PRESIDENTIAL ELECTORAL TRIBUNAL

P.E.T. Case No. 005 – FERDINAND "BONGBONG" R. MARCOS, JR., *protestant,* **versus,** **MARIA LEONOR "LENI DAANG MATUWID" G. ROBREDO,** *protestee.*

x---Promulgated: February 16, 2021-----------x

SEPARATE OPINION

M. LOPEZ, *J.*:

I commend Justice Marvic M.V.F Leonen for his exhaustive discussions on every point raised in the election protest. Indeed, the protestant failed to show that he will probably overcome the overall lead of the protestee in his second cause of action. Following Rule 65 of the 2010 Rules of the Presidential Electoral Tribunal (2010 PET Rules),[1] further consideration of the remaining protested provinces or clustered precincts may no longer be necessary. The protestant chose his pilot provinces to demonstrate his allegations of electoral fraud and irregularities, which are supposedly sufficient to affect the election results' outcome. Although the Tribunal found some irregularities, as shown by the increase in the votes of both the protestant and the protestee, the protestant failed to show that these irregularities are sufficient to overcome the overall lead of the protestee. On the contrary, the protestee's overall lead after revision increased. If the pilot provinces represent the worst of the irregularities attendant to the 2016 vice-presidential race as protestant wants this Tribunal to believe, then the results in the remaining protested precincts will probably be insufficient to alter the protestee's win.

Nonetheless, I humbly submit this opinion to give context to my vote and humbly differ on some points discussed in the well-written *ponencia*. The Tribunal's pronouncements, in this case, will influence how other tribunals and bodies resolve the election protests filed before them. In particular, I submit a different approach on the specificity of allegations in the election protest and propose a formula to determine reasonable recovery.

Foremost, I agree with Justice Leonen that an election protest must contain specific allegations of frauds and anomalies in the protested precincts. Otherwise, the protest must be summarily dismissed. Rule 17 of the 2010 PET Rules is evident on the required allegations before a protest is considered sufficient in form and substance.

> RULE 17. Contents of the protest or petition. (A) An election protest or petition for *quo warranto* shall commonly state the following facts:
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> (a)   the position involved;
> (b)   the date of proclamation; and
> (c)   the number of votes credited to the parties *per* the proclamation.

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[1]   A.M. No. 10-4-29-SC (2010).

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(C)   An election protest shall also state:
(a)   that the protestant was a candidate who had duly filed a certificate of candidacy and had been voted for the same office.
(b)   the total number of precincts of the region, province, or city concerned;
(c)   the protested precincts and votes of the parties to the protest in such precincts per the Statement of Votes By Precinct or, if the votes are not specified, an explanation why the votes are not specified; and
(d)   **a detailed specification of the acts or omissions complained of showing the electoral frauds, anomalies, or irregularities in the protested precincts.** (Emphasis supplied.)

Rule 17 (d) requires a detailed specification of the electoral frauds, anomalies, or irregularities in the protested precincts. I submit that this requirement must be read in conjunction with Section 255 of the Omnibus Election Code (OEC).[2]

SEC. 255. Judicial counting of votes in election contest. — Judicial counting of votes in election contest. — **Where allegations in a protest or counter-protest so warrant, or whenever in the opinion of the court the interests of justice so require,** it shall immediately order the book of voters, ballot boxes and their keys, ballots and other documents used in the election be brought before it and that the ballots be examined and the votes be recounted. (Emphasis supplied.)

