

## EN BANC

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

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

### R E S O L U T I O N

**BRION, J.:**

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

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*.<sup>[1]</sup>

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,<sup>[2]</sup> 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.<sup>[3]</sup> The protagonists, though, disagree on the authenticity of the ballots and moved, pursuant to the Rules on Electoral Contests<sup>[4]</sup>, 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.<sup>[5]</sup>**

#### *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,<sup>6</sup> the RTC decided the protest in Peñano's 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, 20G7 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,<sup>[7]</sup> (emphasis provided)

Varias appealed tfeis 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 lo *Rosa*] 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.