EN BANC

G.R. No. 203302 - **MAYOR EMMANUEL L. MALIKSI**, petitioner, v. **COMMISSION ON ELECTIONS and HOMER T. SAQUILAYAN**, respondents.

Promulgated:

April 11, 2013

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DISSENTING OPINION

CARPIO, J.:

For the Court's consideration is the Extremely Urgent Motion for Reconsideration filed by Emmanuel L. Maliksi (Maliksi) assailing this Court's 12 March 2013 Decision which affirmed the 14 September 2012 Resolution of the Commission on Elections (COMELEC) En Banc and declared Homer T. Saquilayan (Saquilayan) as the duly-elected Municipal Mayor of Imus, Cavite.

In his motion for reconsideration, Maliksi cited extensively from the Dissenting Opinion[1] and asserted that he was denied due process when the COMELEC First Division decrypted, printed, and examined the ballot images without notice to him. Maliksi further alleged that this Court's 12 March 2013 Decision is null and void for having been promulgated in the absence of Associate Justice Jose Portugal Perez (Justice Perez).

First, I will discuss the issue of the absence of Justice Perez when the Court's 12 March 2013 Decision was promulgated.

Section 4, Rule 12 of the Internal Rules of the Supreme Court allows a member of this Court to leave his or her vote in writing. The Rule states:

> SEC. 4. *Leaving a vote.* - A Member who goes on leave or is unable to attend the voting on any decision, resolution, or matter may leave his or her vote in writing, addressed to the Chief Justice or the Division Chairperson, and the vote shall be counted, provided that he or she took part in the deliberation.

As such, there was nothing irregular when Justice Perez left his vote in writing with the Chief Justice because he took part in the previous deliberation of the case.

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[1] Penned by Associate Justice Lucas P. Bersamin.

Maliksi again assails the decryption and printing of the ballot images for the first time on appeal.

I reiterate that Saquilayan first requested for the printing of the ballot images before the trial court when he filed a Motion To Print Picture Images Of The Ballot Boxes Stored In The Memory Cards Of The Clustered Precincts[2] dated 21 March 2011. In that Motion, Saquilayan made the allegation of tampering citing that during the preliminary revision proceedings, he noticed an unusually large number of double-voted ballots only for the position of Mayor and that the recorded counts of all the revision committees show significant discrepancies between the ballot counts and the results reflected in the election returns.[3] It was only on 3 May 2011 that the trial court in an Omnibus Order granted Saquilayan's motion for the printing of the ballot images in the CF cards.[4] On 16 May 2011, the COMELEC Election Records and Statistics Department (ERSD) informed Saquilayan that the CF cards were still in the custody of the trial court. In a Manifestation and Request[5] dated 20 May 2011, Saquilayan asked the trial court to forward the CF cards of the protested precincts to the ERSD to enable the COMELEC to decrypt and print the ballot images. The decryption of the ballot images was set on 21 June 2011.

Maliksi then filed a Motion for Honorable Court to Request ERSD to Specify Procedure to Decrypt Compact Flash (CF) Cards. The trial court, in an Order[6] dated 17 June 2011, requested the ERSD to specify the procedure that it would undertake during the proceedings and set the case for conference on 27 June 2011. In a letter[7] dated 20 June 2011, Maliksi wrote the ERSD requesting that further proceedings be deferred and held in abeyance in deference to the 17 June 2011 Order of the trial court. On 27 June 2011, on the date the case was set for conference, Maliksi filed a Motion to Consider That Period Has Lapsed to Print Ballot's Picture Images[8] on the ground that Saquilayan only had 30 days from receipt of the Omnibus Order dated 3 May 2011 to accomplish the printing of the ballot images. Maliksi alleged that the 30-day period started on 10 May 2011 when Saquilayan received the 3 May 2011 Omnibus Order and ended on 22 June 2011. Thus, Saquilayan was already barred from having access to the electronic data in the COMELEC's back-up server and to print the ballot images in the CF cards. The trial court granted Maliksi's motion in its Order dated 3 August 2011[9] despite the fact that the delay in the decryption could not be attributed to Saquilayan's fault alone but also due to the failure of the trial court to turn over the CF cards to the ERSD and to Maliksi's motion for

