor probatorio es de mas peso que la declaracion del presidente de la junta Walfredo J. Jaranilla que dijo que la mayoria de la junta rechazo las balotas Exhibits X al OO por estar manchadas, diciendo que aquellas manchas las encontraron durante el escrutinio sin poder determinar quienes han puesto dichas marcas.

"En el acta antes mencionada Exhibit R, no aparece el numero de balotas rechazadas como marcadas; el paquete de las diez balotas 'sobrantes' no se ha encontrado dentro de la urna blanca ni cualquiera otra balota tachada como marcada. (Arts. 462 y 463, Nueva Ley Electoral.) Luego las citadas balotas Exhibits X al OO excepto los Exhibits Y y MM han sido debidamente rechazadas por toda la junta de inspectores, cuyos miembros firmaron sin protesta la referida acta Exhibit R.

"En vista de las disposiciones legales antes mencionadas y de los hechos probados, el juzgado resuelve que de las 38 balotas sin cupones encontradas en la urna encarnada de balotas inutilizadas, solamente, los Exhibits Y, MM, 40, 41, 42 y 46 que no estan manchadas ni marcadas, aunque al dorso aparecen las notas puestas indebidamente por los inspectores, pueden ser consideradas como balotas sobrantes, juntamente con los Exhibits 37, 38 y 39 que las partes consideraron tambien como sobrantes, haciendo un total de 9 balotas; y el resto de 29 balotas deben ser consideradas debidamente rechazadas por la junta de inspectores por estar marcadas o contrasenadas, pues de la declaracion del mismo presidente de la junta Walfredo J. Jaranilla, se desprende que ninguno de los inspectores ha puesto tales manchas, y debe concluirse por tanto, que las marcas ya estaban puestas antes del escrutinio; aparte de las razones ya arriba expuestas, pues no han sido empaquetadas dichas balotas marcadas, ni las balotas sobrantes como ordena la ley, ni fueron colocadas en la urna blanca, ni se han mencionado en el Exhibit R que es una prueba admitida por las partes contendientes."

It is quite obvious from the above-quoted passages of the decision of the respondent judge that the latter had considered the thirty-eight ballots found in the red box of precinct No. 32 of the City of Iloilo and determined

what were excess ballots (Exhibits Y, MM, 40, 41, 42, 46, 37, 38 and 39) and what were marked (the remaining twenty-nine ballots), without forgetting to state in this connection that "el resto de 29 balotas deben ser consideradas debidamente rechazadas por la junta de inspectores por estar marcadas o contrasenadas" and to particularize the inscriptions and marks found and appearing on the ballots here in controversy. This, we think, is a sufficient compliance on the part of the respondent judge. This court has already held that a judge may be required "to decide a question, but not to decide it in a particular way" (*Arteche vs. De la Rosa*, 58 Phil., 589), and that it will not, through mandamus, "order or direct what judgment shall be rendered in any given case" (*Sanson vs. Barrios*, G. R. No. 45086, promulgated August 22, 1936).

It appears from the record before us (Answer, p. 2) that when the respondent judge reopened the election case here involved, "El recurrido Melocoton ha pedido al Juzgado, en vista de ello, que la separation de las sobrantes se hiciera por sorteo como unica manera de hacer justicia a las partes; pero el recurrente Sanagustin se opuso a ello y sostuvo que las balotas no manchadas o no contrasenadas debieran ser las sobrantes, y las manchadas son las que faltaban en la urna blanca y deberian ser apreciadas por el Juzgado si eran o no realmente contrasenadas. El Juzgado obró de acuerdo con la teoria del recurrente * * *." The petitioner cannot therefore now avail himself of the criticism that the respondent judge had not properly segregated the excess ballots, for the reason that he is not permitted to shift from one theory at the trial to a new and different theory in the appellate court. (*Toribio vs. Decasa*, 55 Phil., 461, citing *Williams vs. McMicking*, 17 Phil., 408; and *Agoncillo and Marino vs. Javier*, 38 Phil., 424; *American Express Co. vs. Natividad*, 46 Phil., 207.)

Much less can the petitioner fruitfully argue that the respondent judge erred in finding Exhibits Y, MM, 40, 41, 42, 46, 37, 38 and 39 as excess ballots on the ground that Exhibits Y and MM bore on their reverse sides the note "mark ballot". For, as correctly remarked by the respondent judge, "aun dando de barato en gracia al argumento de la parte recurrente, considerando como balotas limpias y buenas las 9 balotas Exhibits Y, MM, 40, 41, 42, 46, 37, 38 y 39, que el juzgado ha considerado sobrantes, resulta que el Dr. Sanagustin aparece votado en los Exhibits Y y MM. Y adjudicandole estos dos votos solamente tendria un total de 4209 contra 4222 de Melocoton, quedando todavia a este una diferencia a su favor de 13 votos."

Finding the instant petition to be lacking in merit, it is the judgment of this court that the same be as it is hereby dismissed, with costs against the petitioner. So ordered.

Villa-Real, Imperial, Diaz, Concepcion, and Moran, JJ., concur.

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