



REPUBLIC OF THE PHILIPPINES  
**SENATE ELECTORAL TRIBUNAL**  
COA-NCR Bldg., Batasan Road, Quezon City

FRANCIS N. TOLENTINO,  
Protestant,

- versus -

SET CASE No. 001-16

LEILA M. DE LIMA,  
Protestee.

x- - - - - x

**RESOLUTION NO. 16-14**

On 24 October 2016, Protestant Tolentino filed a *Manifestation with Urgent Motion* of even date, notifying the Tribunal that on 11 October 2016, he received a *Notice* dated 10 October 2016 from the Commission on Elections (COMELEC) through Atty. Jose M. Tolentino, Jr., Executive Director, Deputy Project Director, 2016-AES Project, informing Protestant Tolentino of the COMELEC's intention to release beginning 26 October 2016, 1,356 units of unused Vote Counting Machines (VCMs) to Smartmatic-TIM 2016.

In his *Manifestation with Urgent Motion*, Protestant Tolentino mentioned that attached to the said *Notice* was a letter from COMELEC Commissioner Christian Robert S. Lim dated 27 September 2016 addressed to this Tribunal through its Honorable Chairperson, Senior Associate Justice Antonio T. Carpio, informing the Tribunal that the COMELEC had approved the request of Smartmatic-TIM 2016, Inc. for the release of 1,356 units of VCMs which were delivered to the COMELEC for contingency purposes during the 09 May 2016 Automated Elections and that COMELEC would release the aforementioned VCMs to Smartmatic absent any contrary order from the Tribunal.

For some unexplained reason, Protestant Tolentino failed to mention that in the *Notice* dated 10 October 2016, he was also notified of the briefing to be conducted at the Training Room of the JAM Liner Warehouse in Sta. Rosa City, Laguna, on 19 October 2016 at 10:00 o'clock in the morning to discuss the protocol to be observed during said release. In this regard, Protestant Tolentino was requested to provide the Office of Commissioner Lim on or before 17 October 2016 with the names of his three (3) representatives who will attend the said briefing. Protestant Tolentino did not state whether he sent representatives to the briefing.

Protestant Tolentino further manifested that on 21 October 2016, he received thru counsel an email from the COMELEC, requesting the names of Protestant's representatives and supervisor for the stripping activities on 26 October 2016.

Protestant Tolentino submitted that the intended stripping activities on 26 October 2016 based only on the unilateral declaration/determination of the COMELEC that these 1,356 units of VCMs are outside the scope of the Tribunal's Preservation Order in Resolution No. 16-01 dated 07 July 2016 is a clear violation of the terms of the precautionary order. Thus, Protestant Tolentino moved to prohibit COMELEC from releasing the subject VCMs on 26 October 2016 and to schedule a preliminary discussion between the COMELEC, the parties and their counsels, and this Honorable Tribunal for the purpose of setting the protocol in conducting technical examination of the subject VCMs to determine whether or not these were not used during the 09 May 2016 Automated Elections.

On 27 October 2016, Protestant Tolentino filed a *Manifestation with Reiterative Motion to Prohibit the COMELEC from Continuing with the Release of the 1,356 VCMs Allegedly Not Used During the 2016 Automated Elections* dated 26 October 2016.

In this later *Manifestation*, Protestant Tolentino said that he sent a representative to observe the 26 October 2016 proceedings in Sta. Rosa, Laguna. During the proceedings, and contrary to the COMELEC's representations that the 1,356 VCMs were not used during the 2016 Automated Elections and that the SD

cards contained therein did not have any data content, it was found that out of 500 VCMs opened so far, at least 90 SD cards have files and/or data in it.

