

EN BANC

[G.R. No. 181809, February 17, 2010]

**ROSE MARIE D. DROMAL, PETITIONER, VS. HERNAN G. BIRON
AND COMMISSION ON ELECTIONS, RESPONDENTS.**

D E C I S I O N

DEL CASTILLO, J.:

We reiterate settled rulings on the appreciation of election returns in this case, to wit, (1) before a certificate of votes may be used to prove tampering, alteration, falsification or any other anomaly committed in the election returns, it must comply with Sections 16 and 17 of Republic Act (RA) No. 6646,^[1] (2) the exclusion of election returns on the ground of tampering must be approached with extreme caution and must be based on clear and convincing evidence, and (3) in case of discrepancy in the other authentic copies of an election return, the procedure in Section 236 of the Omnibus Election Code^[2] (OEC) should be followed. For failure to comply with these rules and principles, we hold that the Commission on Elections (COMELEC) acted with grave abuse of discretion amounting to lack or excess of jurisdiction and accordingly order it to rectify the unjustified disenfranchisement of voters in this case.

This Petition for *Certiorari* under Rules 64 and 65 of the Rules of Court seeks to annul and set aside the COMELEC *En Banc*'s February 1, 2008 Resolution.^[3] The COMELEC *En Banc* affirmed its Second Division's September 12, 2007 Resolution^[4] in SPC No. 07-147 which ordered the exclusion of 11 election returns in the canvassing of votes for the position of vice mayor in the Municipality of Dumangas, Iloilo.

Factual Antecedents

Petitioner Rose Marie D. Doromal (Doromal) and private respondent Hernan G. Biron (Biron) were the vice mayoralty candidates for the Municipality of Dumangas, Iloilo in the May 14, 2007 elections. During the canvassing of votes, Biron orally objected to the inclusion of 25^[5] election returns. Biron anchored his objections to the inclusion of the 21 returns on the alleged missing *taras*^[6] in Copy 4 of the contested returns, which he obtained as the standard bearer of LAKAS-CMD, the recognized dominant majority party in said elections.^[7] As regards the remaining four contested returns, Biron opposed their inclusion allegedly because there was a discrepancy between the number of votes stated in the said returns and those stated in the certificate of votes issued by the Board of Election Inspectors (BEI). In view thereof, the Municipal Board of Canvassers (MBC) deferred the canvassing of the said returns. Thereafter, Biron filed his written objections and supporting evidence.

On May 18, 2007, the MBC denied^[8] the petitions for exclusion. It found that there was no tampering on the number of *taras* for Doromal in the copy of the election return for the MBC. It also held that the copy of the election return of the MBC was complete with no material defect and duly signed and thumbmarked by the BEIs.^[9]

Aggrieved, Biron appealed to the COMELEC. The case was docketed as SPC No. 07-147^[10] and raffled to the Second Division. Pending the resolution of the appeal, the proclamation of the winning vice mayoralty candidate was ordered suspended.

Ruling of the COMELEC Second Division

On September 12, 2007, the COMELEC Second Division, voting 2-1, issued a Resolution partially granting Biron's appeal. It ordered the exclusion of only 11 contested election returns while at the same time ordered the inclusion of the remaining 14 election returns in the canvassing of votes, *viz*:

WHEREFORE, foregoing premises considered, the instant appeal is PARTIALLY GRANTED. The election returns in Precinct Nos. 17A/18A, 20A, 21A/21B, 30A/31A, 59A/60A, 122A/122B, 162A/163A, 169A, 173A/173B, 174A/174B, 192A, 202A, 204A and 207A, are hereby ordered INCLUDED in the canvass of returns for the vice-mayoralty position in Dumangas, Iloilo. The Municipal Board of Canvassers of Dumangas, Iloilo is hereby ordered to RECONVENE and PROCEED with the canvass of the said election returns and PROCLAIM the candidate who garners the most number of votes.

The election returns in Precinct Nos. 107-A, 114-A, 6A/6B, 55-A, 67A/67B, 116A/116B, 130A, 42A/43A, 90A/90B, 7A/7B and 208A/208B are hereby ordered EXCLUDED in the canvass of returns by the Municipal Board of Canvassers of Dumangas, Iloilo.

