

EDMUNDO S. ALBERTO, PROVINCIAL FISCAL AND BONIFACIO C. INTIA, 1ST ASST. PROVINCIAL FISCAL, BOTH OF CAMARINES SUR, PETITIONERS, VS. HON. RAFAEL DE LA CRUZ, IN HIS CAPACITY AS JUD...

G.R. No. L-31839. June 30, 1980

Ponente: CONCEPCION JR., J.

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CONCEPCION JR., J.:

Petition for certiorari, with a prayer for the issuance of a writ of preliminary injunction, to annul and set aside the order of the respondent Judge, dated January 26, 1970, directing the petitioners, Provincial Fiscal and Assistant Provincial Fiscal of Camarines Sur, to amend the information filed in Criminal Case No. 9414 of the Court of First Instance of Camarines Sur, entitled: "The People of the Philippines, plaintiff, versus Eligio Orbita, accused," so as to include, as defendants, Governor Armando Cledera and Jose Esmeralda, assistant provincial warden of Camarines Sur; as well as the order dated February 18, 1970, denying the motion for the reconsideration of the said order.

In Criminal Case No. 9414 of the Court of First Instance of Camarines Sur, Eligio Orbita, a provincial guard, is prosecuted for the crime of Infidelity in the Custody of Prisoner, defined and punished under Article 224 of the Revised Penal Code, committed, as follows:

"That on or about the 12th day of September, 1968, in the barrio of Taculod, municipality of Canaman, province of Camarines Sur, Philippines, and within the jurisdiction of this Honorable Court, the said accused, being then a member of the Provincial Guard of Camarines Sur and specially charged with the duty of keeping under custody and vigilance detention prisoner Pablo Denaque, did then and there with great carelessness and unjustifiable negligence leave the latter unguarded while in said barrio, thereby giving him the opportunity to run away and escape, as in fact said detention prisoner Pablo Denaque did run away and escape from the custody of the said accused." [1]

In the course of the trial thereof, or more particularly during the cross-examination of prosecution witness Jose Esmeralda, assistant provincial warden of Camarines Sur, the defense brought forth and confronted the witness with a note, marked as Exhibit 2, purportedly written by Gov. Armando Cledera, asking Jose Esmeralda to send five men to work in the construction of a fence at his house at Taculod, Canaman, Camarines Sur, then leased by the province and used as an official guest house. Jose Esmeralda, declared, however, that he could not remember who handed the note to him; that he was not sure as to the genuineness of the signature appearing therein; and that he was not present when the note was made and signed by Gov. Cledera. [2] Believing that the escape of Pablo Denaque was made possible by the note of Gov. Cledera to Jose Esmeralda and that Cledera and Esmeralda are equally guilty of the offense for which the accused Eligio Orbita had been charged, the defense counsel filed a motion in court seeking the amendment of the information so as to include Gov. Cledera and Jose Esmeralda as defendants therein. [3]

Acting upon said motion, as well as the opposition of the prosecution officers,[4] and finding that "the court cannot grant the motion or order the inclusion of Gov. Cledera and Lt. Esmeralda at this stage unless an investigation is made," the respondent Judge directed the Fiscal's office, within 15 days from date, "to cause the further investigation of the case, taking into consideration the provisions of Article 156 in relation to Articles 223 and 224 of the Revised Penal Code in order to determine once and for all whether the Governor as jailer of the Province and his assistant have any criminatory participation in the circumstances of Pablo Denaque's escape from judicial custody." [5]

In compliance with said order, the Fiscal set the reinvestigation of the case for December 19, 1969. Summonses were issued to Gov. Cledera, Jose Esmeralda, Lorenzo Padua, the provincial warden, and the accused Eligio Orbita to be present thereat.[6] But, on the date set for the reinvestigation of the case, only Gov. Cledera, Jose Esmeralda and Lorenzo Padua appeared. The accused Eligio Orbita did not appear. Neither was the note (Exhibit 2) produced. Since no additional evidence was presented, the Fiscal manifested in court on January 2, 1970 that "after conducting a reinvestigation of the case and after a thorough and intelligent analysis of the facts and law involved, no prima facie case against Governor Cledera and Jose Esmeralda exist, hence, they cannot be charged." [7]

