103 Phil. 277

[G. R. Nos. L-10364 and L-10376. March 31, 1958]

RUFINO T. SAMSON, PETITIONER, VS. THE HONORABLE COURT OF APPEALS, ET AL., RESPONDENTS.

D E C I S I O N

BAUTISTA ANGELO, J.:

Rufino T. Samson was jointly charged with Amado L. Cruz and Bonifacio Vergara and two others whose names are unknown in two separate informations with the complex crime of estafa through falsification of two checks of the Philippine National Bank before the Court of First Instance of Manila (Cases Nos. 12802 & 12803). On a plea of not guilty, they were tried and found guilty as Samson *vs.* Court of Appeals, et al. charged, the court sentencing each of the three defendants to suffer in each case a penalty of not less than 6 years and 1 day and not more than 9 years, 4 months and 1 day of *prision mayor*, to pay a fine of P2,500 and the costs. In addition, they were sentenced to indemnify the Philippine Ryukyus Command, the payee of the checks, in the sum of P5,417.11 in each of the two cases.

The trio appealed from the decision and the Court of Appeals affirmed the same but with a reduced penalty with regard to appellants Cruz and Vergara. Appellant Samson was only found guilty of committing the crime through gross imprudence and was accordingly sentenced to 4 months of *arresto mayor* in each of the two cases.

Dissatisfied with his conviction, Samson sued out the present petition for review contending (1) that the acts done by him, as found by the Court of Appeals, do not constitute gross imprudence; (2) that there is no such offense as estafa through (falsification by) negligence; and (3) that the Court of Appeals erred in denying his motion for new trial.

The facts as found by the Court of Appeals are: “Espiridion Lascaño, father of the late Felipe Lascaño, a lieutenant of the USAFFE, who died during the last World War, and his widow Rosalina Paras, through the latter filed, as Felipe Lascaño’s only legitimate surviving heir, their claim papers with, the Red Cross Chapter in the Province of Sorsogon in the early part

of 1946.

"On October 2, 1948 Amado L. Cruz asked the help of his former classmate Rufino T. Samson in getting the checks of the two claimants who were with him at Camp Murphy by approaching an officer of the Philippine Army who could identify said persons assuring Samson that he had known said claimants for a long time. Having been assured twice of the identity of the supposed claimants and after examining their residence certificates attached to the claim papers, Samson accompanied by Cruz and the supposed claimants went to talk to Lt. Manuel Valencia and requested him to act as guarantor to secure the claimant's checks. Believing in the representations made by Samson, Lt. Valencia accompanied them to the Deceased Check Delivery Section, Finance, AFP, and secured the release of PNB Check No. 754497J, Exhibit C, in favor of Rosalina Paras for the sum of P6,417.11 and PNB Check No. 754498J, Exhibit D, in favor of Espiridion Lascaño for the sum of P6,417.10. Thence, the party impaired to the Bureau of Treasury, Finance Building, where again through the help of Rufino T. Samson, the two checks above-mentioned were cashed by the teller Rosario Mallari who knew Samson. In accordance with the regulations of the Bureau of Treasury the payee Rosalina Paras, not knowing how to write or sign her name, was required to thumbmark on the back of the check, Exhibit C, and below her thumbmark Rufino T. Samson and Francisco Ordoñez signed as witnesses. Espiridion Lascafio who knows how to sign his name was asked to do so on the back of the check, Exhibit D, and below his signature Samson signed not as a witness but as the last indorser. The accounts called for in said two checks were delivered to Samson and Cruz, who, as will be shown hereafter, was the person who signed as Francisco Ordoñez, counted the money and delivered it to the supposed claimants. The party then proceeded to the Aristocrat Restaurant where together with about eleven others took their lunch for which Vergara paid P60, besides giving Samson P300 supposed to be paid to the officers who helped them in securing the checks plus P10 for Samson's taxi fare. Samson left the party and went to the movie to meet a friend from Camp Murphy.