SO ORDERED.^[11]

The COMELEC Second Division ordered the exclusion of the 11 election returns (subject returns) because the same were allegedly tampered or falsified. It held that eight of the 11 subject returns showed that the *taras* were either closed on the third or fourth vote, instead of on the fifth vote, resulting in a discrepancy between the number of *taras vis-à-vis* the written figures and words in the said returns. With regard to the remaining three returns, the Second Division noted a glaring dissimilarity between the votes stated in the said returns and those stated in the certificate of votes. Further, it lent credence to the affidavits of Biron's poll watchers stating that numerous irregularities attended the tallying of the votes at the precinct level. According to the Second Division, these irregularities pointed to a scheme to increase the votes of Doromal, thus, necessitating the exclusion of the subject returns.

Commissioner Rene V. Sarmiento (Commissioner Sarmiento) registered a dissent. He reasoned that the missing *taras* did not, by themselves, conclusively establish that the subject returns were altered or tampered. Also, the affidavits of Biron's poll watchers should not have been given weight for being self-serving. In his view, the

proper recourse was not to exclude the subject returns but to order the correction of manifest errors so that the number of votes in figures and words would conform to the number of *taras* in the subject returns.

Thus, on September 24, 2007, the MBC reconvened and proceeded to canvass the abovementioned 14 returns. As a result, Biron emerged as the winning candidate with 12,497 votes while Doromal received 12,319 votes, or a winning margin of 178 votes. On even date, Biron was proclaimed as the duly elected vice mayor of the Municipality of Dumangas, Iloilo.

Ruling of the COMELEC En Banc

On February 1, 2008, the COMELEC *En Banc* affirmed the ruling of the Second Division. It held that the Second Division properly appreciated the affidavits of Biron's poll watchers given the serious allegations of irregularities that attended the tallying of votes; that the use of the certificate of votes to establish tampering in the subject returns was proper in a pre-proclamation controversy; and that an examination of the records of this case supported the Second Division's findings that the subject returns were tampered or falsified.

Commissioner Sarmiento maintained his previous dissent that the exclusion of the subject returns was improper. He further noted that in case correction of manifest errors was not viable, votes may be recounted pursuant to Section 236 of the OEC.

Issues

The issues raised by petitioner may be summarized as follows:

1. The COMELEC gravely abused its discretion when it failed to compare the contested returns with the other authentic copies thereof before ruling that there was tampering or falsification of the said returns.
2. The COMELEC gravely abused its discretion when it used the certificate of votes to exclude the three contested election returns considering that it cannot go beyond the face of the returns in establishing that there was tampering or falsification and considering further that said certificates did not comply with Section 17 of RA 6646.
3. The COMELEC gravely abused its discretion when it gave credence to the self-serving affidavits of private respondent's poll watchers.
4. The COMELEC gravely abused its discretion when it ordered the exclusion of the subject returns because, in case of falsification or tampering, the procedure under Sections 235 and 236 of the OEC should have been followed in order not to disenfranchise the voters.^[12]

Petitioner's Arguments

Doromal advances several possible reasons for the missing *taras* in Copy 4 (*i.e.*, copy of the dominant majority party) of the subject returns, to wit, (1) the pressure

exerted by the poll clerk in accomplishing duplicate originals of the subject returns was not sufficient as to leave its mark on the succeeding pages, (2) the carbon paper had poor quality, (3) the election return papers were misaligned relative to the carbon paper, or (4) the erasures were deliberately made by Biron on Copy 4 to pave the way for the subject pre-proclamation controversy.

Further, while the instant petition was pending resolution before this Court, Doromal requested the COMELEC to open the ballot boxes where the COMELEC's copy of the subject returns (*i.e.*, Copy 3) was safekept. On April 21, 2008, the COMELEC granted the request and ordered the opening of the ballot boxes. It thereafter allowed Doromal to photocopy Copy 3 of the subject returns found therein. On June 17, 2008, petitioner filed a Motion for Leave to File Manifestation^[13] with attached Manifestation^[14] before this Court summarizing her observations with respect to Copy 3 of the subject returns. She noted that some of the missing *taras* in Copy 4 were not found in Copy 3. With respect to the missing *taras* in Copy 3 just as in Copy 4, petitioner reiterated that the cause thereof was the insufficient pressure exerted by the poll clerk in accomplishing the election returns or the misalignment of the election return copies while the duplicate originals were being accomplished using carbon paper. Thus, there was no basis for the COMELEC to rule that the subject returns were falsified or tampered.