As worded, the law merely requires sufficient allegations in the election protest to authorize the ballot boxes' opening and examination of the ballots. It does not even require a *prima facie* showing of fraud and irregularities to authorize the counting. In *Dayo v. COMELEC*,[3] the Court had the opportunity to emphasize the application of Section 255 of the OEC:

When fraud and irregularities are alleged in the protest and the court believes the interest of justice so requires, it should order that the ballots be examined and the votes counted (Section 255 Omnibus Election Code). **If the court is not satisfied that the allegations of the protest are sufficient, it should give the protestant an opportunity to prove his allegations, instead of dismissing the protest on the basis of interrogatories taken in another case involving other parties. Allegations of fraud and irregularities are sufficient grounds for opening the ballot boxes and examining the questioned ballots** (Moguis Jr. vs. CA & Bisnar, G.R. No. 66547, May 7, 1985). **Evidence or irregularities is not necessary to justify the revision of ballots** (Jaguros vs. Villamor, 134 SCRA 553). To require parole and other evidence on the alleged irregularities before opening the ballot box, would only give the protestee time and opportunity to delay the settlement of the controversy through lengthy presentation of testimonial evidence and cross-examination (Astorga vs. Fernandez, 19 SCRA 331). The trial court committed grave abuse of discretion when it declared, based only on the interrogatories in the companion case (Protest Case No. 06-88) that there is no evidence of fraud or irregularities committed. As wryly observed by the Solicitor General in his comments on the petition: "there was precisely no evidence of fraud and irregularities on record

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[2]   Batas Pambansa Bilang 881 (1985).
[3]   276 Phil. 487 (1991).

because the trial court did not give private respondent (the protestant) a chance to substantiate his allegations."[4] (Emphasis supplied.)

The allegation of fraud and irregularity should, however, relate to the need to examine ballots. In *Miguel v. COMELEC,*[5] the Court held that "when there is an allegation in an election protest that would require the perusal, examination or counting of ballots as evidence, it is the ministerial duty of the trial court to order the opening of the ballot boxes and the examination and counting of ballots deposited therein."[6] Notably, the ballots serve as the best evidence of how the voters voted.[7]

I respectfully submit that *Dayo* and *Miguel* do not run contrary to the later cases of *Corvera v. Sabillo,*[8] *Aguillo v. COMELEC,*[9] and *Lloren v. COMELEC,*[10] were not rendered "obsolete" and "ineffectual." First, *Corvera* and *Aguillo* are Unsigned Resolutions, which should not overturn the doctrine outlined in *Dayo* and *Miguel.*[11] Second, the summary dismissal of the election protests in *Corvera, Aguillo,* and *Lloren* refers to the defect of identifying which protested precincts were affected by electoral fraud and irregularities. Even *Peña v. HRET,*[12] which *Aguillo* cited, refers to the defect in identifying which protested precincts were affected. This defect affects the "seriousness" of the allegations, which makes Section 255 of the OEC inapplicable. The protestant's failure to specify the protested precincts where the fraud and irregularities were committed contradicts the allegations' "seriousness," and reveals a perfunctory allegation of fraud and irregularities. In case of doubt, prudence dictates that the protestant should be given his day in the Tribunal. An election protest affords a losing candidate an effective remedy to contest an election. It also serves to erase doubts on who won and breathes life to the Court's consistent pronouncement that the outcome of elections involves public interest.[13]

In *Saquilayan v. COMELEC,*[14] the Court emphasized that *Miguel* should be differentiated from *Peña*:

> The facts of the present petition are similar to those in *Miguel* rather than to those in *Peña*. In *Miguel*, there was a controversy between two candidates for municipal mayor, while *Peña* dealt with candidates for a congressional district office. Also, one reason that led to the dismissal of the election protest in *Peña* was the protestant's failure to specify the 700 out of the 743 precincts

