101 Phil. 575

[G. R. No. L-9789. May 25, 1957]

FERNANDO E. RICAFORT, PETITIONER, VS. HON. WENCESLAO L. FERNAN, IN HIS CAPACITY AS JUDGE OF THE COURT OF FIRST INSTANCE OF DAVAO, AND JUANITO ESPEEO, JR., RESPONDENTS.

D E C I S I O N

FELIX, J.:

Fernando E. Ricafort instituted these certiorari proceedings for the purpose of securing judgment from this Court annulling the order of the respondent Judge of September 23, 1955, dismissing the information filed in Criminal Case No. 2980 of the Court of First Instance of Davao charging respondent Juanito Espero with the crime of qualified theft allegedly committed in the City of Davao while in the employ of the petitioner. Said information substantially avers that during the period comprised between October, 1952, and July 31, 1953, the defendant did wilfully, maliciously and criminally, with grave abuse of confidence and intent of gain and without the knowledge and consent of the owner thereof, take, steal and carry away medicines and money belonging to the petitioner, of the total value of P1,426.17, to the damage and prejudice of the latter. In his pleading, petitioner further prays that the respondent Judge, Wenceslao L. Fernan, be ordered to reinstate said criminal case for its trial on the merits.

The facts of the case may be briefly stated as follows: upon the filing of said information by the Provincial Fiscal, counsel for the defendant moved for a bill of particulars on the ground that the information did not allege the definite time in which the crime of qualified theft was executed. The motion, however, was denied by the respondent court because a copy of the balance sheets showing the different dates when the various amounts were allegedly *misappropriated* by the accused, was served upon the attorneys for the defendant. Those balance sheets (Annexes A and A-1 attached to the motion to quash later submitted), showed that the defendant was a sales representative or agent receiving a commission of 5 per cent of all sales made and that in the course of the performance of his duties as such

he was found short in the sum of P1,013.09.

Based on these balance sheets counsel for the defendant, now respondent Juanito Espero, filed a motion and a supplemental motion to quash on the following grounds: (1) that the information charged more than one offense; (2) that the Court had no jurisdiction over some of the separate offenses; and (3) that the information charged the wrong offense. Defendant's counsel then asked the Court for permission to present evidence in order to support the allegations in the motions to quash, which the court granted. At the hearing of the motions to quash, defendant presented Exhibits 1, 1-A and 1-B. In Exhibit 1 the offended party, petitioner Fernando E. Ricafort, recognized the accused as his sales representative, to which exhibit a certified statement of accountability of the accused was attached, wherein the sales, collections and commissions covering the period from October, 1952, to July, 1953, were stated. At said hearing it was also disclosed that the accused, as petitioner's sales representative, was authorized to sell different articles on commission basis, which articles the offended party Fernando E. Ricafort had turned over to his agent for sale. As the delivery of the drugs or merchandise to be sold on commission by petitioner to the defendant involved a transfer of the juridical possession thereof from the former to the latter, the lower Court believed that the crime resulting from the alleged *misappropriation* of the goods or of the proceeds thereof, would be, at most, *estafa* and not theft, simple or qualified, so the Court acting on the motion to quash, dismissed the case with costs *de oficio*.

From this order, and without first praying the Court for its reconsideration, or causing the intervention of the Provincial Fiscal of Davao who filed the information, the purported victim of the crime—the petitioner herein—instituted the present case in this Court seeking to obtain the remedy applied for in his petition. In this instance respondents submit the following questions at issue, to wit:

1. Do the petitioner and Ms attorney have legal representation in this ease?;
2. Does certiorari lie in the present instance?; and
3. If certiorari is the proper legal remedy to contest the correctness of an order sustaining a motion to quash in a criminal case, did the respondent Judge of the Court of First Instance of Davao act without or in excess of his jurisdiction, or with grave abuse of discretion, in issuing the order dated September 23, 1955, dismissing. the information in Criminal Case No. 2819 on the ground that the "facts do not constitute the crime of

> qualified theft" for which offense the accused is charged under the information?