Although Protestant Tolentino had already objected to the continuing release of the rest of the VCMs, consistent with his urgent motion, since COMELEC appeared bent on continuing with the release of the rest of the VCMs absent any contrary order from this Tribunal, Protestant Tolentino prayed in this later *Manifestation with Reiterative Motion* that the Tribunal immediately prohibit COMELEC from continuing with the release of the 1,356 subject VCMs, which is ongoing; and to schedule a preliminary discussion between the COMELEC, the parties and their counsels, and this Honorable Tribunal for the purpose of setting the protocol in conducting technical examination of the subject VCMs to determine whether or not these were not used during the 09 May 2016 Automated Elections and are thus outside of the preservation order issued by this Honorable Tribunal.

SET Resolution No. 16-01 dated 07 July 2016 is very clear. The Preservation Order covers only **contested** ballot boxes, their contents and keys, list of voters with voting records, books of voters and other documents and materials or paraphernalia **used or accomplished in connection with the 09 May 2016 elections for the office of the Senator of the Philippines**, as well as data storage devices containing electronic data evidencing the conduct and the results of elections, which are in their keeping and custody, as the case may be; and to hold all such materials/documents subject to further orders and instructions of the Senate Electoral Tribunal. (Emphasis supplied)

In approving the request of Smartmatic-TIM 2016, Inc. for the release of 1,356 units of VCMs which were delivered to the COMELEC for contingency purposes during the 09 May 2016 Automated Elections and in stating that the said VCMs were not deployed during the recently concluded elections, COMELEC enjoys the presumption of regularity in the discharge of its functions in accordance with Rule 131, Section 3 (m) of the Rules of Court, thus:

**Section 3. Disputable presumptions.** — The following presumptions are satisfactory if uncontradicted, but may be contradicted and overcome by other evidence:

"x x x

x x x

x x x

"(m) That official duty has been regularly performed;"

It is therefore incumbent upon Protestant, before this Tribunal could grant his prayer, to rebut such presumption by: (a) proving that the VCMs and/or SD cards in question contain data pertaining to any of the contested precincts in the instant election protest, and (b) that the said VCMs and/or SD cards were in fact used during the 09 May 2016 elections.

The bare allegation, "it was found that some of the SD cards contained in the subject VCMs have files and/or data in it," is insufficient to rebut said presumption of regularity in the performance of official duty.

Furthermore, it has not escaped the Tribunal's attention that Protestant Tolentino had all the chance to discuss with the Comelec the protocol to be observed during the release of the VCMs. This could have been readily done during the briefing scheduled on 19 October 2016, of which Protestant Tolentino was duly notified and to which he was requested to send his three (3) representatives. Having permitted this chance to pass by, Protestant Tolentino cannot now come to the Tribunal asking for the same relief that was readily available to him with the exercise of simple diligence.

It has also not escaped the Tribunal's attention that although Protestant Tolentino received the *Notice* of the Commission's intent to release the subject VCMs as early as 11 October 2016, it was only on 24 October 2016, or barely two (2) days before the start of the release/stripping proceedings that Protestant Tolentino filed his first *Manifestation with Urgent Motion*. We deem that such action was deliberately employed to enable Protestant Tolentino to use the pendency of his motions before the Tribunal as a justification to delay the release/stripping proceedings being conducted by the Comelec. Such ploy, we cannot countenance.

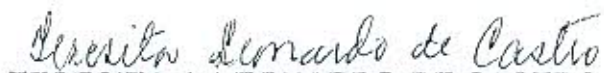
IN VIEW OF THE FOREGOING, the Executive Committee of the Tribunal resolves to DENY Protestant Tolentino's *Manifestation with Urgent Motion* dated 24 October 2016 as well as his *Manifestation with Reiterative Motion to Prohibit the COMELEC from Continuing with the Release of the 1,356 VCMs Allegedly Not Used During the 2016 Automated Elections* dated 26 October 2016.

SO ORDERED.

08 November 2016.



ANTONIO T. CARPIO  
Senior Associate Justice  
Chairperson



TERESITA J. LEONARDO-DE CASTRO  
Associate Justice  
Member



ARTURO D. BRION  
Associate Justice  
Member