

IN THE MATTER OF THE PETITION OF ROMAN DE ASIS FOR A WRIT OF HABEAS CORPUS. ROMAN DE ASIS, PETITIONER, VS. THE HON. HONORIO ROMERO, PRESIDING JUDGE, COURT OF FIRST INSTANCE OF ...

G.R. No. L-33125. September 30, 1971

Ponente: CASTRO, J.

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CASTRO, J.:

In this petition for habeas corpus, the petitioner Roman de Asis prays for his release from detention through the nullification of the order for his arrest dated August 18, 1970, issued by the respondent Judge Honorio Romero of the Court of First Instance of Pampanga on the basis of an information filed by the respondent assistant provincial fiscal Antonio G. P. Fausto of Pampanga with the said court charging the petitioner with "kidnapping with serious illegal detention."

It appears that on June 3, 1970, in the absence of the petitioner and his counsel, the respondent fiscal conducted a preliminary investigation pursuant to a complaint for kidnapping filed by one Eduardo Sumang against De Asis and two other persons. According to the respondent fiscal, a subpoena issued on May 14, 1970 was duly served upon De Asis on May 28, 1970, as evidenced by the return of service thereof attached to the records of the instant petition, but "he refused to sign his name to acknowledge receipt of the copy of the subpoena as per return made by Pat. R. Salvador of San Simon Pampanga, thus giving him ample time and opportunity to appear."

An information for "kidnapping with serious illegal detention" was thereafter filed against the petitioner with the CFI of Pampanga.

On August 18, 1970, on the basis of this information, the respondent judge issued the order of arrest in question.

The central theme of the petitioner De Asis' contention is that the respondent judge issued the warrant of arrest in question without previously having personally examined under oath or affirmation the complainant and the latter's witnesses in the said case, in violation of section 1(3) of Article III of the Constitution.

After he was apprehended, De Asis filed with the lower court a petition for bail dated December 17, 1970. Hearing on this petition was postponed several times on motion of De Asis.

In the meantime, on December 21, 1970, De Asis was arraigned; with the aid of counsel, he entered a plea of not guilty.

After De Asis' arraignment, the fiscal's office of Pampanga filed with the respondent court a motion to admit an amended information dated February 1, 1971, charging De Asis and his co-accused with kidnapping with murder, in lieu of the original information for "kidnapping with serious illegal detention." This motion to amend was instituted after a preliminary investigation conducted thereon by the provincial fiscal's office of Pampanga. The lower court granted the motion with respect to De Asis' co-accused (who had not yet been arraigned at that

time) in an order dated February 9, 1971, but deferred action on the motion as to De Asis, in view of the filing of the instant petition for habeas corpus on February 8, 1971 as well as De Asis' motion for reconsideration of the preliminary investigation (that led to the filing of the motion to amend information).

On March 3, 1971, a petition for provisional release was filed with this Court by De Asis, alleging illegality of (1) the war-rant of arrest (in question) issued by the respondent judge against him as well as of (2) the filing of the aforesaid motion to amend information which, in the petitioner's opinion, charges an altogether different offense and for which no warrant for his arrest has as yet been issued.

On March 23, 1971, the respondent fiscal filed his opposition to this petition for provisional release on the following grounds: (1) the motion to amend information was filed because of the discovery of the body of the alleged kidnapped victim (Rafael Sumang) subsequent to the filing of the original information; and (2) the offense of "kidnapping with serious illegal detention" and the offense of murder which is to be added to the original information, are both capital offenses, the former being punishable by reclusion perpetua to death, the latter by reclusion temporal in its maximum period to death.

On April 2, 1971, we denied the petition for provisional release, "without prejudice to [De Asis] taking it up with the lower court."

In the reported decisions of this Court is a fairly excellent catalogue of dissertations on the precious position of personal freedom as part of the nation's heritage and the country's political consciousness. But although the existing legal order guarantees to every individual security against any non-due-process type or form of restraint or detention, it nonetheless leaves it to and expects him to initiate the assertion of his corresponding right, in conformity with rules laid down or expounded by the institutions which the people themselves, in their sovereign capacity, have by covenant established.