I. As stated by counsel for the respondents, the petition herein is an offshoot, an incident of said criminal case for qualified theft. For all purposes, therefore, it is a continuation of that case and partakes of the nature of a criminal proceeding. This being so, the party defeated by the order of the respondent Judge dismissing the information in Criminal Case No. 2819 of the Court of First Instance of Davao must be the People of the Philippines and not the petitioner, the complaining witness. Consequently, the proper party to bring this petition is the State and the proper legal representation should be the Solicitor General and not the attorney for the complaining witness who was the private prosecutor in said Criminal Case No. 2819. It is true that under the" Rules of Court the offended party may take part in the prosecution of criminal cases and even appeal in certain instances from the order or judgment of the courts, but this "is only so in cases where the party injured has to protest his pecuniary interest in connection with the civil liability of the accused.

Petitioner did not institute the case at bar for the purpose of protecting his pecuniary interest as supposed offended party of the crime charged in the information that was dismissed, but to cause the restoration of the case and to have it tried as if nothing had happened. This, certainly, falls within the province of the representative of the People who in this case has not appealed nor joined the private prosecutor in bringing this case before Us.

Besides, and as to certiorari proceedings, Rule 67 of the Rules of Court prescribes:

> "Sec. 5. DEFENDANTS AND COST IN CERTAIN CASES.—When the petition filed relates to the acts or omissions of a court or of a judge, the petitioner shall join as parties defendant with such court or judge *the person or persons interested in sustaining* the proceedings of the court; and it shall he the duty of such person or persons to appear and defend, both in his or their own behalf and in behalf of the court or judge affected by the proceedings, and costs awarded in such proceedings in favor of the petitioner shall be against the person or persons in interest only and not against the court or judge."

It cannot be denied that one of the parties in said Criminal Case No. 2819, the name of

which appears in the caption of the information, was the People of the Philippines which yielded to the order of the Court objected to by the private prosecutor, and the People should have been made a party to these proceedings, in the same manner as the defendant Juanito Espero whom the petitioner had to include as respondent in his amended petition.

Moreover, in People to. Velez, 77 Phil. 1026, We have- already held that the offended party cannot appeal from the order of the Court dismissing criminal case. In that case the attorney for the offended party appealed from the order of the Court of First Instance of Misamis Occidental that dismissed the information against the accused, upon motion of the latter's counsel, on the ground that the supposed libelous document was a privileged document. The Provincial Fiscal did not oppose the motion for dismissal filed by the defendant in the Court of First Instance because he was also of the opinion that the latter which was the subject matter of the case was a privileged communication, and when the appeal of the offended party reached this Court the Solicitor General filed a motion to dismiss the appeal.

> "*Held:* it appearing from the record that there was a pending civil action arising out of the same alleged libelous document filed by the offended party against the same defendant, the offended party has no right to intervene in the prosecution of this ease, and consequently cannot appeal from the order of the court dismissing the information. The reason of the law in not permitting the offended party to intervene in the prosecution of a criminal case, if he has waived his right to institute a civil action arising from a criminal act or has reserved or, a *fortiori*, already instituted the said civil action, is that he has no special interest in the prosecution of the criminal action. *Besides, even if the offended party has not instituted a separate civil action nor reserved his right to do so, and has intervened in the prosecution of the criminal action, as his intervention is subject to the direction and control of the fiscal, that is, the Provincial Fiscal or the Solicitor General, the latter in the exercise of his authority to control the prosecution has the right to move for the dismissal of the appeal interposed by the offended 'party if such dismissal would not affect the right of the offended party to civil indemnity." Padilla's* Criminal Procedure, 1955 Ed., p. 697-698).

In the present case the dismissal of the information or the criminal action does not affect the right of the offended party to institute or continue the civil action already instituted arising from the offense, because such dismissal or extinction of the penal action does not carry with it the extinction of the civil one under section 1-(*d*), Rule 107 of the Rules of Court.

II. Rule _ 67 of the Rules of Court provides:

> "Section 1. *Petition for certiorari*.—When any tribunal, hoard or officer exercising judicial functions, has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion and *there is no appeal, not any plain, speedy and adequate remedy in the ordinary course of law*, a person aggrieved thereby may file a Verified petition in the proper court alleging the facts with certainty and praying that judgment be rendered annulling or modifying the proceedings of such tribunal, board, or officer as the law requires, with costs."