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[4]   *Id.* at 492.
[5]   390 Phil. 478 (2000).
[6]   *Id.* at 485-486.
[7]   See *Rosal v. COMELEC,* 547 Phil. 379 (2007).
[8]   G.R. No. 208610 (Notice), November 11, 2014.
[9]   G.R. No. 197975-76 (Notice), March 19, 2013.
[10]   695 Phil. 288 (2012).
[11]   See THE INTERNAL RULES OF THE SUPREME COURT, A.M. No. 10-4-20-SC, Rule 13, Section 6 (c) "[b]y unsigned resolution when the Court disposes of the case on the merits, but its ruling is essentially meaningful only to the parties; has no significant doctrinal value; or is minimal interest to the law profession, the academe, or the public. The resolution shall state clearly and distinctly the facts and the law on which it is based."
[12]   337 Phil. 70 (1997).
[13]   See *Suliguin v. COMELEC,* 520 Phil. 92 (2006).
[14]   462 Phil. 383 (2003).

where the alleged anomalies occurred. In both *Miguel* and the present petition, the protestants questioned all the precincts in their respective municipalities.

Furthermore, the *Miguel* case, being the more recent decision, should prevail in case of a conflict, under the well-established doctrine that a later judgment supersedes a prior one in case of an inconsistency.[15] (Underscoring in the original.)

In this context, I humbly differ from the ponente's pronouncement that the protestant's election protest should have been considered insufficient in form and substance and summarily dismissed. Here, the protestant alleged the following fraud and irregularities in his protest:

[M]assive electoral fraud, anomalies, and irregularities, such as, but not limited to terrorism, violence, force, threats, force, intimidating, pre-shading of ballots, vote-buying, substitution of voters, flying voters, pre-loaded SD cards, **misreading of ballots, unexplained, irregular and improper rejection of ballots containing votes for protestant Marcos,** malfunctioning Vote Counting Machine, and abnormally high unaccounted votes/ under votes for the position of Vice President compromised and corrupted the conduct of the elections and the election results for the position of the Vice-President in the protested precincts.[16] (Emphasis supplied.)

The allegation of ballots' misreading and improper rejection deserve the ballots' scrutiny. The misreading of ballots is a serious allegation that can affect the elections' outcome if proven right. Further, the margin of vote between protestant and protestee is relatively low, with a mere 1.83% of the protestee's votes.[17] The relatively small lead margin emphasizes the need to open the ballot boxes and provide the protestant an opportunity to substantiate his allegations of fraud, irregularities, and anomalies.

While only allegations are needed to warrant ballots' examination, the protestant must still demonstrate that the alleged fraud and irregularities exist during the initial determination of the protest's grounds. The allegations of fraud and anomalies do not automatically mean that the ballot boxes in all of the protested clustered precincts would be opened and examined. Rule 65 of the 2010 PET Rules requires that the protestant choose his pilot provinces, demonstrating the alleged fraud and irregularities. The Tribunal must be convinced that the remaining protested provinces should also be examined. Thus, the protestant must carefully choose his pilot provinces; otherwise, the protest may be dismissed after an initial determination of the protest's merit.

INITIAL DETERMINATION OF THE GROUNDS FOR PROTEST

RULE 65. Dismissal; when proper. — The Tribunal may require the protestant or counter-protestant to indicate, within a fixed period, the province or provinces numbering not more than three, best exemplifying the frauds or irregularities alleged in his petition; and the revision of ballots and reception of evidence will begin with such provinces. **If upon examination of such ballots and proof, and after making reasonable allowances, the Tribunal is convinced that, taking all**

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[15] *Id.* at 390.
[16] *Ponencia,* pp. 35-36.
[17] Protestee enjoys a lead margin of 263,473 votes.

circumstances into account, the protestant or counter-protestant will most probably fail to make out his case, the protest may forthwith be dismissed, without further consideration of the other provinces mentioned in the protest. x x x (Emphasis supplied.)

The rule is broad enough to leave the Tribunal with discretion on whether the protest should be dismissed depending on what will transpire during the initial determination of the protest's merit. However, the rule is silent on what circumstances are considered convincing enough to merit the remaining protested provinces' consideration. The circumstances should refer to the existence of fraud or irregularities and a sufficient decrease in the protestee's overall lead. Under the rules governing election protests of other elective positions, the protestant must show a "reasonable recovery" to overcome the protestee's overall lead. For instance, the Senate Electoral Tribunal also requires an initial determination of the protest's merit. The determination takes into account whether the officially proclaimed results will be affected.