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[2] *Rollo*, pp. 283-285.
[3] Id. at 283.
[4] Id. at 293-295.
[5] Id. at 298-300.
[6] Id. at 302-303.
[7] Id. at 304.
[8] Id. at 307-309.
[9] Id. at 359, Omnibus Order dated 1 September 2011.

the ERSD to specify the procedure in decrypting the CF cards. Clearly, the issue of tampering, as well as the request for the decryption of the ballot images, was not raised for the first time on appeal.

Maliksi also echoed the Dissenting Opinion that the printing of the ballot images may only be resorted to after the proper Revision/Recount Committee had first determined that the integrity of the ballots and the ballot boxes was not preserved. Citing Section 6, Rule 15 of COMELEC Resolution No. 8804,[10] as amended by Resolution No. 9164,[11] Maliksi alleged that the decryption of the images stored in the CF cards and the printing of the decrypted images must take place during the revision or recount proceedings and that it should be the Revision/Recount Committee that determines whether the ballots are unreliable.

Section 6, Rule 15 should be read together with Rule 16 of Resolution No. 8804, as amended by Resolution No. 9164, particularly Section 3, which provides:

> Section 3. Printing of Ballot Images. - **In case the parties deem it necessary**, they may file a motion to be approved by the Division of the Commission requesting for the printing of ballot images **in addition to those mentioned in the second paragraph of item (e)**. Parties concerned shall provide the necessary materials in the printing of images such as but not limited to copying papers, toners and printers. Parties may also secure, upon prior approval by the Division of the Commission, a soft copy of the ballot images contained in a secured/hashed disc on the condition that the ballot images be first printed, at the expense of the requesting party, and that the printed copies be signed by the parties' respective revisors or representatives and by an ERSD IT-capable representative and deposited with the Commission.
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> The Over-all chairman shall coordinate with the Director IV, Election Records and Statistics Department (ERSD), for the printing of images. Said director shall in turn designate a personnel who will be responsible in the printing of ballot images. (Emphasis supplied)

Section 3, Rule 16 does not require any allegation of tampering before the printing of ballot images may be requested by the parties. It does not require prior determination by the Revision/Recount Committee that the integrity of the ballots and the ballot boxes was not preserved. Under Section 3, Rule 16, the request may be made *when the parties deem the printing of the ballot images necessary.*

To repeat, the parties can request for the printing of the ballot images "in case the parties deem it necessary." This is a ground separate from that in Section 6(e), which refers to a determination of the integrity of the ballots by

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[10] In Re: Comelec Rules of Procedure on Disputes In An Automated Election System in Connection with the May 10, 2010 Elections.

[11] In the Matter of Reinstating and Reimplementing Comelec Resolution No. 8804 with Amendments.

the Revision/Recount Committee. Section 3, Rule 16 provides that "[i]n case the parties deem it necessary, they may file a motion to be approved by the Division of the Commission requesting for the printing of ballot images **in addition to those mentioned in the second paragraph of item (e).**" The second paragraph of item (e) speaks of signs of tampering, or if the ballot box appears to have been compromised, thus:

> Section 6. Conduct of the Recount – x x x.
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> x x x x
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> (e) Before the opening of the ballot box, the Recount Committee shall note its condition as well as that of the locks or locking mechanism and record the condition in the recount report. **From its observation, the Recount Committee must also make a determination as to whether the integrity of the ballot box has been preserved.**
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> In the event that there are signs of tampering or if the ballot box appears to have been compromised, the Recount Committee shall still proceed to open the ballot box and make a physical inventory of the contents thereof. The committee shall, however, record its general observation of the ballots and other documents found in the ballot box. (Emphasis supplied)

