

EN BANC

[G.R. No. 121331, August 28, 1996]

**GERRY B. GARAY, PETITIONER, VS. COMMISSION ON ELECTIONS
AND JAIME GATA, JR., RESPONDENTS.**

DECISION

PANGANIBAN, J.:

Did the Commission on Elections commit grave abuse of discretion in setting aside the results of a special election it called due to a failure of elections and in declaring the winner on the basis of a tally board and a certificate of votes in the previous regular elections?

This is the main issue brought to this Court in this petition for certiorari to nullify the Resolution^[1] of the respondent Commission on Election *En Banc*^[2] in SPC No. 95-180 promulgated on August 7, 1996.

The Facts

After the results of the May 8, 1995 elections were canvassed in 73 precincts in the Municipality of Matnog, Province of Sorsogon, petitioner Gerry B. Garay, a candidate for vice-mayor, was credited with 5,411 votes and private respondent Jaime Gata, Jr., his rival, 5,391 or a margin of twenty (20) votes in favor of petitioner. The said results, however, excluded the votes from precinct 30-A of Barangay Culasi, Matnog, where armed men forcibly took the ballot box together with the election returns, other election papers, documents and/or paraphernalia.

Because the votes in precinct 30-A would obviously affect the standing of the said candidates, the Municipal Board of Canvassers (MBC) did not proclaim the winner. Failing to convince said Board to proclaim him by virtue of a certificate of votes issued by the Board of Election Inspectors (BEI) showing he garnered 116 votes against 68 votes for Garay in said precinct, respondent Gata brought the matter to the respondent Commission. In his appeal,^[3] respondent Gata included a copy of the Tally Board, duly authenticated by the BEI, showing the same count as the Certificate of Votes: that is, Gata-116 votes and Garay - 68 votes. If these were added to the already canvassed votes, Gata would win by a 28-vote margin.

In the meantime, while the said appeal was pending, respondent COMELEC - upon recommendation of Comm. Julio Desamito - conducted a special election in precinct 30-A,^[4] on the ground of failure of election due to the loss of the ballot box and the election documents. Both petitioner Garay and respondent Gata actively participated in the election which was held on June 7, 1995. Petitioner won handily in the said election and was thereafter proclaimed Vice-Mayor of Matnog.

The Comelec First Division denied due course to the appeal because of appellant's

(Gata) failure "to furnish the Commission all pertinent documents necessary for the latter to rule on the matter."^[5] Respondent Gata's motion for reconsideration^[6] of this Comelec action is still pending before the Comelec First Division. Subsequently, the COMELEC *En Banc* issued a Resolution promulgated on August 7, 1995 annulling the special election and directing the MBC to reconvene and to include "in the canvass, the votes reflected on the Tally Board submitted by the Board of Election Inspectors x x x." As a result, respondent Gata was declared winner. The Commission *En Banc* said that it was "convinced without taint of any doubt that the votes shown in the tally board and certificate of votes reflect the true and genuine will of the electorate x x x."

The Issue

Petitioner now assails this Resolution of August 7, 1995 claiming grave abuse of discretion by respondent COMELEC (1) for its reversal of its own First Division; and (2) for annulling the special election and allowing the use of the Tally Board and the Certificate of Votes in the new canvass.

In fine, the issue may be worded thus: Did the respondent Commission commit grave abuse of discretion amounting to lack of jurisdiction in setting aside the results of the special election it called due to a failure of elections and in declaring the winner on the basis of the Tally Board and the Certificate of Votes submitted by the private respondent Gata?

Respondent Commission, through the Solicitor General, alleges that, since the Tally Board and the Certificate of Votes were unarguably authentic, there was no basis for holding the special election, as **there was no failure of elections**. Answering petitioner's contention that the "mandatory procedure of Section 20 of Republic Act No. 7166 and Section 33 of Comelec Resolution No. 2756 were not complied with," respondent Commission said that the special election was called because the winner could not be ascertained on the basis of the Certificate of Votes alone. However, when the Tally Board was taken into account, the Commission *En Banc* "found that indeed that true results of the election could be determined" from the said Tally Board.

In a Resolution dated February 20, 1996, this Court required the respondent Commission "to forthwith certify to this Court the entire records of the case, including (a) the Certificate of Votes and the Tally Board of Precinct No. 30-A of Barangay Culasi, Matnog, Sorsogon, and (b) any duly-authenticated copy of the Election Returns (for the May 8, 1995 regular elections) for said precinct, if available, and if not available, to explain in writing why not available, all within a period of ten (10) days from notice." In compliance, the Comelec certified and elevated to this Court:

"1. Records of SPC No. 95-180 (In the matter of appeal from the ruling of the Board of Canvassers of Matnog, Sorsogon, Jaime Gata, Jr., petitioner-appellant).

2. Tally Board of Precinct No. 30-A of Barangay Culasi, Matnog, Sorsogon, consisting of five (5) pages, sealed in five (5) separate envelopes, each envelope containing one (1) page.

3. Certificate of Votes for Precinct No. 30-A, Barangay Culasi, Matnog, Sorsogon, attached to the Motion for Reconsideration marked as Exhibits 'A' and 'G', pages 55 and 65 of the records of the case."

