

**CO TE HUE, PETITIONER, VS. HON. DEMETRIO B. ENCARNACION,
JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA,
RESPONDENT.**

G.R. No. L-6415. January 26, 1954

Ponente: BAUTISTA ANGELO, J.

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BAUTISTA ANGELO, J.:

This is a petition for certiorari seeking to set aside an order of the Court of First Instance of Manila which directs that petitioner be included as one of the accused in a criminal case for estafa from which he was previously excluded by an order of the court.

On July 15, 1950, several persons, including petitioner, were charged with the crime of estafa in the Court of First Instance of Manila: (Criminal Case No. 13229). Petitioner was arraigned and pleaded not guilty. On August 29, 1951, upon motion filed by the offended party, with the conformity of his counsel, and without objection on the part of the fiscal, the case was provisionally dismissed as to petitioner. On May 31, 1952, the fiscal filed a motion to revive the case on the ground that its dismissal with respect to petitioner "was impractical, discriminating since the ground of dismissal was not based on the merits of the case." Petitioner objected to this motion but the court granted it stating that after a reinvestigation it was found that he was just as guilty as the other accused. On November 12, 1952, petitioner moved to quash the information as to him alleging that his reinclusion in the same after it has been provisionally dismissed places him in double jeopardy. This motion was denied, and respondent Judge having refused to reconsider his order petitioner filed the present petition for certiorari alleging that said Judge has acted in excess of his jurisdiction.

It is the theory of petitioner that the charge for estafa filed against him having been dismissed albeit provisionally without his express consent, its revival constitutes double jeopardy which bars a subsequent prosecution for the same offense under section 9, Rule 113, of the Rules of Court. This claim is disputed by the Solicitor General who contends that, considering what has transpired in relation to the incident, the provisional dismissal is no bar to his subsequent prosecution for the reason that the dismissal was made with his express consent.

We are inclined to uphold the view of the Solicitor General. From the transcript of the notes taken at the hearing in connection with the motion for dismissal, it appears that a conference was had between petitioner and the offended party in the office of the fiscal concerning the case and that as a result of that conference the offended party filed the motion to dismiss. It also appears that as no action has been taken on said motion, counsel for petitioner invited the attention of the court to the matter who acted thereon only after certain explanation was given by said counsel. And when the order came the court made it plain that the dismissal was merely provisional in character. It can be plainly seen that the dismissal was effected not only with the express consent of petitioner but even upon the urging of his counsel. This attitude of petitioner, or of his counsel, takes this case out of the operation of the rule.

A case in point is *People vs. Romero*,[*] G. R. No. L-4517-20, promulgated on July 31, 1951, wherein the order

of dismissal was issued after the defense counsel has invited the attention of the court to its former order to the effect that the case would be dismissed if the fiscal was not ready to proceed with the trial on June 14, 1950. When the case reached this Court on appeal, counsel claimed that "it is indubitable that your defendant did not himself personally move for the dismissal of the cases against him nor expressly consent to it; and that the dismissal was, in effect, an acquittal on the merits for failure to prosecute, because no reservation was made in favor of the prosecution to renew the charges against your defendant in the ulterior proceedings." In overruling this plea, this Court said:

"Whatever explanation that may be given by the attorneys for the defendant, it is a fact which cannot be controverted that the dismissal of the cases against the defendant was ordered upon the petition of defendant's counsel. In opening the postponement of the trial of the cases and insisting on the compliance with the order of the court dated May 25, 1950 that the cases be dismissed if the Provincial Fiscal was not ready for trial on the continuation of the hearing on June 14, 1950, he obviously insisted that the cases be dismissed- The fact that the counsel for the defendant and not the defendant himself, personally moved for the dismissal of the cases against him, had the same effect as if the defendant had personally moved for such dismissal, inasmuch as the act of the counsel in the prosecution of the defendant's cases was the act of the defendant himself, for the only case in which the defendant cannot be represented by his counsel is in pleading guilty according to section 3, Rule 114, of the Rules of Court."

There is more weighty reason to uphold the theory of reinstatement in the present case than in that of Romero considering the particularity that the dismissal was provisional in character. In our opinion that is not the dismissal contemplated by the rule that has the effect of barring a subsequent prosecution.

Petition is dismissed with costs.

Pablo, Padilla, Montemayor, Reyes, Jugo, and Labrador, JJ., concur.

Bengzon, J., concurs in the result.

[*] 89 Phil., 672.

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