Section 3, Rule 16 allows an additional ground for the printing of the ballot images: the determination by the parties that the printing is necessary. Clearly, even without signs of tampering or that the integrity of the ballots and the ballot boxes had been compromised, the parties may move for the printing of the ballot images. In this case, the COMELEC En Banc made it clear in its Comment[12] that the COMELEC First Division ordered the decryption, printing and examination of the digital images because the COMELEC First Division "discovered upon inspection that the integrity of the ballots themselves was compromised and that the ballot boxes were tampered."[13] **However, applying Section 3 of Rule 16, the finding of tampering was not even necessary for the COMELEC First Division to allow the printing of the ballot images.**

Saquilayan moved for the printing of the ballot images as early as 21 March 2011 before the trial court. Saquilayan reiterated his motion to have the ballot images printed when he filed his appeal brief[14] before the COMELEC First Division. Saquilayan pointed out that he filed reiterations of his motion to print with copies furnished to Maliksi until the COMELEC First Division ordered the printing.[15] There is nothing in the records which showed that Maliksi opposed Saquilayan's motion.

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[12] *Rollo*, pp. 484-516.

[13] Id. at 500.

[14] Id. at 237, Saquilayan's Comment, p. 25.

[15] Id.

Section 3, Rule 9 of Resolution No. 8808 provides:

> Section 3. No hearings on motions. - Motions shall not be set for hearing unless the Commission directs otherwise. Oral argument in support thereof shall be allowed only upon the discretion of the Commission. **The adverse party may file opposition five days from receipt of the motion, upon the expiration of which such motion is deemed submitted for resolution.** The Commission shall resolve the motion within five days. (Emphasis supplied)

When Maliksi did not oppose Saquilayan's motion for the printing of the ballot images, he is deemed to have waived his right to oppose the motion. The motion was deemed submitted for resolution. The COMELEC En Banc categorically stated that Maliksi "*never* questioned the Order of decryption of the First Division nor did he raise any objection in any of the pleadings he filed with this Commission – a fact which already places him under estoppel."[16] Maliksi could not claim that he was denied due process because he was not aware of the decryption proceedings. The Order[17] dated 28 March 2012 where the COMELEC First Division directed Saquilayan to deposit the required amount for expenses for the supplies, honoraria, and fee for the decryption of the CF cards was personally delivered to Maliksi's counsel. The Order[18] dated 17 April 2012 where the COMELEC First Division required Saquilayan to deposit an additional amount for expenses for the printing of additional ballot images from four clustered precincts was again personally delivered to Maliksi's counsel. Maliksi feigned ignorance of the decryption proceedings until he received the COMELEC First Division's Resolution of 15 August 2012.

As regards Maliksi's claim that he was deprived of his right to be present during the authentication process and the actual printing of the ballot images, Section 3 of Resolution No. 8804, as amended by Resolution No. 9164, does not require the parties or their representatives to be present during the printing of the ballot images. Maliksi should have moved to be present at, or to observe, the decryption proceedings when he received the 28 March 2012 Order directing the decryption. Maliksi did not, and thus he waived whatever right he had to be present at, or to observe, the decryption proceedings.

I emphasize that there is no denial of due process where there is opportunity to be heard, either through oral arguments or pleadings.[19] Further, the fact that a party was heard on his motion for reconsideration negates any violation of the right to due process.[20] Maliksi's motion for

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[16] Id. at 61.

[17] Id. at 362.

[18] Id. at 366.

[19] *Atty. Octava v. Commission on Elections*, 547 Phil. 647 (2007).

[20] See *German Management & Services, Inc. v. Court of Appeals*, 258 Phil. 289 (1989).

reconsideration was directed against the entire resolution of the First Division, including the recount proceedings which he claimed to have violated his right to due process.