One of the most important of these settled rules is that any objection to the procedure followed in the matter of the acquisition by a court of jurisdiction over the person of the accused must be opportunely raised before he enters his plea, otherwise the objection is deemed waived.[1]

De Asis could have, right after his arrest, objected to the regularity of the issuance of the warrant of arrest in question. Instead he not only filed a petition for bail with the lower court, thereby accepting the court's jurisdiction over his person, but he also pleaded, on arraignment, to the information filed against him.

As to the argument that the respondent fiscal is "bent" on filing an amended information for kidnapping with murder in lieu of the original information for "kidnapping with serious illegal detention," and that the said amended information charges an altogether different offense for which no warrant for his arrest has as yet been issued, we are persuaded that the said argument cannot be countenanced under the facts here obtaining.

In resolving De Asis' petition for habeas corpus, this Court must determine, on the basis of the relevant facts conceded after proper inquiry, whether or not the petitioner is being illegally restrained of his liberty, and, if so, relieve him from the unlawful restraint.

Judging from the facts disclosed in the case at bar, the petitioner does not appear to be under an unlawful restraint of his liberty. For, if he is now under detention, it is by virtue of the questioned warrant of arrest issued for his apprehension, which, even if we assume that it was defective at the time of its issuance, has been cured, as we said earlier, of its supposed infirmities by his failure to interpose the proper objection thereto at the opportune time.

The petitioner, however, stresses that it is the intention of the respondent fiscal to amend the original information

in connection with which the questioned warrant of arrest was issued. But, even if this intention of the fiscal is conceded, it is not controverted that he filed in the court a quo, as the Rules of Court require, a motion to effectuate the amendment desired. Naturally, there will be a hearing on this motion, and in the course of such proceeding, in which the petitioner De Asis will be present, oral testimony and other evidence will be adduced concerning the fact of death and identity of the alleged kidnapped victim and other related circumstances. The hearing on the said motion, in our opinion, serves and fulfills the essential purpose and requirements of a full-blown preliminary investigation for the alleged crime of murder intended to be added to the original basic charge of kidnapping as an inextricable part thereof. Thus, if the court a quo finds and is convinced, at the hearing on the motion to amend the information, that there is prima facie evidence of murder indispensably connected with the alleged kidnapping, then it is but natural, nay, logical, to expect that it will grant the said motion. In such event, it is clearly wishful thinking and an unavailing technicality to require the court a quo to order the release of the petitioner De Asis and then (or then and there) issue another warrant for his arrest. Upon the other hand, if the said court believes that the original information should stand as it is, then for the more reason that the petitioner should not be ordered released.

ACCORDINGLY, the prayer of the petitioner Roman de Asis that he be released and discharged from custody is hereby denied. No costs.

Concepcion, C.J., Reyes, J.B.L., Dizon, Makalintal, Zaldivar, Teehankee, and Villamor, JJ., concur.

Fernando, J., see dissenting opinion.

Barredo, J., in the result.

Makasiar, J., reserves his right to write a dissenting opinion.

[1] People vs. Marquez, L-23654, March 28, 1969, 27 SCRA 808, 812 (per Barredo, J.), citing People vs. Solon, 47 Phil. 443; People vs. Magpale, 70 Phil. 176; People vs. Lambino, 103 Phil. 504; People vs. Selfaisan, et al., L-14732, January 28, 1961, 1 SCRA 235; People vs. Casiano, February 16, 1961, 1 SCRA 479.

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CONCURRING OPINION

BARREDO, J.:

I concur in the result.

In voting in favor of the judgment in this case, I do so with reservations as to question of whether or not the omission of a preliminary examination conducted personally by the judge as required by the Bill of Rights, as distinguished from the preliminary investigation which is not constitutionally provided for, is subject to waiver. At the very least, I am very sure that such waiver must be nothing less than express or clearly made with consciousness on the part of the accused of his rights in the premises.