So that where an appeal is in itself a sufficient and adequate remedy that would promptly relieve the petitioner from the injurious effects of the order or judgment complained of, the existence of that appeal would bar the institution of the remedy of certiorari. In the case of Arches vs. Beldia et al., G. R. No. L-2414, promulgated on May 27, 1949, this Court held "that neither certiorari nor prohibition lie against an order of the court granting or denying a motion to quash an information. If the courts have jurisdiction to take cognizance of the case and to decide the motion to quash, *appeal in due time is the* obvious and only *remedy* for the *public* prosecutor or the accused, as the case may be."

In this connection it is to be stated at this juncture, that the petitioner did not pray the respondent Judge for a reconsideration of his order of dismissal, nor file any motion to that effect, and having failed to avail himself of this obvious remedy he cannot thereafter seek relief by by certiorari.

> Certiorari will not lie where the relief sought is obtainable by application in the court of the original proceeding and it has not there been applied for. In this connection, it has been held that before filing a petition for certiorari, the

> attention of lower court should first be called to its supposed error and its correction ask for, and that if this is not done, the right shall be denied. * * *"
>
> (II Moran, 1952 Ed., p. 169-170; Hen-era vs. Barreto, 25 Phil. 245; Uy Chu vs. Imperial, 44 Phil. 27; the Manila Post Publishing Co. vs. Sanchez, 81 Phil., 814, 46 Off. Gaz. Sup. 1, 412; Alvarez vs. Ibanez, 83 Phil., 104, 46 Off. Gaz., 42S8).

III. Having come to the conclusion (1) that the petitioner has no personality to institute the present recourse in this Court and (2) that the remedy of certiorari is not available to annul the order of dismissal of the respondent judge in said Criminal Case No. 2819 of the Court of First Instance of Davao, it would seem unnecessary for Us to pass upon the third question at issue. Yet, We prefer to make briefly a few remarks on this point.

The information filed in said case No. 2819 really and in effect charged the defendant Juanito Espero with the crime of qualified theft. It was drafted in clear and plain words and contained all the requisites prescribed in section 5, Rule 106 of the Rules of Court for a sufficient information. The trouble arose not because said information was defective, but" because the true facts of the case did not conform to the allegations of the indictment. This was discovered when upon the filing of a motion for a bill of particulars counsel for the offended party furnished the defense with Exhibit 1, to which a certified statement of accountability of the accused was attached. It was then disclosed that the defendant Juanito Espero did not *take*, steal and carry away medicines valued at P430.08 and money amounting to P1,013.09, but *received* medicines for sale on commission, the proceeds of which he allegedly *misappropriated* during the lapse of time comprised between October, 1952 and July 31, 19-53. Naturally, the averments of the information had to be considered modified and amplified in accordance with the very admissions of the offended party and the Provincial Fiscal made at the hearing of the motion to quash. In the case of People vs. Navarro et al.,* 42 Off. Gaz., 497-499, the question was raised as to whether or not the trial court could take into consideration facts not appearing in the information but divulged at the pre-trial. In deciding in the affirmative, this Court held:

> "It must be noted that the section of the Rule (Sec. 2-A, Rule 113) permitting a motion to quash on the ground that 'the facts charged do not constitute an offense' omits reference to the facts detailed in the information. Other

> sections of the same Rule would imply that the . issue is restricted to those alleged in the information (see sections 9 and 10, Rule 113). *Prima facie, the facts charged are those in the complaint, but they may be amplified or qualified by others appearing to be additional circumstances, upon admissions made by the People's representative, which admission could anyway be submitted by him as amendments to the same information. It would seem, to be pure-technicality to hold that in the consideration of the motion the 'parties and the Judge were precluded from considering fact which the Fiscal admitted to be true, simply because they were not described in the complaint.* Of course, it may be added that upon similar motions the court and the Fiscal are not required to go beyond the averments of the information, nor is the latter to be inveigled into a premature and risky revelation of his evidence, but we see no reason to prohibit the Fiscal from making", in all candor, admissions of undeniable facts, because the principle can never he sufficiently reiterated that such official's role is to sec that justice is done; not that all accused are convicted, but that the guilty are justly punished. Less reason can there be to prohibit the court from considering those admissions, and deciding accordingly, in the interest of a speedy administration of Justice."