"On October 4, or just two days after cashing the checks, while at Camp Murphy Samson was informed by Severino Anda, one of those who were with the party which cashed the checks, thus said checks were delivered to the wrong parties. Worried by such news he left for Sorsogon the following day to locate the real

> claimants. While on the train he saw an old couple whom he suspected to be the fake claimants because they had been throwing furtive glances at him. Upon arriving at Sorsogon he reported the matter to the police and caused to be taken the couple's finger prints, names and address. At about 10 a.m., October 6, he went to look for the house of the Lascaño family. He found Espiridion Lascaño too old and weak to leave the house. He saw Rosalina at the school where she was teaching and inquired from her whether she had received a check from Camp Murphy as well as the check of the old man and he was answered in the negative. He returned to Manila the following day and on October 8 reported the matter to Sgt. Luis Balignasan, G-2 PC, who after taking his affidavit promised to help him and conduct the necessary investigation. He submitted a copy of the finger prints of the suspects."

Analyzing the criminal responsibility of appellant Samson, the court made the following comment:

> "Coming now to appellant Rufino T. Samson, we believe that the following facts are admitted; that on the strength of the assurances given by Amado L. Cruz that the supposed claimants were the real ones he requested the help of Lt. Manuel Valencia to act as guarantor and Valencia, relying on his representations, accompanied him and the claimants to the Delivery Window and secured the checks for them; that again Rufino T. Samson helped Amado T. Cruz and the supposed claimants by signing as witness together with Cruz so that the supposed claimant Rosalina Paras could cash her cheek and went to the extent of signing as last indorser on the back of the check, Exhibit D, in favor of Espiridion Lascano and then later at the Aristocrat Restaurant accepted from Vergara and Cruz the sum of P300 to be paid to the officers who helped them and the further sum of P10 for his taxi fare. There is no evidence that he was aware that the supposed claimants were not the real ones and his subsequent conduct shows it to be true; but although he did not know them personally he induced another friend of his, Lt. Manuel Valencia, to believe in the identity of said claimants thus helping his co-accused Amado L. Cruz, Bonifacio Vergara and John Doe and Maria Doe to perpetrate the crime of estafa through falsification. It is unbelievable that he would accept as his share the meager amount of P310 if he were a co-conspirator in the commission of a fraud amounting to over P12,000.

> We see nothing strange in his acceptance of P310 as a token of gratitude on the part of the claimants, but he has undoutedly acted with reckless imprudence for having taken no precaution whatsoever in assuring himself that the supposed claimants were the real ones. The mere assurances given him by Amado L. Cruz were not sufficient to justify his acting in the manner he did."

We find no error in the conclusion reached by the Court of Appeals that the appellant herein acted with gross negligence in assuring Lt. Valencia and the cashier of the identity of the supposed claimants, as a result of which the impersonators managed to secure possession of the checks in question and to cash the same. Appellant was, or must have been aware that the claim was for a sizeable amount, totalling over twelve thousand pesos, and ordinary prudence required that he should satisfy himself by all proper and adequate means of the identity of the persons claiming said amounts, since they were personally unknown to him. The mere assurance of a former classmate would certainly not be a satisfactory identification to justify disbursement of such a large amount if the funds belonged to appellant; and we see no justification for his treating government funds with less care and diligence than if they were his own. Nor does the submission to this appellant of residence certificates constitute adequate identification, since these certificates are tax receipts and not means of establishing the identity of persons; and appellant as a Lieutenant of the Army is sufficiently intelligent and educated to foresee the possibility that the certificates could be forged or stolen.