Maliksi alleged that the COMELEC First Division should have limited itself to reviewing the evidence on record, meaning the physical ballots, instead of using the decrypted images. Maliksi thus wanted the COMELEC First Division to ignore its finding of tampering. On this issue, the COMELEC En Banc stressed:

> x x x. Worth noting also is that these 8,387 ballots all came from 53 clustered precincts specifically pinpointed by Maliksi as his pilot precincts (which is 20% of the total precincts he protested) – thereby affecting a total of 33.38% or more than one-third (1/3) of the total ballots cast in those precincts. We find this too massive to have not been detected on election day, too specific to be random and too precise to be accidental – which leaves a reasonable mind no other conclusion except that those 8,387 cases of double-shading were purposely machinated. These dubious and highly suspicious circumstances left us with no other option but to dispense with the physical ballots and resort to their digital images. To recount the tampered ballots will only yield us tampered results defeating the point of this appeal.[21]

In his Reflections submitted to this Court, Justice Perez stated that the present electoral contest is all about **over-voting**. Justice Perez cited Guideline No. 5 used by the COMELEC which states:

> 5. On over-voting. It has been the position of the Commission that over-voting in a certain position will make the vote cast for that position stray but will not invalidate the entire ballot, so in case of over-voting for the contested position, such vote shall be considered stray and will not be credited to any of the contending parties.

Justice Perez added that "in case of over-voting which is the case at hand, Guideline No. 5 outrightly provides the consequence that the vote shall be considered stray and will not be credited to any of the contending parties." Justice Perez stated that the COMELEC disobeyed its own rule that over-voting results in a stray vote.

This case is not a case of over-voting under Guideline No. 5. In **over-voting** under Guideline No. 5, one person, that is, **the voter himself, votes for two or more persons for one elective position.** When the ballot is fed to the PCOS machine, the machine reads that two or more candidates for the same position had been shaded. The digital image will record two spaces shaded for one position. On the other hand, in **double-shading,** the voter shades the space for one candidate but another person, after the ballot is fed to the PCOS machine, surreptitiously shades another space for another

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candidate for the same position. In double-shading, the digital image shows only one shaded space for a candidate while the ballot shows two shaded spaces. In the present case, there was actually a double-shading (although it was inaccurately referred to as over-voting in the COMELEC First Division's Decision) which was done by person or persons other than the voter. When the ballot was fed to the PCOS machine, the machine read only one vote for one candidate for one position. After the double-shading, there were already two votes for two candidates for the same position, but the digital image still contains only one shaded space.

Here, the double-shading happened **after** the ballots were fed to and read by the PCOS machines because the digital images show only one shaded space while the ballots show two shaded spaces. **Double-shading is a post-election operation.** The double-shading covered 8,387 ballots, "exclusively affecting the position of Mayor and specifically affecting the ballots of Saquilayan"[22] and the 8,387 affected ballots surprisingly all came from 53 clustered precincts "specifically pinpointed by Maliksi as his pilot precincts."[23]

The situation here is the one covered by Guideline No. 2 cited by Justice Perez which states that "[t]he best way to identify if a ballot has been tampered is to go to the digital image of the ballot as the PCOS was able to capture such when the ballot was fed by the voter into the machine when he cast his vote." This is what the COMELEC First Division did and the COMELEC First Division discovered that there was no double-shading in the digital images of the ballots. Obviously, the double-shading was done by persons other than the voters.
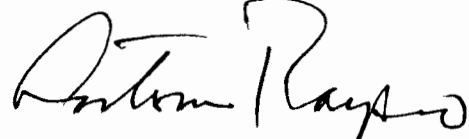
Again, Saquilayan raised the issue of tampering of the ballots as early as 21 March 2011 before the trial court. The COMELEC First Division took into consideration the allegation of tampering. Even without the allegation of tampering, Section 3, Rule 16 of Resolution No. 8804, as amended by Resolution No. 9164, allows the parties to request for the printing of the ballot images if the parties deem it necessary. It is undisputed that Saquilayan requested the COMELEC for the printing of the ballot images and Maliksi did not file any opposition to Saquilayan's motions. Upon inspection of the ballots and ballot boxes, the COMELEC First Division found that the integrity of the ballots had been compromised. When the digital images of the ballots were examined, the COMELEC First Division found that there was no double-shading. As such, the ballots should not be considered stray under Guideline No. 5.

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[22] Id.

[23] Id.

ACCORDINGLY, I vote to **DENY** with **FINALITY** the Extremely Urgent Motion for Reconsideration filed by Emmanuel L. Maliksi.

ANTONIO T. CARPIO
Associate Justice