The balance sheets show cash shortages in the total sum of P803.91, but this amount was broken down into several other sums, the smallest of which are P30, P15.95, P22.61 and P1, and even assuming that the crime committed in said case was qualified theft, the resulting offense for the taking of these small amounts would not come within the jurisdiction of the Court of First Instance, for any of such offenses would fall within the jurisdiction of the Municipal Court of Davao (section 87-b and c-3 of Re- public Act No. 296, known as the Judiciary Act of 1948, and Article 309, No. 5, of the Revised Penal Code.) Unlike in cases for *estafa* in which the misappropriations of various separate amounts that are to be accounted for in one single occasion may be considered and prosecuted as only one offense, in the crime of theft, simple or qualified, each *taking* of another's property, coupled with the other circumstances prescribed in" Article 308 of the Revised Penal Code, constitutes a separate crime of theft.

On the other hand, the acts committed by the defendant in connection with the case at bar, if they constitute any crime at all, that crime would be *estafa*, because unlike in the case of People vs. Locson, 57 Phil. 325, cited by petitioner, in which the teller of a bank only obtained the *physical or material possession* of the money taken by him, the defendant

Juanito Espero obtained from the offended party the juridical possession of the drags or medicines he received to sell on commission.

In the case of People us. Isaac, the regular driver of a jeepney was on vacation and the owner of that vehicle hired Isaac on a temporary basis and entrusted the vehicle for a "pasada", that is to say, for transporting passengers for a compensation at the rate of P10 per day. Appellant never returned the vehicle and after a search the vehicle was found in Tarlac. Appealing from a judgment of conviction counsel *de oficio* contends that appellant may have committed estafa but not theft, on the theory, that the possession of the vehicle was obtained with consent of the owner, and therefore there was no illegal taking. Held: To this we cannot agree. In the case of U. S. vs. De Vera, 43 Phil. 1000, this Court said that "when the delivery of a chattel has not the effect of transferring the juridical possession thereof or title thereto, it is presumed that the possession of and title to, the thing so delivered remains in the owner; and the act of disposing thereof with intent of gain and without the consent of the owner constitutes the crime of theft." (2 Padilla's Criminal Law, 1955 Ed., p. 531).

'ESTAFA' DISTINGUISHED FROM THEFT. In general, the crime of *estafa* is distinguished from that of theft by the manner in which the offender in each case acquires possession of the property. The *estafador* receives the possession of the property, while the thief takes, without the owner's consent, the possession of the latter's property.

There are, however, instances where even if the property mis- appropriated was received by the offender, the misappropriation will constitute theft, and not estafa. In such cases, distinction should be made whether the offender, on receiving the property, acquired: (1) the material possession alone or (2) the material and juridical possession, or (3) the material and juridical possession plus the ownership, of the property. Where only the' material possession is transferred, conversion of the property gives rise to the crime of theft; where both material and juridical possessions are transferred, misappropriation of the property would constitute estafa; and where in addition to the material possession, the owner- ship of tho property is transferred, misappropriation would only give rise to a civil obligation (People vs. Aquino, 36 Off. Gaz., 1886). For example, an agent of the public authorities who, in the performance of his duties, and because of the lack of registration papers, takes possession of cattle in the presence of the cattleman charged with the care thereof, without any opposition or protest on the part of said cattleman or

on the part of the possessor or owner of the cattle seised, does not commit the crime of theft, inasmuch as said cattle were seized with the knowledge of the person presumed to be owner. But' the defendant's own act of selling the cattle seized and appropriating the value thereof to his own use, without reporting the case to his superior officers or to the competent authorities, constitute the crime of estafa (U. S. vs. Dacaimy, 8 Phil. 617.)" (Book Two, Part II, Francisco's Penal Code, p. 1098.) .

The case of People vs. de Leon, 49 Phil. 437, cited by the petitioner has no bearing on the case at bar, because the "taking" in that case occurred on the same occasion, while the alleged "takings" .under consideration took place on different days.

In the light of the foregoing considerations, We can by no means declare that the order objected to by the petitioner is erroneous. On the contrary, it was issued in accordance with law.

Wherefore, the herein petition for certiorari is dismissed, with costs against petitioner. So it is ordered.

Bengzon, Padilla, Montemayor, Reyes, A., Bautista, Angelo, Labrador, Conception, Reyes, J. B. L., and E*ndencia, . JJ.*, concur.

•75 Phil., 516.

Date created: October 13, 2014