There is no question that appellant cooperated in the commission of the complex offense of *estafa* through falsification by reckless imprudence by acts without which it could not have been accomplished, and this being a fact, there would be no reason to exculpate him from liability. Even assuming that he had no intention to defraud the offended party if his co-defendants succeeded in attaining the purpose sought by the culprits, appellant's participation *together* with the participation of his co-defendants in the commission of the offense *completed* all the elements necessary for the perpetration of the complex crime of *estafa* through falsification of commercial document (Article 17, Revised Penal Code). Anyway and for the purposes of the penalty that was actually imposed upon appellant, it is immaterial that he be considered only guilty of falsification of a commercial document through reckless negligence, because the penalty for the crime of falsification of a commercial document under Article 172, No. 1, of the Revised Penal Code, is *prision correccional* in its medium and maximum periods and a fine of not more than P5.000.00 which under the provisions of Articles 25 and 26 of the same Code is a *correctional penalty*.

Consequently, if in the cases at bar the crimes of falsification were due to reckless imprudence, the corresponding penalty would be arresto mayor in its minimum and medium periods (Art. 365, opening paragraph of the Revised Penal Code), which comprehends the penalty imposed by the Court of Appeals upon appellant.

Under the facts found by the Court of Appeals, the acts of appellant constitute in each case the crime of *estafa* through falsification of a mercantile document by reckless imprudence, because in so far as the falsification is concerned, his acts of endorsing the respective checks by way of identification of the signatures of the payees entitled to said ehecks and their proceeds, constituted a written representation that the true payees participated in the indorsement and cashing of the checks aforesaid, when in truth and in fact the true payees had no direct intervention in the proceedings (Art. 171, Revised Penal Code). Even if such indorsement and identification were extraneous to the official duties of appellant, he would be nevertheless liable as a private person under Article 172 of the Revised Penal Code. Decisions of this Court and of the Supreme Court of Spain assert the juridical standing of the crime of falsification by imprudence since in falsifying public or mercantile documents the element of intent to cause damage is not required because what the law seeks to repress is the prejudice to the public confidence in these documents.

> "An act executed without malice or criminal purpose, but with carelessness, negligence, or lack of precaution, which causes harm to society or to an individual, should be classified as either reckless negligence or simple imprudence; the person responsible therefor is liable for such results as should have been anticipated, and for acts "which no one would commit except through culpable indifference.
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> "The courts heretofore dealing with acts punishable under the Penal Code of Spain which, with slight modifications, is practically the same as the one in force in these Islands, have heard and decided cases involving falsification of documents with reckless negligence. They therein applied the provisions of article 581 of the Spanish Code, which is identical with article 568 of the Code in force in these Islands, as may be seen among others, in judgments in cessation of July 8, 1882, December 21, 1885, November 8, 1887, and December 7, 1896; also in case No. 2818, United States *vs.* Mariano Vega, decided by this Court." (U.S. *vs.* Maleza, 14 Phil., 468).[1]

It is however contended that appellant Samson cannot be convicted of the crime of *estafa* through falsification by imprudence for the reason that the information filed against him charges only a willful act of falsification and contains no reference to any act of imprudence on his part. Nor can it be said, counsel argues, that the alleged imprudent act includes or is necessarily included in the offense charged in the information because a deliberate intent to do an unlawful act is inconsistent with the idea of negligence.

The rule regarding variance between allegation and proof in a criminal case is: "When there is variance between the offense charged in the complaint or information, and that proved or established by the evidence, and the offense as charged is included in or necessarily includes the offense proved, the defendant shall be convicted of the offense proved included in that which is charged, or of the offense charged included in that which is proved" (Section 4, Rule 116, Rules of Court). As a complement we have also the following rule: "An offense charged necessarily includes that which is proved, when some of the essential elements or ingredients of the former, as this is alleged in the complaint or information, constitute the latter. And the offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form a part of those constituting the latter" (Section 5, Rule 116, *Idem*.).

