

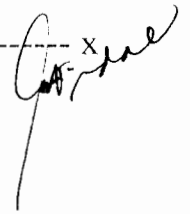
G.R. No. 203302

MAYOR EMMANUEL L. MALIKSI, petitioner v.
COMMISSION ON ELECTIONS AND HOMER T. SAQUILAYAN, respondent.

X -----

Promulgated: April 11, 2013

CONCURRING OPINION



PEREZ, J.:

The issue as basic as due process of law and the opinion of as many as seven of us who saw that petitioner was deprived of the fundamental right highlights my duty to join the discussion. With the present motion for reconsideration providing the opportunity to look into the reasons that divided the Court, I do so.

1. The electoral contest is all about over-voting. Simply, it means that in the contested ballots both the slots separately for petitioner Maliksi and respondent Saquilayan who vied for the position of Mayor of Imus, Cavite, were shaded. The guideline in the appreciation of ballots with over-voting is embodied in Guideline No. 5 used by the COMELEC. Thus:

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. (Emphasis supplied)

There is a correlated guideline, Guideline No. 2, in the sense that both guidelines refer to instances of shading. However, as regards the covered matter and the consequence, the two rules are hugely different. Guideline No. 2 is about an entire ballot that is claimed to have been shaded by two or more persons, and it states:

2. On ballots claimed to have been shaded by two or more persons. – Unlike in manual elections where it is easy to identify if a ballot has been written by two persons, in case of an automated election, it would be very hard if not impossible to identify if two persons shaded a single ballot. The best way to identify if a ballot has been tampered is to go to the digital image of the ballot as the PCOS machine was able to capture such when the ballot was fed by the voter into the machine when he cast his vote. In the absence of any circumstance showing that the ballot was shaded by persons other than the voter, the ballots should not be rejected to give effect to the voter's intent.



Clearly, in case of a ballot claimed to have been shaded by two or more persons, there is an inquiry to determine whether or not the ballot was shaded by person/s other than the voter. The Guideline implies a presumption in favor of shading by the voter whose ballot should be rejected only if there is “any circumstance” showing shading by somebody else.

On the contrary, 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.

The reason behind the significant variance in the consequences of the two kinds of shading can be debated endlessly. The obviousness of the difference outlined by the COMELEC, which is the sole judge of an election contest, forecloses such a debate. What the obviousness brings about, as it is my intention, is the grave abuse of discretion on the part of the COMELEC.

The COMELEC disobeyed its own rule that over-voting results in a stray vote. Relying on “allegations of ballot and ballot box tampering,” which allegations are without proof from the proponent, the COMELEC nonetheless favors the allegations through its own inspection of the ballot boxes to support its conclusion that “it is apparent that the integrity of the ballots had been compromised.” That was done on the first review of the appealed decision. On second review, the COMELEC resorted to the observation of “unprecedented number of double-votes” which left it “with no other option but to dispense with the physical ballots and resort to their digital image.”

The grave abuse of discretion of the COMELEC is clear from its own words describing what it did in this case.

It can be implied from its own decision on first review that the COMELEC agrees that before the physical ballots can be disregarded and the digital image favored, the tampering of the ballot box must be priorly proven. It had to allude to ballot box tampering because without the defect, the integrity of the ballots is unassailable. No proof of tampering came from the contestants in this case. The COMELEC relied on its observations. And it did not even detail the circumstances of the inspection it made and the facts that make tampering “apparent.”

Indeed, the over-voting itself cannot be the proof of ballot tampering. Even if we go by the Guideline on the claim of ballot shading by two or



more persons, the presumption is that the ballot was shaded only by the voter, and this presumption prevails absent any circumstance showing that the ballot was shaded by persons other than the voter. Plainly, in the instant case, there is no circumstance independent of the fact of shading that such shading was done by someone other than the voter. Its odd reliance on the over-voting itself underscores the applicability of the presumption that, in this case, the voter himself/herself did the shadings.

The fact is that petitioner has in his Election Protest, come forward with an explanation about over-voting. Thus:

4.A.6. In Official Sample Ballot with Voters Information Sheet (VIS) issued by the Commission on Elections, the number four candidate for Mayor of Imus, Cavite is Emmanuel L. Maliksi which appears on the first row, third column in the said COMELEC official sample ballot, x x x. However, in the Official Ballot, the name of Emmanuel L. Maliksi appears on the second row, second column as number four candidate and the name of the fifth candidate Homer T. Saquilayan was moved from the first row fourth column to first row third column where the name of Emmanuel L. Maliksi was originally located on the sample ballot, x x x. This evidently resulted in the confusion and mistake in the shading of the proper space for mayoralty candidate Emmanuel L. Maliksi.

This proposition was evidently found tenable by the trial court which, upon the opening of the ballot boxes and ballots, applied the guideline that the over-votes are stray votes. That proposition based on facts reached the COMELEC *via* appeal. It should have at least merited a discussion.

2. I concur with the *ponencia* of Justice Bersamin. I discussed the lack of factual and legal premise for the decryption done by the COMELEC to punctuate its grave abuse of discretion that even went further and similarly characterized the process of decryption itself.

I thus join Justice Bersamin in the remand of this case to the COMELEC for immediate cleansing of the process, which after all, kindred to the purpose of Justice Bersamin, is the object of my participation in the resolution of this contest, not the pleasure of anyone of the contestants.


JOSE PORTUGAL PEREZ
Associate Justice