As regards the amendment of the information, I believe that it is better for the petitioner that such amendment is admitted instead of allowing the prosecution to file a separate information, which, under settled jurisprudence, can be done inasmuch as the accused in circumstances as those herein obtaining is not considered placed in jeopardy

as to the graver offense. In any event, if as stated in the main opinion, evidence is presented during the hearing of the motion for leave to amend, it would not be because the rules so require, but for some other reason. Personally, I consider such evidence unnecessary.

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DISSENTING OPINION

FERNANDO, J.:

With due recognition and full awareness that the decision reached by this Court is on the whole an expedient and pragmatic solution that cuts through the tangled maze of procedural irregularities, embodied in an opinion of Justice Castro characterized by craftsmanship of a high order, I feel constrained to dissent. I shall explain why.

1. The basis for my inability to view matters in the same light the Court does is the compelling force of the constitutional right to be free from arrest except on the existence of a probable cause, the determination of which under the Constitution is granted solely to a judge, not to any other official, "after examination under oath or affirmation of the complainant and the witnesses he may produce, * * *." [1] Such a right may be waived, it is true, but only on a showing that the person so arrested without the constitutional requisites having been fully complied with has manifested his willingness, whether expressly or impliedly, but in either case in language or conduct, unmistakable and unequivocal, to submit to such a procedure, even if tainted by unconstitutionality. The record for me, and this I say with due respect, fails to support such a finding.

2. It is undisputed that fidelity to the above constitutional mandate requires literal compliance with its terms. So it was expressly affirmed in a 1948 decision, *Sayo v. Chief of Police of Manila*. [2] Thus: "Under this constitutional precept no person may be deprived of his liberty, except by warrant of arrest or commitment issued upon probable cause by a judge after examination of the complainant and his witness. And the judicial authority to whom a person arrested by a public officer must be surrendered can not be any other but a court or judge who alone is authorized to issue a warrant of commitment or provisional detention of the person arrested pending the trial of the case against the latter. Without such warrant of commitment, the detention of the person arrested for more than six hours would be illegal and in violation of our Constitution." [3]

3. It is imperative, to my mind, that constitutional rights, certainly not excluding the safeguard against being arrested without the procedure set forth in the Constitution being strictly adhered to, must be maintained in their undiluted form. No intrusion into the domain of liberty is to be allowed except in accordance with what the fundamental law prescribes. A regime of constitutionalism would be meaningless if it were otherwise. The judiciary is called upon to assure that it exists as an actuality and not merely as a desirable goal to be achieved.

This is not to assert that a waiver of constitutional rights is at all times and under all circumstances barred. If knowingly made, it has the effect of an individual being thereafter precluded from complaining that there was an infringement of the guarantees to which he, like any other individual, is entitled. For a waiver to exist though, there must ordinarily be an intentional relinquishment. It must be shown that it was made with full understanding of the consequences entailed. Such a waiver may, of course, be implied from his conduct, but only if the conclusion becomes inescapable that such indeed was his intention.

Justice Laurel did expound with force and clarity in *Pasion Vda. de Garcia v. Locsin*[4] the authoritative doctrine. Thus: "Doubtless, the constitutional immunity against unreasonable searches and seizures is a personal right which may be waived. * * * The waiver may be either express or implied * * *. No express waiver has been made in the case before us. It is urged, however, that there has been a waiver by implication. It is well-settled that to constitute a waiver of a constitutional right, it must appear, first, that the right exists; secondly, that the person involved had knowledge, either actual or constructive, of the existence of such right; and, lastly, that said person had an actual intention to relinquish the right. * * * Certainly, the constitutional immunity from unreasonable searches and seizures, being a personal one, cannot be waived by anyone except the person whose rights are invaded or one who is expressly authorized to do so in his or her behalf. * * * It is, as Judge Cooley observes, but a submission to the authority of the law. * * * As the constitutional guaranty is not dependent upon any affirmative act of the citizen, the courts do not place the citizen in the position of either contesting an officer's authority by force, or waiving his constitutional rights; but instead they hold that a peaceful submission to a search or seizure is not a consent or an invitation thereto, but is merely a demonstration of regard for the supremacy of the law." [5]