While a criminal negligent act is not a simple modality of a willful crime, as we held in Quizon *vs*. Justice of the Peace of Bacolor,* G. R. No. L-6641, July 28, 1955, but a distinct crime in itself, designated as a quasi offense in our Penal Code, it may however be said that a conviction for the former can be had under an information exclusively charging the commission of a willful offense, upon the theory that the greater includes the lesser offense. This is the situation that obtains in the present case. Appellant was charged with willful falsification but from the evidence submitted by the parties, the Court of Appeals found that in effecting the falsification which made possible the cashing of the checks in question, appellant did not act with criminal intent but merely failed to take proper and adequate means to assure himself of the identity of the real claimants as an ordinary prudent man would do. In other words, the information alleges acts which charge willful falsification but which turned out to be not willful but negligent. This is a case covered by the rule when there is a variance between the allegation and proof, and is similar to some of the cases decided by this Tribunal.

> Under a charge of forcible abduction, the defendant may be convicted of illegal detention if the evidence does not show that the kidnapping was with lewd

designs. (People *vs.* Crisostomo, 46 Phil., 775.)

The crime of theft is included necessarily in that of robbery and therefore a defendant can be convicted of the former, notwithstanding that he was charged the latter offense. (U. S. *vs.* Birueda, 4 Phil., 229; People *vs.* Rivera, 64 Phil., 578.)

The crime of robbery *en cuadrilla* is necessarily included in that of *bandolerisimo* (brigandage), and therefore the defendants can be convicted of the former on an information charging the latter. (U. S. *vs.* De la Cruz, 4 Phil., 430.)

Where the information charges brigandage, but the evidence fails to show that the crime was committed by an armed band, the defendants can be convicted of robbery. (U. S. *vs.* Mangubat. 3 Phil., 1.)

Under a charge of malversation a public official may be found guilty of *estafa*. (U. S. *vs.* Solis, 7 Phil., 195.)

Moreover, Section 5, Rule 116, of the Rules of Court does not require that all the essential elements of the offense charged in the information be proved, it being sufficient that *some* of said essential elements or ingredients thereof be established to *constitute the crime proved*. This conclusion is strengthened by the provisions of Section 9, Rule 113, of the Rules of Court under which appellant could no longer be prosecuted for *estafa* through falsification of commercial documents by reckless negligence were we to acquit him in the cases at bar on the obviously technical theory of the dissenters.

The fact that the information does not allege that the falsification was committed with imprudence is of no moment for here this deficiency appears supplied by the evidence submitted by appellant himself and the result has proven beneficial to him. Certainly, having alleged that the falsification has been willful, it would be incongrous to allege at the same time that it was committed with imprudence for a charge of criminal intent is incompatible with the concept of negligence.

With regard to the motion for new trial filed by appellant for the purpose of introducing an allegedly newly discovered evidence which consists of an affidavit of one Emiliano Salangsang-Salazar, it appearing that the same if admitted would only be corroborative in nature and would not have the effect of altering the result of the case, the same is denied.

Wherefore, the decision appealed from is affirmed, with costs against appellant.

Paras, C. J., Bengzon, Padilla, Montemayor and *Endencia, JJ.,* concur.

Reyes, A., J., concurs in the result.

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[1] *See* also the case of People *vs.* Blancas, 56 Phil., 801, wherein a minister of the Philippine Independent Church was convicted of falsification of public document through reckless imprudence.

In the case of People *vs.* Baas, CA-G. R. No. 11761-R, May 31, 1955-II Padilla's Criminal Law, p. 221, a doctor was charged with and convicted of falsification of public document through reckless imprudence.

* 97 Phil., 842. 286

FELIX, J., *concurring:*

I concur in the majority decision for the reasons therein stated. I, however, desire to state a few words in answer to the arguments adduced in the dissenting opinion to the effect that "under the ruling of the majority, each and every charge of a willful offense will necessarily *imply* an alternative charge of *criminal negligence*" and that this is a way of "getting around the established rule that not more than one offense should be charged" and of preventing the accused from guarding against such hidden multiplicity of charges. It is claimed that in such situation the defendant would be unable to determine whether he is being tried for *committing* the crime or *for not preventing its commission*, when he could have done so.