On January 19, 1970, the accused Eligio Orbita filed a "Motion for Reconsideration" praying "that the Order of this Honorable Court dated December 11, 1969 be reconsidered in that instead of ordering the Provincial Fiscal to reinvestigate this case, on the basis of the evidence already adduced during the trial of this case, he be ordered to amend the information to include Cledera and Esmeralda it appearing from the evidence on record that their inclusion is warranted." [8]

On January 26, 1970, the respondent Court issued the order complained of, the dispositive portion of which reads, as follows:

"WHEREFORE, premises considered, in the light of the facts brought about by the prosecuting fiscal, let the charges be so amended by including in the information the author or writer of Exhibit 2 and the person or persons who carried out the said orders considering the provisions of Article 156 in relation to Articles 223 and 224 of the Penal Code." [9]

The Fiscal filed a motion for the reconsideration of said order,[10] but the motion was denied on February 18, 1970.[11] Hence, the instant recourse.

From the facts of the case, We are convinced that the respondent Judge committed an error in ordering the fiscal to amend the information so as to include Armando Cledera and Jose Esmeralda as defendants in Criminal Case No. 9414 of the Court of First Instance of Camarines Sur. It is the rule that a fiscal by the nature of his office, is under no compulsion to file a particular criminal information where he is not convinced that he has evidence to support the allegations thereof.[12] Although this power and prerogative of the Fiscal, to determine whether or not the evidence at hand is sufficient to form a reasonable belief that a person committed an offense, is not absolute and subject to judicial review,[13] it would be embarrassing for the prosecuting attorney to be compelled to prosecute a case when he is in no position to do so, because in his opinion, he does not have the necessary evidence to secure a conviction, or he is not convinced of the merits of the case. The better procedure would be to appeal the Fiscal's decision to the Ministry of Justice and/or ask for a special prosecutor.

Besides, it cannot be said that the Fiscal had capriciously and whimsically refused to prosecute Cledera and Esmeralda. In his order directing the Fiscal's office to conduct a further reinvestigation of the case, the respondent Judge candidly admitted that without a reinvestigation of the case, he cannot determine once and for all whether or not to include Gov. Cledera and Jose Esmeralda in the information. Pursuant thereto, a reinvestigation was

conducted by the fiscal's office. Summonses were issued. But, no additional fact was elicited since Eligio Orbita did not appear thereat. Neither was the note (Exh. 2) presented and produced. Gov. Cledera could not admit nor deny the genuineness of the signature appearing in the note since it was not on hand. Such being the case, the prosecuting officers had reason to refuse to amend the information filed by them after a previous preliminary examination and investigation.

Moreover, there is no sufficient evidence in the record to show a prima facie case against Gov. Cledera and Jose Esmeralda. The order to amend the information is based upon the following facts:

"1. Pablo Denaque, a detention prisoner for homicide, escaped while working at the Guest House of Governor Cledera on September 12, 1968;

"2. The Governor's residence at that time is being rented by the province and its maintenance and upkeep is shouldered by the province of Camarines Sur;

"3. That neither Governor Cledera nor Lt. Jose Esmeralda was charged or entrusted with the duty of conveying and guarding the detainee from the jail to the residence of the governor;

"4. That the detainee worked at the Governor's residence by virtue of an order of the Governor (Exhibit 2) which was implemented by Lt. Esmeralda; and

"5. That it was the accused Orbita himself who handpicked the group of prisoners to work at the Governor's residence on September 12, 1968." [14]

Article 156 of the Revised Penal Code provides:

"Art. 156. Delivering prisoners from jails. - The penalty of arresto mayor in its maximum period to prision correccional in its minimum period shall be imposed upon any person who shall remove from any jail or penal establishment any person confined therein or shall help the escape of such person, by means of violence, intimidation, or bribery. If other means are used the penalty of arresto mayor shall be imposed.

If the escape of the prisoner shall take place outside of said establishments by taking the guards by surprise, the same penalties shall be imposed in their minimum period."

The offense may be committed in two ways: (1) by removing a person confined in any jail or penal establishment; and (2) by helping such a person to escape. To remove means to take away a person from the place of his confinement, with or without the active cooperation of the person released. To help in the escape of a person confined in any jail or penal institution means to furnish that person with the material means such as a file, ladder, rope, etc. which greatly facilitate his escape.[15] The offense under this article is usually committed by an outsider who removes from jail any person therein confined or helps him escape. If the offender is a public officer who has custody or charge of the prisoner, he is liable for infidelity in the custody of prisoner defined and penalized under Article 223 of the Revised Penal Code. Since Gov. Cledera, as governor, is the jailer of the province,[16] and Jose Esmeralda is the assistant provincial warden, they cannot be prosecuted for the escape of Pablo Denaque under Article 156 of the Revised Penal Code.

