

**BERNABE ZAFRA Y CUBILLO, LAURENCIO ZAFRA, TERESO ZAFRA Y
TABANAS AND CELERINO TABOADA Y DE LA CERNA, PETITIONERS,
VS. THE CITY WARDEN, CEBU CITY JAIL, RESPONDENT.**

G.R. No. L-49602. May 17, 1980

Ponente: DE CASTRO, J.

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DE CASTRO, J.:

After their conviction as accessories on a plea of guilty, to the following information for "Robbery In Band"

"That on or about the 29th day of July, 1978, at about 5:15 o'clock P.M., in the City of Cebu, Philippines and within the jurisdiction of the Honorable Court, the said accused, conniving, con-federating, together with Ranulfo Arellano, Toto Estandarte, Elmer Valdez and Edito Tejero, and mutually helping with one another, two of whom were armed with firearms, with deliberate intent, with intent of gain, then succeeded to enter into the store of Gaysen Goldsmith located at Magallanes Street, and by means of violence upon person, to wit: by pointing their firearms upon one Chua Tec cautioning him not to move nor make any outcry, without the knowledge and consent of the owner thereon, did then and there take, steal and carry away there-from the following things to wit:

1)

Assorted Kinds of jewelries worth

P200,000.00

2)

Cash

130.00

3)

One (1) Citizen watch worth

500.00

4)

Two (2) Sharp Calculators worth

600.00

TOTAL

P201,230.00

in the total value of P201,230.00 belonging to said Chua Tec, to the damage and prejudice of the latter in the amount aforesaid.

"That the accused Bernabe Zafra y Cubillo, Laurencio Zafra, Tereso Zafra y Tabanas and Celerino Taboada y dela Cerna, having knowledge of the crime described above but without having participated therein either as principals or as ac-complices, with deliberate intent, with intent or gain, did then and there take part subsequent to its commission, by profiting themselves or assisting the offenders to profit by the effects of the crime."

above-named petitioners were sentenced by the Circuit Criminal Court, 14th Judicial District, Cebu City to suffer the indeterminate penalty of from two (2) years and one (1) day as minimum, to four (4) years, two (2) months and one (1) day, both of prision correccional, as maximum, to indemnify, jointly and severally, the offended party CUA TEC in the unrecovered amount of P201,230.00 and to pay proportionate costs.

Their motion for reconsideration claiming that they should be sentenced only to 21 days of arresto menor, and to indemnify the offended party in such amount as each received out of the amount of P201,230.00, the total value of the properties stolen having been denied, petitioners appealed the decision to this Court on purely question of law. Their motion to fix their respective bail bond for their provisional liberty pending appeal having been also denied by the lower court, petitioners filed a petition for habeas corpus (G.R. No. L-49602) on January 5, 1979.[1] However, the petition for review by way of appeal of the decision of the lower court was filed only on March 28, 1979,[2] in compliance with the Resolution of this Court dated February 26, 1979.

Being intimately interrelated, the two petitions above referred have been consolidated for joint consideration and decision.

As culled from the petition for habeas corpus,[3] the facts which gave rise thereto are as follows:

"1. That in an information dated August 21, 1978, your petitioners were charged as accessories after the fact for the crime of Robbery before the Circuit Criminal Court of Cebu; xerox copy of said information is attached herewith as annex "A";

"2. That upon arraignment on September 8, 1978, your petitioners pleaded guilty as accessories after the fact as charged in the aforementioned in-formation;

"3. That in a decision dated Sept. 15, 1978, which was duly promulgated, the Circuit Criminal Court convicted your petitioners as accessories after the fact and imposed upon all of them the penalty of imprisonment for Two (2) years and One (1) day of prison correccional as the minimum, to Four (4) years Two (2) months and One (1) day of prison correccional as the maximum and to indemnify the offended party Cua Tec in the amount of P201,230.00 and to pay the costs of suit; xerox copy of the said decision is attached herewith as annex "B";