The Comelec also explained that the Election Returns could not be produced because, as stated in the submitted affidavit executed by Lyn M. Garil, Chairman of the Board of Election Inspectors for Precinct No. 30-A, Matnog, Sorsogon, said returns were "snatched by armed men in the evening of May 8, 1995 together with all the contents of the ballot box for said precinct."

The Court's Ruling

After judicious deliberation and consultation, we hold that the Comelec En Banc gravely abused its discretion when it decided to set aside and annul the special election it had earlier called and conducted because of failure of election due to the forcible taking by armed men of the ballot box together with the election returns and other election documents and paraphernalia.

The respondent Commission's plea that it is "convinced without taint of any doubt that the votes shown in the tally board and certificate of votes reflect the true and genuine will of the electorate" is weak and unpersuasive because the Certificate of Votes and the Tally Board were already in the possession of the COMELEC before it decided to call the special election. Note that private respondent Gata presented the Certificate before the Municipal Board of Canvassers (MBC) during the canvassing. When the latter rejected it, Gata appealed to the COMELEC from the said ruling, attaching to his appeal a copy of the Tally Board. Nevertheless, the respondent Commission still decided to hold the special election.

The Certificate of Votes presented by Gata may have been obtained by him pursuant to Section 16 of R.A. No. 6646 (The Electoral Reform Law of 1987).^[7]

Thus, when the said Certificate was rejected by the MBC, it must have been because Gata not only failed to comply with the procedure for its identification and offer as mandated in Section 17 of R.A. No. 6646 which reads:

"SEC. 17. Certificate of Votes as Evidence. - The provisions of Sections 235 and 236 of Batas Pambansa Blg. 881 notwithstanding, the certificate of votes shall be admissible in evidence to prove tampering, alteration, falsification or any anomaly committed in the election returns concerned, when duly authenticated by testimonial or documentary evidence presented to the board of canvassers by at least two members of the board of election inspectors who issued the certificate: Provided, That failure to present any certificate of votes shall not be a bar to the presentation of other evidence to impugn the authenticity of the election returns."

but also because a certificate of votes can never be a valid basis for canvass. According to Section 17, a certificate of votes can only be "evidence to prove tampering, alteration, falsification or any other anomaly committed in the election returns concerned, when duly authenticated x x x." A certificate of votes does not constitute sufficient evidence of the true and genuine results of the election; only election returns are, pursuant to Sections 231, 233-236, and 238 of B.P. Blg. 881.^[8]

In like manner, neither is the tally board sufficient evidence of the real results of the election. Moreover, in the instant case, the fact that the tally board made its appearance only when Gata attached it to his appeal makes it highly suspect and therefore unreliable. Such appearance has not been convincingly explained even by Lyn M. Garil, chairman of the BEI. Her affidavit that the Tally Board "dropped to the floor" as the armed men left the polling place is hearsay. Section 217 of B.P. Blg. 881 (The Omnibus Election Code) requires that the tally board or sheet shall, together with other election documents, be placed *inside* the ballot box:

"SEC. 217. Delivery of the ballot boxes, keys and election supplies and documents. - Upon the termination of the counting of votes, the board of election inspectors shall place in the compartment for valid ballots, the envelopes for used ballots hereinbefore referred to, the unused ballots, the tally board or sheet, a copy of the election returns, and the minutes of its proceedings, and then shall lock the ballot box with three padlocks and such safety devices as the Commission may prescribe. Immediately after the box is locked, the three keys of the pad locks in three separate envelopes and shall be sealed and signed by all the members of the board of election inspectors. The authorized representatives of the Commission shall forthwith take delivery of said envelopes, signing a receipt therefore, and deliver without delay one envelope to the provincial treasurer, another to the provincial fiscal and the other to the provincial election supervisor.

The ballot box, all supplies of the board of election inspectors and all pertinent papers and documents shall immediately be delivered by the board of election inspectors and the watchers to the city or municipal treasurer who shall keep his office open all night on the day of election if necessary for this purpose, and shall provide necessary facilities for said delivery at the expense of the city or municipality. The book of voters shall be returned to the election registrar who shall keep it under his custody. The treasurer and the election registrars, as the case may be, shall on the day after the election require the members of the board of election inspectors who failed to send the objects referred to herein to deliver the same to him immediately and acknowledge receipt thereof in detail. "(Sec. 161, 1978 EC).

Since the ballot box, and necessarily, all the election documents contained therein, had been forcibly taken and had never been recovered, then the tally board must have been likewise lost.

The fact that the Comelec decided to hold the special election shows that it was not convinced of the authenticity and/or sufficiency of Gata's "certificate of votes" and "tally board."

The special election was called pursuant to Section 6 of the Omnibus Election Code, which requires notice and hearing before a special election may be held. There was no objection from any candidate or political party to the holding of the special election (as none had questioned it). In fact, the main protagonists - the petitioner and private respondent Gata - even actively participated in the said election. The latter's active participation therein rendered his appeal from the ruling of the MBC