This argument is, in my opinion, utterly untenable. In the first place, there is no multiplicity of accusations but a charge that is *included* in another which is rendered inoperative and ceases to have any effect on the defendant for lack of supporting evidence, in the second place, no one better than the defendant knows what he has done in connection with the crime he is charged and he must have in mind that section 4, Rule 116, of the Rules of Court already warned him that he could be convicted of *any crime included in the crime charged in the information if there were any variance between the latter and the crime established by the evidence.* So that he cannot now claim that he was caught by surprise or prejudiced

in any way if the crime he was accused in the information degenerated into a case of criminal negligence. Although I do not deny that in Quizon *vs.* Justice of the Peace of Bacolor, (97 Phil., 342), We held that criminal negligence is a distinct crime established in our Penal Code, I cannot pass unmentioned the more juridical and more realistic point of view expressed in People *vs.* Faller, 67 Phil., 529, where it was held that:

> RECKLESS IMPRUDENCE *is not a crime in itself. It is simply a way of committing it and merely determines a lower degree of criminal liability.* The information alleges that the appellant acted willfully, maliciously, unlawfully and criminally. To this information no objection was interposed. Negligence being a punishable criminal act tvhen it results in a crime, the allegation in the information that the appellant also committed the acts charged unlawfully and criminally includes the charge that he acted with negligence.

For the foregoing considerations, I vote with the majority in affirming the decision appealed from, with costs against appellant.

DISSENTING:

REYES, J. B. L.,

I regret my inability to agree that.under a charge of *intentionally* committing a crime, an accused may be convicted of committing such crime through negligence or imprudence.

We have shown in Quizon *vs.* Justice of the Peace of Bacolor (97 Phil., 342), July 28, 1955, that criminal negligence is not a mere variant of the intentional misdeed; that it is a distinct and separate crime in itself. We also pointed out in that case that while wilful crimes are punished according to their results, in crimes of negligence, what the law punishes is the carelessness itself, the failure to take the precautions that society has a right to expect will be taken under the circumstances of each case. So that, while the intentional crime of *lesiones* is substantially different from that of *falsification, lesiones* by imprudence and falsification by imprudence are in themselves substantially identical offenses, being but two instances of criminal negligence punishable under one and the same article (365) of the Revised Penal Code.

It is argued that negligence is not a crime but a way of committing it. That view may be true from the philosophical standpoint, but not from that of the Penal Code, notwithstanding People *vs.* Faller, 67 Phil., 529, which was questioned in the Quizon case. The stubborn fact is "Que *la culpa es un delito propio* como el homicidio, las lesiones, etc. lo cual tambien es absurdo; on obstante ello *en nuestra sistema legislativo hay que partir de esa base*, que por otra parte el Tribunal Supremo acentua" (Puig Peña Der Penal, Tomo I, pag. 316). And this is emphasized by the designation of *quasi-offenses* by our Penal Code, that the Spanish Penal Code does not even use.

As a consequence, it must be admitted that intentional falsification and falsification by negligence not only differ in seriousness, but in essence; they are, by their nature, two different offenses altogether. Wherefore, an offender who is accused of intentional falsification can not be held to answer for falsification by negligence, because the essential element of the latter offense, the ingredient that characterizes it and separates it from all other offenses, to wit, the criminal negligence or carelessness, is not involved in the elements of the crime charged. Not only is it not included: *it is excluded by incompatibility*, because malice or intent can not co-exist with negligence. Intent presupposes that the offender actually visualized or contemplated the act of falsification and determined to realize it; negligence implies that the offender *should have* foreseen or anticipated, but *did not* actually anticipate or foresee, the consequences of his act. In the former, the law punishes the culprit for his decision to breach the law, in the latter, for his failure to foresee that his action would result in such a breach.