"4. That within the reglementary period, your petitioners not being in accord with the decision against them with respect to the penalty imposed upon them, filed a motion for reconsideration of the aforementioned decision, copy of which motion for reconsideration is attached herewith as annex "C"; your petitioners contended in said motion for reconsideration that at most the penalty that ought to be imposed upon them should only be a prison term of 21 days of arresto menor;

"5. That in an order dated September 20, 1978, the Circuit Criminal Court of Cebu denied the afore-mentioned motion for reconsideration; copy of said order is attached herewith as annex "D";

"6. That on September 26, 1978, your petitioners filed their notice of appeal and they requested that their appeal be lodged before this Honorable Supreme Court on pure questions of law; copy of said notice of appeal is attached herewith as annex "E";

"7. That likewise, on September 26, 1978, your petitioners filed a motion, copy of which is attached herewith as annex "F", praying that the amount of the appeal bail bond for the temporary liberty of your petitioners pending appeal be determined and/or fixed;

"8. That in an order dated September 26, 1978, the Circuit Criminal Court of Cebu gave due course to the appeal interposed by your petitioners; copy of said order is attached herewith as "G";

"9. That however, the Circuit Criminal Court of Cebu in an order dated September 26, 1978, denied the motion of your petitioners to fix and/or determine the amount of the appeal bail bond; copy of said order is attached herewith as annex "H";

"10. That in a manifestation and motion dated November 20, 1978, your petitioners again prayed that they be allowed to post an appeal bail bond and that the amount thereof be fixed, copy of said manifestation and motion is attached herewith as annex "I";

"11. That in an order dated November 23, 1978, copy of which is attached herewith as annex "J", the Circuit Criminal Court of Cebu denied the afore-mentioned manifestation and motion on the ground that since the appeal of your petitioners had been perfected, it has no more jurisdiction to resolve the same;

"12. That despite consistent follow up and urgings on the Clerk of Court of the Circuit Criminal Court of Cebu, the records of the above-entitled case to date had not been forwarded to this Honorable Supreme Court to the great prejudice of your petitioners, thus your petitioners had no other recourse but to file the instant petition since until at present, the appeal of your petitioners had not been docketed yet before this Honorable Supreme Court."

In their petition for review,[4] petitioners' allegations of the essential facts are identical to those alleged in the petition for habeas corpus, so much so that they merely adopted as their Memorandum in the petition for review, the Memorandum they submitted earlier in the petition for habeas corpus,[5] the issues being also essentially the same.

Re: Petition for Habeas Corpus (G.R. No. L-49602)

This petition is not without merit if viewed from the denial by the lower court of the motion of petitioners to fix the amount of bail bond at P3,000.00 each, which they wanted to post for their provisional liberty pending appeal.[6] In denying said motion, the lower court gave as reason the fact that petitioners have pleaded guilty, and

their appeal is purely on a question of law, to wit, the propriety of the penalty imposed upon them.[7]

Regardless of the nature of the appeal, whether it is on question of fact or on purely legal issues, the right to bail pending appeal remains unabridged. The right, after conviction, may be a matter of discretion,[8] but it does not appear in this case that the lower court denied bail upon consideration of certain facts and circumstances that relate to the possibility of petitioner absconding to thwart the process of criminal justice, which is the primary consideration in granting or denying bail.[9] For it is not so much in the imposition of an allegedly excessive penalty that habeas corpus might lie, for as correctly observed by the Solicitor General, appeal is the proper remedy, but in the denial of bail, without sufficient warrant that the detention of petitioners is illegal. While the petitioners pleaded guilty, and their appeal is only on question of law, the questioned sentence has not become final as to give warrant to petitioners' detention pending appeal without right to bail. Nor may petitioners be said to have commenced service of a sentence since they have assailed their sentence as illegal. The lower court's reason for denying bail pending appeal is, therefore, legally untenable. Petitioners should have been allowed to post bail for their provisional liberty while their appeal is pending in this Court.

In any event, with how the petition for review is going to be resolved, this petition for habeas corpus would become academic and moot.

