

EN BANC

[G.R. No. 189078, February 11, 2010]

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

DECISION

BRION, J.:

Rosal v. Commission on Elections^[1] (*Rosal*) instructively tells us how to appreciate revision of ballot results as against election returns in an electoral contest, as follows:

(1) The ballots cannot be used to overturn the official count as reflected in the election returns unless it is first shown affirmatively that the ballots have been preserved with a care which precludes the opportunity of tampering and all suspicion of change, abstraction or substitution;

(2) The burden of proving that the integrity of the ballots has been preserved in such a manner is on the protestant;

(3) Where a mode of preserving the ballots is enjoined by law, 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;

(4) It is only when the protestant has shown substantial compliance with the provisions of law on the preservation of ballots that the burden of proving actual tampering or the likelihood thereof shifts to the protestee; and

(5) Only if it appears to the satisfaction of the court or COMELEC that the integrity of the ballots has been preserved should it adopt the result as shown by the recount and not as reflected in the election returns.^[2] [Emphasis supplied.]

Among other arguments, petitioner Virgilio P. Varias (*Varias*) asserts in his petition^[3] that the respondent Commission on Elections (*COMELEC*) gravely abused its discretion when it did not follow *Rosal* in resolving the appeal of the mayoralty contest between him and respondent Jose "Joy" D. Peñano (*Peñano*). He therefore asks us to annul the decision of the COMELEC's First Division dated December 18, 2007 and the COMELEC *En Banc* Resolution dated August 17, 2009 in *Jose "Joy"*

THE ANTECEDENTS

Varias and Peñano were candidates for the position of Mayor of Alfonso, Cavite in the May 14, 2007 elections. On May 17, 2007, Varias was proclaimed winner **after the canvass of all election returns**. He garnered 10,466 votes as against Peñano's 10,225 - a margin of 241 votes.

On May 25, 2007, Peñano filed an election protest with the Regional Trial Court (RTC), Branch 18, Tagaytay City, citing various election irregularities committed in **14 precincts/clustered precincts**.^[4] Peñano alleged in his protest that:

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;

8.3 Valid votes correctly and properly cast in favor of the protestant were illegally and baselessly considered as stray;

8.4 Ballots containing valid votes of the protestant were intentionally and/or illegally misappreciated or considered as marked and declared null and void;

8.5 Votes cast in the name of the protestee in the ballots in excess of the total number voters [sic] who actually voted were illegally considered, appreciated and credited in favor of the protestee;

8.6 Votes cast in ballots prepared by persons other than those who actually voted were considered, appreciated and counted for protestee

The RTC issued on May 28, 2007 a precautionary order commanding the Municipal Treasurer and the Election Officer to take immediate steps to safeguard the ballot boxes of the protested precincts.

Varias filed his Answer with Counter-Protest. In light of the counter-protest, the RTC reiterated its precautionary order on June 5, 2007. **On June 12, 2007, the contested ballot boxes were placed under the RTC's custody.**

The election protest proceeded in due course and the revision of the ballots was scheduled.

Peñano presented the testimonies/affidavits of his witnesses - poll watchers who served in Precincts/Clustered Precincts 87A,^[5] 90A/90B,^[6] 92A/92B^[7] and 102A^[8]. The witnesses-poll watchers invariably declared that there had been irregularities in

the counting of votes, *i.e.*, tallying was done hurriedly; votes actually for Peñano were counted in Varias' favor; ballots for Peñano were declared stray or marked; votes that were obviously written by two persons were still credited to Varias' total; the Board of Election Inspectors (*BEI*) of various precincts failed to record all the poll watchers' objections/questions on the tally.

Varias, on the other hand, presented the testimonies/affidavits of his own witnesses - his poll watchers for Clustered Precinct 90A/B and Precinct 87A^[9] and the Chair of the BEI of Precinct No. 92A.^[10] These witnesses invariably declared that there were no unusual incidents in their respective precincts. The poll watchers declared that they brought the ballot boxes and other election paraphernalia to the office of the Municipal Treasurer at the Alfonso Municipal Hall after the counting.^[11]

After completion of the revision that saw the physical count of all the protested precincts, the Revision Committee submitted a Report^[12] showing that Peñano garnered more votes than Varias. The Report also reflected the following observations:

1. In Precinct No. 0081A/0081B, the revisor for the Protestee made the general objection for ballots marked V-1 to V-74 as fabricated and substituted ballots.
2. In Precinct No. 0086A/0086B, one ballot was found in the compartment for spoiled ballots.
3. In Precinct No. 0087A/0087B, five (5) voters were included by Court Order as stated in Minutes of Voting. There is also an entry in the incident/irregularities in the MOV of tearing of unused ballots.
4. In Precinct No. 0087A, the revisor for the Protestant made the observation that all the ballots are genuine with COMELEC water marks and that the signature of BEI Chairman at the back of each ballot is authentic and the same with the documents found inside the ballot box.

The revisor for the Protestee made the general objection that all the ballots are substituted ballots and fabricated; the texture of the ballots do not appear the same, the lower and upper portion of the ballot where the stub was placed has too [sic] distinctive tearing, one by original tearing and one was cut by a scissors; and that different signatures appear at the back of the ballots, using two colors of ink - black and blue.

5. In Precinct No. 0090A, the envelope for valid ballots is partially torn and no lower detachable coupons were found inside the ballot box. Both revisors for the parties made substantially the same objections/observations as in Precinct No. 0087A.
6. In Precinct No. 0092A, the envelope for valid ballots is partially torn on its lower portion, only one detachable coupon was found inside

the large compartment of the ballot box. Both revisors for the parties made substantially the same objections/observations as in the above precincts.

7. In Precinct No. 0095A/0095B, nine (9) voters were excluded by Court Order.
8. In Precinct No. 0101A, one (1) padlock of the ballot box was sawed by Rommel Fernando as it cannot be opened by using any of the three keys for the said precinct.
9. In Precinct No. 0102A, both revisors for the parties made substantially the same objections/observations as in the above precincts. The revisor for the Protestee made the additional observations that the paper seal for valid ballots was pasted. The lower stub in the said precinct were [sic] found in a sealed envelope.

The protagonists then moved for a technical examination of the contested ballots on the conditions that: (1) the examination shall be conducted by experts from the Questioned Document Division of the National Bureau of Investigation (*QDD-NBI*); and (2) the examination shall be done within the court's premises and under its supervision. The RTC granted the motions.

The NBI Report

The QDD-NBI submitted the following report/findings dated September 26, 2007^[13] which showed that:

- 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. 87A 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. 92A 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.

The RTC Ruling

On December 17, 2007, the RTC rendered a Decision^[14] in Peñano's favor, finding that he garnered 10,312 votes as against Varias' 10,208. The RTC arrived at this tally^[15] by: **(1)** partly considering the results of the revision^[16] (where Peñano was credited with 136 more votes while Varias suffered a 299 vote reduction); **(2)** disregarding the ballot count results at Clustered Precincts 81A/81B (where Peñano received a 37 vote increase

while 83 votes were deducted from Varias' total);^[17] and **(3)** deducting 6 votes or ballots from Peñano's for the following reasons: set(s) of ballots were written by one person (*WBO*); entries in a single ballot were written by two persons (*WBT*); or a ballot had been marked (*MB*), while at the same time 22 votes were deducted from Varias' total for having been either *WBO*, *WBT* or *MB*.

On the critical issue of whether the ballots of Precinct 87A could be relied upon, the RTC cited and used this Court's ruling in *Rosal v. COMELEC* as legal premise and ruled:

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, 2007 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.