The difference being so radical, I can not see how the appellant can be held as a coiprincipal of the crime of estafa with falsification through his reckless imprudence, considering that the negligence negates the appellant's knowledge of, or participation in, the intent to commit the fraud. It is urged that appellant's imprudent act was indispensable and that without it, the estafa could not be successfully accomplished, hence, he should be deemed a principal by cooperation under par. 3 of Art. 17, R.P.C. I consider the argument fallacious.

> "ART. 17 says: "Art. 17. *Principals*.-The following are considered principals:
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> 1. Those who take a direct part in the execution of the act;
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> 2. Those who directly force or induce others to commit it;
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> 3. Those who cooperate in the commission of the offense by another act without

> which it would not have been accomplished."

Now, *to cooperate* is to help, to aid; and necessarily presupposes, knowledge of the ultimate purpose in view. This very Court, in People *vs.* Aplegido, 76 Phil., 571, has ruled that—

> "to cooperate means to desire or wish in common a thing. But that *common will* or *purpose* does not necessarily mean a previous understanding."

What *common will* or *purpose* can exist between one who acts maliciously and another who acts negligently? If the appellant deliberately omitted to take precautions in order to facilitate the *estafa*, he would not be guilty of estafa witlr falsification through imprudence, but of intentional estafa with falsification. Such deliberate intent, however, was expressly declared *not to exist* by the Court of Appeals, and that finding is conclusive.

In U.S. *vs.* Magcomot, 13 Phil., 386, 389; this Court, through Mr. Justice Mapa, decided that—

> "In view of all the circumstances of the case we are satisfiied that the assault was committed without the concurrence of the will of Isidro and Clemente Magcomot, and in the absence of that volition, which is the fundamental source, of criminal liability, these codefendants can not lawfully be held liable for the aggression and its consequences. On the other hand, it can not be pleaded that the acts committed on the body of the deceased by said codefendants and by Epifanio were perpetrated at the same time, because this simultaneousness does not of itself demonstrate *the concurrence of wills nor the unity of action and purpose which are the bases of the responsibility of two or more individuals*, and in the absence of which it is strictly just, in accordance with the sound principles of law, that each one should only be held liable for the acts perpetrated by him." (Emphasis supplied)

Other cases to the same effect are collated in People *vs.* Tamayo, 44 Phil. 38. Let me note also that it is unquestioned doctrine that it is an essential condition of complicity that the accomplice, "*With knowledge* of the *criminal intent*, should cooperate with the intention of supplying material or moral aid in the execution of the crime" (People *vs*. Tamayo, 44 Phil.,

49, cit. Dec. May 23, 1905; Viada, 5 Sup. 169; Dec. June 28, 1901; Viada, 4 Sup. 196). If to cooperate as an *accomplice* demands knowledge of the criminal intent, how may one cooperate as *principal* without it? It seems to me that such ruling would violate the basic principles of the Revised Penal Code on joint criminal responsibility.

On the procedural side, the objections to appellant's conviction of estafa by falsification through negligence are much more serious. Section 5, Rule 116, upon which the majority relies as justifying the conviction, expresses the following rule:

> "An offense charged necessarily includes that which is proved, when some of the essential elements or ingredients of the former, *as this is alleged in the complaint* or *information*, constitute the letter." (italics mine)

It is not enough, therefore, that the elements of the crime for which an accused is convicted should be proved, but they must also be charged or alleged. This means, if it means anything at all, that the crime proved may be constituted by *some*, i.e., a *lesser number*, of integrating elements or requisites than the offense charged, provided *all* such constituent elements are alleged. Thus, in the eases cited by the majority opinion, a charge of robbery includes that of theft, because to constitute theft, we merely eliminate or subtract the element of violence from the alleged components of robbery. One accused of forcible abduction can be convicted of illegal detention, because the elements are common *except* for the *lewd designs*; robbery is included in brigandage (bandolerismo) because their elements are identical except for the organization of the band for *the purpose of committing highway robbery*. And malversation by a public official and estafa only differ in that the former must be committed by taking advantage of public office; by discarding the latter constituent element, the remainder alleges a crime of estafa. All these cases, therefore, proceed on the theory that by striking out some of the averments in the information the remainder charges the crime of which the accused is convicted. But it has never been held that a crime is included in the offense charged when not only must one element alleged be discarded but another one, not alleged, must be supplied. Illustrative of this case is People *vs.* Oso, 62 Phil., 271, where we quashed a conviction for abduction with rape, because the charge was plain abduction, since carnal knowledge through violence did not appear in the original accusation.