The words of the late Justice Black in *Johnson v. Zerbst*, [6] cited with approval in *Abriol v. Homeres* [7] speaks to the same effect. Thus: "'Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of Counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a Federal Court's authority to deprive an accused of his life or liberty. When this right is properly waived, the assistance of Counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence. If the accused, however, is not represented by Counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or liberty. A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to failure to complete the court - as the Sixth Amendment requires - by providing Counsel for an accused who is unable to obtain Counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake. If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed. The judgment of conviction pronounced by a court with-out jurisdiction is void, and one imprisoned thereunder may obtain release by habeas corpus. * * *.'" [8]

4. There is thus a denial of a constitutional right resulting in the loss of jurisdiction of the court that issued the warrant of arrest. Under the circumstances, the invocation of the remedy of habeas corpus is both fitting and appropriate. It is provided in the Rules of Court that where it is shown that where a person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or judge, the writ shall not be allowed. [9] Once a jurisdictional defect is shown though, and a deprivation of a constitutional right is an infirmity impressed with such a character, the competence to act further by such a court ceases. The person detained may, through this proceeding, assail the legality of his confinement and secure his release. So we have held in a number of cases impressive for their number and unanimity. [10]

5. The compulsion exerted by the above doctrine which for me are controlling necessarily results in my inability to reach the same conclusion as my brethren. With due respect, I feel that only thus would the great writ of liberty continue serving its historic purpose as the most speedy mode of assuring that no illegal detention is tolerated. Moreover, the time has long been overdue for lower court judges all over the country to realize that when the Constitution requires from them an examination under oath or affirmation of the complainant and the witnesses he may produce before a valid warrant of arrest may be issued, it means what it says. Hence this dissent.

[1] The Bill of Rights provides: "The right of the people to be secure in their persons, houses, papers, and effects

against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirm-ation of the complainant and the witnesses he may produce, and particularly des-cribing the place to be searched, and the persons or things to be seized." Art. III, Sec. 1, par. (3).

[2] 80 Phil. 859 (1948). This constitutional provision likewise bars the Commissioner of Immigration from issuing a warrant of arrest to determine whether probable cause exists for the deportation of an alien, Cf. *Qua Chee Gan v. Deportation Board*, L-20290, Sept. 30, 1963, 9 SCRA 27; *Vivo v. Montesa*, L-24576, July 29, 1968, 24 SCRA 155; *Contemprate v. Acting Commissioner of Immigration*, L-28604, Oct. 30, 1970, 35 SCRA 623.

[3] *Ibid*, p. 867.

[4] 65 Phil. 689 (1938).

[5] *Ibid*, pp. 694-695.

[6] 304 US 458 (1938).

[7] 84 Phil. 525 (1949).

[8] *Ibid*, pp. 533-534.

[9] Section 4 of Rule 102 provides: "When writ not allowed or discharge authorized. - If it appears that the person alleged to be restrained of his liberty is in the custody of an officer under process issued by a court or judge or by virtue of a judgment or order of a court of record, and that the court or judge had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or if the jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process, judgment or order. Nor shall anything in this rule be held to authorize the discharge of a person charged with or convicted of an offense in the Philip-pines, or of a person suffering imprisonment under lawful judgment."

[10] Cf. *Conde v. Rivera*, 45 Phil. 650 (1924); *Harden v. Director of Prisons*, 81 Phil. 741 (1948); *Abriol v. Homeres*, 84 Phil. 525 (1949); *Chavez v. Court of Appeals*, L-29169, August 19, 1968, 24 SCRA 663; *Celeste v. People*, L-31435, January 30, 1970, 31 SCRA 391; *Gumabon v. Director of the Bureau of Prisons*, L-30026, January 30, 1971, 37 SCRA 420.

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