Re: Petition for Review (G.R. No. L-49938)

The sole issue raised in the appeal is whether the penalty imposed by the lower court is proper. The contention of petitioners is that in determining the penalty to be imposed on them as accessory in the offense charged, which is two degrees lower than that prescribed for the consummated offense, the whole penalty provided for in paragraph 5 of Article 294 of the Revised Penal Code for simple robbery and not paragraph 5 of Article 295 which is the penalty prescribed when the robbery is committed by a band, as was applied by the lower court, should be the basis.

The Solicitor General agrees with petitioners not because regardless of whether the robbery committed is by a band or not, the basis for determining the penalty for the accessory in the crime is invariably the penalty prescribed for simple robbery, unattended by any qualifying or aggravating circumstance, but because in the instant case, the petitioners pleaded guilty to an information which charges simple robbery, not robbery in band, although so designated by the prosecuting fiscal. The Solicitor General explains his position in the following manner:

"Although the crime to which petitioners had pleaded guilty as accessories had been designated as Robbery in Band in the Information, the allegations in the body thereof show that only two of the four principal accused were armed. Under Article 296 of the Revised Penal Code, it is necessary that there be more than three armed malefactors taking part in the commission of the robbery in order that the crime could be considered as one committed by a band. Falling short of this requirement, the crime charged in the Information in question cannot be properly considered as robbery in band. Contrary to the lower court's ruling, the definition of band in General Order No. 54 dated October 22, 1975, did not actually repeal the definition of band under Article 296 of the Revised Penal Code. As defined in said General Order, 'a band consists of three or more persons, at least one of whom is armed, for use in the commission of a crime.' However, this definition was strictly 'for purposes' of this General Order, which was to vest on the 'military tribunals x x x' exclusive jurisdiction of the crime of robbery committed by a band as defined in said General Order No. 54. There was no provision in this General Order from which could be drawn the slightest implication, that band as defined in Article 296 of the Revised Penal Code has been repealed. Besides, General Order No. 54 had been repealed or superseded by General Order No. 59 dated June 24, 1977, which invariably removed from the jurisdiction of Military Tribunals the crime of robbery in the manner that it might have been committed. Hence, at the time of the commission of the crime in the present case on July 29, 1978, General Order No. 54 was no longer in effect."

We are in full accord with the above observation of the Solicitor General. Accordingly, his recommendation as to the proper penalty to be imposed on petitioners, which is that of destierro maximum, taking into account the mitigating circumstance of plea of guilty, the prescribed penalty being destierro in its maximum period to arresto mayor in its medium period (Article 71, in relation to sub-paragraph 4 of Article 61 of the Revised Penal Code),^[10] merits our approval.

As to the civil liability, We likewise agree with the observation of the Solicitor General that no error was committed by the lower court in condemning petitioners to pay the offended party in the sum of P201,230.00 which represents the total value of the properties subject matter of the robbery as alleged in the information to which the petitioners pleaded guilty, and there being no principals yet convicted as they have remained at large, and petitioners' liability being joint and several or in solidum as specifically provided by law.

WHEREFORE, the judgment appealed from is hereby modified by imposing the penalty of destierro in its maximum period instead of the prison term imposed by the court a quo, and affirmed in all other respects. It appearing that petitioners have served even more than the maximum of the imposable penalty, because they have been in detention since their arrest up to the present time, their immediate discharge is hereby ordered, unless they are being detained for some other causes.

SO ORDERED.

Teehankee, (Chairman), Makasiar, Fernandez, and Guerrero, JJ., concur.
Melencio-Herrera, J., took no part.

[1] p. 2, Rollo, G.R. No. L-49602.

[2] p. 16, Rollo, G.R. No. L-49938.

[3] G.R. No. L-49602.

[4] G.R. No. L-49938.

[5] p. 35, Rollo, G.R. No. L-49938.

[6] Annex "F" to Petition, p. 31, Rollo, G.R. No. L-49602.

[7] Annex "M" to Petition, p. 33 Rollo, Id.

[8] People vs. Caderao, L-15699, April 22, 1963, 7 SCRA 639.

[9] Alvendia vs. Villaluz, 66 SCRA 38; Montano vs. Ocampo, 49 O.G. 1855

[10] Uy Chin Hua vs. Dinglasan, 86 Phil. 617 (1950).

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