It is very common to say that an accussed may be convicted of any lesser crime than the one charged, without realizing that by lesser crime is meant one that is constituted by a number

of *elements smaller* than those alleged; not a crime that carries a *lighter penalty*.

Now, let us apply the rule to the present case. What are the Ingredients of the crime of falsification in the information?

(1) That the accused made a false statement in a narration of facts (certifying that the impostor's signature was the genuine signature of the true payee);
(2) That he made the false statement in a commercial paper (check);
(3) That he knew that the signature certified to by him was not that of the payee;
(4) That he acted wilfully, unlawfully, and feloniously. Clearly these allegations cannot constitute the crime of falsification by negligence by merely striking out any number of them. And for a plain reason: the averment of *imprudence*, which is the distinctive characteristic of the latter crime, is lacking; it must be supplied from outside the information. Consequently, criminal negligence is not included in the offense charged.

That falsification through imprudence does not include intentional falsification is self-evident. Negligence can not include wilfulness or vice-versa. As pointed out previously, one excludes the other. It is thus unavoidable to conclude that a charge of wilful falsification does not charge falsification by negligence; neither does the latter include the former. Therefore, regardless of the evidence, a conviction for falsification by imprudence can not be had on a charge of wilful forgery, the two being incompatible offenses.

But there is more, and worse. Under the ruling of the majority, each and every charge of a wilful offense (except those where malice is indispensable) will necessarily imply an alternative charge of *criminal negligence*, since the accused may be convicted thereof. Is this not getting around the established rule that not more than one offense should be charged? And how can the accused guard against such hidden multiplicity? If the information should expressly allege that the accused "wilfully, intentionally and/or negligently, by failing to take the requisite precautions" committed an offense, unquestionably the accused could object on the ground that the information on its face charges two offenses, criminal negligence and the wilful crime; and he could demand that the prosecution should elect to stand on one charge alone, and strike out the other. But under the majority ruling, without any specific charge, the accused must stand trial and risk conviction of either the intentional offense or criminal negligence. Is such a procedure at all compatible with the right of the accused to fair play? The accused can not determine whether he is being tried for *committing* the crime or for *not preventing* its commission, when he could have done so.

The unfairness to the accused becomes compounded when it is recalled that negligence

under our Penal Code admits two varieties: *reckless* imprudence and *simple* imprudence, the latter involving a lesser penalty. Under the majority ruling, therefore, a person accused of a wilful offense is actually compelled to face three ways and defend himself against three different offenses: the wilful act, reckless negligence, and simple imprudence. He can not object to any prosecution evidence tending to establish any or all of these multifarious charges; he must also see that his own evidence protects him against all three charges, altho the information recites only one, the intentional offense. I submit that to force an accused to guard against all three possibilities at once is against all fairness, justice and equity. Pitted against the resources of the state, an accused is already at a disadvantage; I see no need to make his position worse.

To cap it all, the accused-appellant in the present case was convicted of criminal negligence on appeal, when he no longer could ask for a reopening of the trial to introduce evidence against such a charge. The least that he is entitled to, it seems to me, is a new trial. It has been the practice hitherto that where the evidence shows the accused to be guilty of a crime different from the one charged, to acquit him of the charge and, without release from custody, remand him to answer tor the proper offense. I see no reason why that rule should not be followed in the present case.

Concepcion, J., concurs.

Date created: October 14, 2014