> RULE 76. Pilot Precincts; Initial Determination. — The revision of the ballots or the correction of manifest errors and reception of evidence shall begin with pilot precincts. If after the appreciation of ballots or election documents and/or reception of evidence in the pilot precincts, **the Tribunal determines that the officially proclaimed results of the contested election will not be affected,** the Tribunal shall dismiss the protest, counter or cross protest without further proceedings.[18] (Emphasis supplied.)

In the House of Representatives Electoral Tribunal, the initial determination of the protest's merit is anchored on the protestant's "reasonable recovery," as shown in the pilot precincts.

> RULE 40. Post-Revision Determination of the Merit or Legitimacy of Protest Prior to Revision of Counter-Protest; Pilot Precincts; Initial Revision and/or Technical Examination. — x x x The revision of ballots or the examination, verification or retabulation of election returns and the reception of evidence in the remaining seventy-five (75%) protested precincts and twenty-five percent (25%) counter-protested precincts shall not commence until the Tribunal shall have determined through appreciation of ballots or election documents and/or reception of evidence, x x x, the merit or legitimacy of the protest, relative to the designated pilot protested precincts.
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> **Based on the results of such post-revision determination, the Tribunal may dismiss the protest without further proceedings, if and when no reasonable recovery was established from the pilot protested precincts,** or may proceed with the revision of the ballot or the examination, verification or re-tabulation of election returns in the remaining contested precincts.
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> x x x x
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> **However, if the proclamation margin is only one thousand (1,000) votes or less, the revision of ballots or the examination, verification or retabulation of election returns and/or reception of evidence shall cover all the contested precincts.**[19] (Emphases supplied.)

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[18] *Ponencia*, p. 46.
[19] *Id.* at 47.

As aptly observed by the *ponente*, election protests involving elective regional, provincial, city, municipal, and barangay officials likewise found that reasonable recovery must be obtained in the initial determination of the protest's merit. However, the above-quoted rules are silent on how reasonable recovery is determined.

The goal in an election protest is to determine who received the plurality of valid votes. Notably, the ballots' revision in the pilot provinces partially determines the parties' correct votes in these areas. The revision of ballots should reflect an increase or decrease in the overall lead *per* proclamation. It should then give this Tribunal an idea of whether the overall lead *per* proclamation is decreasing or not.

In the absence of a numerical value on how many votes should be recovered, I propose that the reasonable recovery must be determined based on the proportion of the protested clustered precincts (only those revised) in the pilot provinces and the total number of protested clustered precincts. Thus, if the protested pilot provinces comprise 20% of the total number of protested clustered precincts, then the determination of the reasonable recovery must use 20% as a basis for reasonable recovery. The proposal recognizes that the protested clustered precincts in the pilot provinces constitute only a portion of the total number of protested clustered precincts. The determination of reasonable recovery should also consider the overall lead *per* proclamation of the protestee, which will serve as the baseline in determining recovery. The percentage of the protested clustered precincts in the pilot provinces (only those revised) with the total number of all protested clustered precincts should determine the percentage or threshold that the protestant should recover.

To determine whether reasonable recovery is met, I propose the following steps:

First, identify the overall lead *per* proclamation. It is the total lead of protestee over protestant based on the official proclamation. The overall lead *per* proclamation represents the number of votes that the protestant must overcome to be declared the winner.