There is likewise no sufficient evidence to warrant their prosecution under Article 223 of the Revised Penal Code, which reads, as follows:

"ART. 223. Conniving with or consenting to evasion. - Any public officer who shall consent to the escape of a prisoner in his custody or charge, shall be punished:

- By prision correccional in its medium and maximum periods and temporary disqualification in its maximum period to perpetual special disqualification, if the fugitive shall have been sentenced by final judgment to any

penalty.

- By prison correccional in its minimum period and temporary special disqualification, in case the fugitive shall not have been finally convicted but only held as a detention prisoner for any crime or violation of law or municipal ordinance."

In order to be guilty under the aforequoted provisions of the Penal Code, it is necessary that the public officer had consented to, or connived in, the escape of the prisoner under his custody or charge. Connivance in the escape of a prisoner on the part of the person in charge is an essential condition in the commission of the crime of faithlessness in the custody of the prisoner. If the public officer charged with the duty of guarding him does not connive with the fugitive, then he has not violated the law and is not guilty of the crime.[17] For sure, no connivance in the escape of Pablo Denaque from the custody of the accused Eligio Orbita can be deduced from the note of Gov. Cledera to Jose Esmeralda asking for five men to work in the guest house, it appearing that the note does not mention the names of the prisoners to be brought to the guest house; and that it was the accused Eligio Orbita himself who picked the men to compose the work party.

Neither is there evidence to warrant the prosecution of Cledera and Esmeralda under Article 224 of the Revised Penal Code. This article punishes the public officer in whose custody or charge a prisoner has escaped by reason of his negligence. The negligence resulting in evasion is definite laxity amounting to deliberate non-performance of duty.[18] In the instant case, the respondent Judge said:

"We cannot, for the present be reconciled with the idea that the escape of Denaque was facilitated by the Governor's or his assistant's negligence. According to law, if there is any negligence committed, it must be the officer who is charged with the custody and guarding of the prisoner. x x x"[19]

We find no reason to set aside such findings.

WHEREFORE, the orders issued on January 26, and February 18, 1970 in Criminal Case No. 9414 of the Court of First Instance of Camarines Sur, entitled: "The People of the Philippines, plaintiff, versus Eligio Orbita, accused," are hereby annulled and set aside. The respondent Judge or any other judge acting in his stead is directed to proceed with the trial of the case. Without costs.

SO ORDERED.

Barredo, (Chairman), Abad Santos, and De Castro,* JJ., concur.
Aquino, J., see concurring opinion.

[*] Mr. Justice Pacifico P. de Castro, a member of the First Division was designated to sit in the Second Division.

[1] Rollo, p. 23.

[2] Id., p. 8.

[3] Id., p. 28.

[4] Id., p. 32.

[5] Id., p. 41.

[6] Id., p. 4; par. 11 of Petition.

[7] Id., p. 49.

[8] Id., p. 52.

[9] Id., p. 17.

[10] Id., p. 55.

[11] Id., p. 22.

[12] People vs. Moll, 68 Phil. 626; Zulueta vs. Nicolas, 102 Phil. 944; Bagatua vs. Revilla, 104 Phil. 392.

[13] De Castro Jr. vs. Castañeda and Liceralde, 11 Phil. 765.

[14] Rollo, pp. 17-18.

[15] Albert, The Revised Penal Code, p. 368.

[16] Sec. 1731, Revised Administrative Code.

[17] U.S. vs. Bandino, 29 Phil. 459.

[18] Aquino, The Revised Penal Code, p. 1213.

[19] Rollo, p. 46.

CONCURRING OPINION

AQUINO, J.:

I concur. Governor Armando Cledera and Jose Esmeralda can be indicted in court by the fiscal not by virtue of a judicial order but only after he has conducted the proper preliminary investigation in accordance with Presidential Decree No. 77.

The case against Cledera and Esmeralda, if there is a prima facie case against them, can be prosecuted separately and does not have to be included in the case against Eligio Orbita.

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