Petitioner also claims that the COMELEC never compared Copy 4 of the subject returns with the other authentic copies of the said returns as required under Section 235 of the OEC. Assuming that the COMELEC made such comparison with the other authentic copies, this was not done in the presence of petitioner in violation of her due process rights.

Anent the exclusion of the three subject returns, petitioner asserts that the COMELEC erred in using the certificate of votes to establish falsification or tampering because the COMELEC cannot go beyond the face of the returns in a pre-proclamation controversy. Assuming *arguendo* that the COMELEC may use the certificate of votes, the requirement set by Section 17 of RA 6646 was not complied with. Thus, the certificate of votes is inadmissible in evidence.

Petitioner faults the COMELEC for relying on the affidavits of private respondent's poll watchers in concluding that irregularities attended the preparation of the subject returns. Evidently, these affidavits are self-serving and of no probative value.

Lastly, petitioner argues that assuming that the subject returns were falsified or tampered, the proper recourse would be to follow the procedure outlined in Sections 235 and 236 of the OEC and not to summarily exclude said returns. Under the aforesaid provisions, the COMELEC should have authorized the opening of the ballot boxes and thereafter ordered the BEI to recount the votes of the candidates affected and prepare a new return which shall then be used by the MBOC as the basis of the new canvass.

Private Respondent's Arguments

Private respondent contends that the points raised by petitioner are factual in nature, thus, not proper in a petition for *certiorari* under Rule 65 which is limited to questions of jurisdiction. He claims that the findings of the COMELEC with respect to

the falsification and tampering of the subject returns must be accorded respect and even finality by this Court. Biron also points out that in making such a finding, the COMELEC Second Division compared the subject returns with the other authentic copies thereof which was affirmed by the COMELEC *En Banc* after the latter made its own independent examination of the records of this case.

Biron also claims that there was no denial of due process. Since a pre-proclamation controversy is summary in nature, Biron posits that the COMELEC properly appreciated the evidence in this case consisting of the pleadings and documentary evidence of the respective parties without the need of holding a formal or trial-type hearing.

He also avers that the COMELEC properly gave credence to the affidavits of his poll watchers. He emphasizes that the subject returns appear to be tampered and falsified on their face so that the affidavits were merely used to buttress or substantiate the cause of these irregularities.

Finally, Biron claims that the procedure under Sections 235 and 236 of the OEC is not applicable to this case because the same refers to the board of canvassers and not the COMELEC. Also, these provisions do not allow the COMELEC to *motu proprio* order the opening of the ballot boxes.

Our Ruling

The petition is meritorious.

An act done contrary to the Constitution, the law or jurisprudence; or executed whimsically, capriciously or arbitrarily out of malice, ill will or personal bias constitutes grave abuse of discretion.^[15] In the instant case, we find that the COMELEC gravely abused its discretion amounting to lack or excess of jurisdiction in ordering the exclusion of the subject returns. The ruling contravenes clear legal provisions as well as long standing jurisprudence on the admissibility of the certificate of votes and the appreciation of election returns. Lamentably, the refusal of the COMELEC to heed this Court's repeated pronouncements has again led to the disenfranchisement of voters in this case. The writ, therefore, lies to correct this grossly abusive exercise of discretion.

The certificates of votes are inadmissible to prove tampering, alteration or falsification for failure to comply with Sections 16 and 17 of RA 6646.

In excluding three of the 11 subject returns, specifically, those coming from Precinct Nos. 90A/90B, 7A/7B and 208A, the COMELEC relied on the alleged glaring dissimilarity between the votes stated in the said returns and those stated in the certificates of votes. Hence, it concluded that the subject returns were falsified and thereafter ordered their exclusion.

The certificate of votes, which contains the number of votes obtained by each candidate, is issued by the BEI upon the request of a duly accredited watcher pursuant to Section 16 of RA 6646. Relative to its evidentiary value, Section 17 of said law provides -