Candidates	Votes per proclamation[20]
Maria Leonor Robredo	14,418,817
Ferdinand Marcos, Jr.	14,155,344
Overall lead	263,473

Second, identify the number of clustered precincts in the pilot provinces that underwent revision and appreciation (revised clustered precincts). Then, compute the proportion of the revised clustered precincts with all protested clustered precincts. Considering that the revised precincts constitute only a portion of all the protested clustered precincts, the protestant is expected to show a proportional "recovery" from the protestee's overall lead *per* proclamation. I propose using the clustered precincts instead of the provinces because the protestant may decide to

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[20] *Id.* at 2.

protest only some clustered precincts within the province. Besides, Rule 17 (d) refers to the "protested precincts."

Total number of protested clustered precincts [A]	39,921[21]
Number of revised clustered precincts in the pilot provinces [B]	5,415[22]
Proportion of A & B	13.56%

Third, determine the reasonable recovery by multiplying the percentage in step 2 and the overall lead *per* proclamation. The resulting numerical value shall be considered reasonable recovery, which the protestee must satisfy for the protest to prosper. "Recovery" is the result after revision and appreciation, which may increase the protestant's votes, decrease the protestee's votes, or a combination of both scenarios. In any of these instances, the protestee's overall lead *per* proclamation will be affected.

REASONABLE RECOVERY Proportion of revised and appreciated clustered precincts and total protested clustered precincts multiplied by the overall lead per proclamation (13.56% * 263,473)	35,726

Fourth, determine the protestant's votes and the protestee's votes after revision and appreciation in the pilot provinces. After that, add the respective revision and appreciation results to the total votes in the clustered precincts other than the revised and appreciated clustered precincts.

	Robredo	Marcos, Jr.
Revision and Appreciation Results	1,510,178[23]	204,512[24]
Add: Total votes in the clustered precincts other than the 5,415 pilot precincts revised and appreciated[25]	12,926,159[26]	13,953,259[27]
Total	14,436,337[28]	14,157,771[29]
TOTAL LEAD AFTER REVISION AND APPRECIATION	278,566	

Fifth, determine if reasonable recovery is met. Under this step, identify and compare the protestee's total lead after revision and appreciation and the protestee's overall lead *per* proclamation. Then, compute the resulting difference by deducting the total lead after revision and appreciation from the overall lead

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[21] P.E.T. Resolution dated October 15, 2019, p. 4.

[22] *Ponencia*, p. 7.

[23] P.E.T. Resolution dated October 15, 2019, p. 52.

[24] *Id.*

[25] *Ponencia*, p. 11.

[26] *Id.*

[27] *Id.*

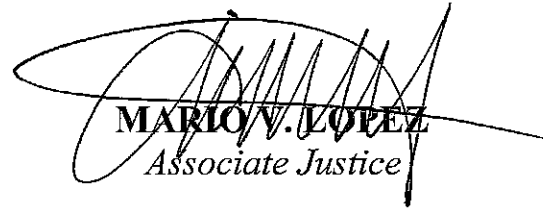[28] P.E.T. Resolution dated October 15, 2019, p. 53.

[29] *Id.*

per proclamation. If the resulting difference is greater than or equal to the reasonable recovery, then the protest may prosper. Otherwise, the protest may be dismissed.

Overall lead per proclamation	263,473[30]	Whether reasonable recovery of 35,726 is met
Less: Total lead after revision and appreciation	278,566[31]	
DIFFERENCE	-15,093	No

Here, it is clear that reasonable recovery is not met. The resulting difference is less than 35,726. The negative value (-15,093) suggests that the protestee's lead increased. On this ground alone, the election protest may be dismissed under Rule 65 of the 2010 PET Rules. Indeed, the protestant cast serious allegations of fraud and irregularities in his election protest. Thus, the Tribunal allowed the protestant to substantiate his allegations through the ballot boxes' opening and let him choose his pilot provinces. However, he failed to prove that electoral fraud and irregularities will alter the election results on who won.

Accordingly, I vote to dismiss the election protest following Rule 65 of the 2010 PET Rules.

MARIO V. LOPEZ
Associate Justice

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[30] P.E.T. Resolution dated October 15, 2019, p. 53.
[31] *Id.*