

LUCIO MUTIA AND EUDOSIO DIGAL, PETITIONERS, VS. HON. COURT OF APPEALS, HON. FERNANDO S. RUIZ, IN HIS CAPACITY AS EXECUTIVE JUDGE, CFI-BOHOL, TAGBILARAN CITY, BRANCH IV, AND LAZA...

G.R. No. L-47203. March 28, 1988

Ponente: SARMIENTO, J.

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SARMIENTO, J.:

The occasion which gave rise to this present controversy was the admission in evidence of the deposition of one of the prosecution witnesses in a criminal case which is still pending in the sala of respondent Judge Fernando S. Ruiz.[1] The petitioners, who are the accused in said criminal case for frustrated homicide, filed a petition for certiorari before the respondent Court of Appeals[2] on the ground that the respondent Judge gravely abused his discretion in admitting this deposition allegedly because there was no formal motion in writing, or a written petition or application for the taking of the said deposition and the petitioners were not given reasonable notice for the taking of the same. However, the said petition was denied. Consequently, the petitioners come to us by way of this petition for review on certiorari of the decision of the Court of Appeals.

Nowhere in Section 7[3] of Rule 119 of the Rules of Court is it stated that a written motion or application for the taking of deposition should be filed in court. Thus, if the court is satisfied with the prosecution's manifestation and explanation in open court that the witness cannot procure bail, or is too sick or infirm to appear at the trial, or has to leave the Philippines with no definite date of returning thereto, it may, in the exercise of its discretionary power, order that the witness deposition be immediately taken upon due notice and in accordance with applicable provisions of the Rules of Court.

Assuming, *ex gratia argumenti*, that there were errors or irregularities in the taking of the questioned deposition, the petitioners, by asking the trial court that they be allowed to cross-examine the same witness also by deposition, on an agreed date and time, are now estopped from questioning such alleged irregularities. Furthermore, by praying that they be allowed to cross-examine the deponent but failing, without justifiable cause, to appear on the date and hour set therefor, the petitioners are deemed to have waived whatever irregularity there was in the taking of the deposition, pursuant to Sec. 7 of Rule 119. We give no credence to their explanation that there could be no such waiver because when they asked leave to cross-examine, they were, allegedly, not yet aware of the illegality of the taking by the prosecution of the deposition; and that it was only while they were going over the records of the case, in preparation for their cross-examination of the deponent, that such defects were discovered. It is unbelievable that from May 31, 1976, when the respondent Judge ordered in open court the taking of the deposition, to August 26, 1976, when the petitioners manifested in writing that they will take the deposition on cross-examination, or a period of about three months, the petitioners were completely unaware of the alleged irregularities which, if true, should be apparent from the record; thus, either they are simply feigning ignorance, or they are guilty of inexcusable negligence.

Lastly, the respondent Court of Appeals correctly held that, if at all, the respondent Judge committed only an error of judgment, not tantamount to a grave abuse of discretion, hence, the proper remedy for correcting such an error is not certiorari, but appeal. Moreover, in the event that the petitioners are later convicted by the trial court, the remedy of ordinary appeal is still available to them.

It is clear that the petitioners failed to show sufficiently that the respondent Court of Appeals had committed any reversible error in the questioned decision.

WHEREFORE, the petition is hereby DENIED. Costs against the petitioners.

This decision is IMMEDIATELY EXECUTORY.

SO ORDERED.

Yap, (Chairman), Melencio-Herrera, Paras, and Padilla, JJ., concur.

[1] Court of First Instance of Bohol, Branch IV.

[2] Jimenez, J.B., J.; Vasquez, Conrado and Reyes, Samuel, JJ.

[3] SEC. 7. Deposition of witness for the prosecution. -- Where, however, it shall satisfactorily appear that the witness cannot procure bail, or is too sick or infirm to appear at the trial, as directed by the order of the court, or has to leave the Philippines with no definite date of returning thereto, he may forthwith be conditionally examined or his deposition immediately taken. Such examination or deposition must be by question and answer, in the presence of the defendant, or after reasonable notice to attend the examination or the taking of the deposition has been served on him, and will be conducted in the same manner as an examination at the trial. Failure or refusal on the part of the defendant to attend the examination or the taking of the deposition after notice hereinbefore provided, shall be considered a waiver. The statement or deposition of the witness thus taken may be admitted in behalf of or against the defendant. His testimony taken, the witness must thereupon be discharged, if he has been detained.

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