

PEOPLE OF THE PHILIPPINES, PETITIONER, VS. JUDGE PIO B. FERANDOS, COURT OF FIRST INSTANCE OF CEBU, TOLEDO CITY BRANCH IX AND BERNARDO CALANG, RESPONDENTS.

G.R. No. L-38840. December 03, 1980

Ponente: AQUINO, J.

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AQUINO, J.:

This case is about the amendment of an information for murder by changing the offense to homicide. The amendment was effected after the prosecution had presented its evidence.

Because respondent Bernardo Calang pleaded not guilty to the amended information (his five co-accused changed their plea of not guilty to guilty) and because the trial judge wanted the fiscal to present again his evidence against Calang, the fiscal in his petition to this Court asked that the amendment be declared void and that the re-introduction of the pro-secution's evidence be dispensed with. The factual background is as follows:

For the killing on August 23, 1966 in Lantoy, Lutopan, Toledo City of Charles D. Hall, the chief geologist of Atlas Consolidated Mining and Development Corporation, the first assistant fiscal of Toledo City filed on September 29, 1966 in the Court of First Instance an information for murder against Felipe Ylaya, Porferio Abadies, Hospicio Resuelo, Alberto Alcantara, J.Cabucayan, Regino Cabañero, Rodulfo Barredo, Bernardo Calang, Richard Doe and John Doe (Criminal Case No. 113-T).

It was alleged in the information that the ten accused as co-conspirators, with treachery and evident premeditation, while hiding behind a rock, ambushed Hall, using two Enfield rifles. Despoblado, abuse of superiority and price, promise or reward were also alleged as aggravating circumstances (pp. 26--27, Rollo).

Upon arraignment, the accused pleaded not guilty. Accused Barredo and Resuelo were later discharged so that they could be used as State witnesses. They testified at the hearing of Calang's motion for admission to bail. Judge Filemon R. Consolacion in his order of June 5, 1968 found that there was evidence that Calang took part in the commission of the murder. He denied Calang's application for bail (p. 35, Rollo).

At a subsequent hearing, the prosecution presented as its third witness the Constabulary sergeant who investigated the case. After his testimony was completed or on January 14, 1971, the lawyers of the five accused (not including the lawyer of Calang, the sixth accused) offered to plead guilty to the offense of homicide (p. 64, Rollo; Petitioner's Memo, p.112-3, Rollo).

The city fiscal explained that he was willing to allow the accused to plead guilty to a lesser offense without amending the information but Judge Pio B. Ferandos and Calang's counsel allegedly insisted that the information be amended (p. 65, Rollo).

However, according to Calang, the city fiscal him-self offered to amend the information by changing the charge to homicide provided that some of the accused would plead guilty (Respondent's Memo, p. 97, Rollo).

Allegedly upon order of Judge Ferandos and over the prosecution's objection, the information was amended, not by the filing of a new information, but by merely crossing out the word "murder" and writing over it the word "homicide" and striking out the allegations regarding evident premeditation, treachery and ambush but retaining, however, the allegations regarding abuse of superiority and price, promise or reward and the date of the original information, September 29, 1966. The amended information reads as follows:

"The undersigned, First Assistant City Fiscal of Toledo (City), accuses Felipe Ylaya, Porferio Abadies Hospicio Resuelo ..., Alberto Alcantara ..., Regino Cabañero, Jacinto Cabucayan ..., Rudolfo Barredo ..., Bernardo Calang, Richard Doe and John Doe of the crime of Homicide committed as follows:

"That on or about August 23, 1966, between 6:30 to 7:00 in the morning at Lantoy, Lutopan, Toledo City and within the jurisdiction of this Honorable Court, the above-named accused, conspiring, confederating and mutually helping one another, with intent to kill, did then and there, unlawfully, criminally, feloniously, attack and shoot with the use of two (2) Enfield .30 caliber rifles one Charles D. Hall, Chief Geologist of Atlas Conso-lidated Mining and Development Corporation hitting him and resulting to the latter's death.

"That in the commission of the crime, the aggravating circumstance of uninhabited place is present in that the above-named accused sought a secluded place at Lantoy which is about six (6) kilometers from Lutopan located inside the mine area and which facilitated the commission of the offense;

"That the aggravating circumstance of superior strength is also present in that the above-named accused were armed with two (2) Enfield .30 caliber rifles, one .22 caliber revolver "Paltik" and a bolo;

"That in the commission of the offense, there exists also the aggravating circumstance that the killing was induced thru a promise of in consideration of price or reward. (pp. 36-37, Rollo).

"x x x

"City of Toledo (For Barili), September 29, 1966."

The six remaining accused were re-arraigned. Five of the accused pleaded guilty to homicide and were sentenced accordingly. The sixth accused, now respondent Calang, reiterated his plea of not guilty (Memo, p. 98, Rollo). He again applied for bail and his application was approved. He was set at liberty and was elected city councilor in the 1971 elections (p. 99, Rollo).

There was a resumption of the trial as to Calang. According to the fiscal, the prosecution manifested to the court that it was adopting the evidence already presented as its evidence against Calang. He did not object to that manifestation (p. 65, Rollo).

Calang's counsel admitted the corpus delicti. So the testimony of the physician who conducted the autopsy was dispensed with. (He and the other prosecution witness, Resuelo, are now dead.)

The prosecution in a motion dated October 4, 1971 made a formal presentation of its documentary evidence, Exhibits A to Q (the death certificate). Among the exhibits presented were the news reports implicating Calang, union president, in the killing (Exh. A and B), the rifles used by Ylaya and Abadies in the killing (Exh. G and H), the extra-judicial confessions of the accused, and photographs of the reenactment of the crime (pp. 39-43, Rollo).

According to Calang, he objected to the documentary evidence on the ground that the exhibits were hearsay, irre-levant and immaterial to the charge of homicide (p. 99, Rollo). According to the fiscal, Calang did not object to the exhibits. Judge Ferandos admitted the exhibits. The prosecution rested its case.

Instead of presenting his evidence, Calang, after several postponements and transfers of hearings, filed a demurrer to the evidence dated December 12, 1972 (pp. 44-59, Rollo). It was opposed by the prosecution.

Calang in his demurrer admitted that Barredo testified that about two weeks before the killing Calang told some persons gathered at the house of his sister that he would pay three thousand pesos for the killing of certain officers of the Atlas Corporation and that Resuelo testified that Calang told him about four days before the killing that Resuelo and his companions should agree on what they should do (pp. 54-55, Rollo). Resuelo and Barredo in their extrajudicial confessions implicated Calang as the mastermind.

The trial court did not resolve the demurrer to the evidence. Instead, it issued an order dated June 19, 1973 requiring the prosecution to present again its evidence to prove the charge of homicide (p. 77, Rollo).

The city fiscal moved for the reconsideration of that order. It asked the court to consider the evidence already presented as evidence against Calang whose counsel had cross-examined the prosecution witnesses. The prosecution intimated that the charge against Calang is still murder because the qualifying circumstances of abuse of superiority and price, promise or reward were not deleted from the information (pp. 78-80).

Judge Ferandos denied the motion in his order of February 22, 1974. He said that he wanted to hear the prosecution witnesses who testified before Judge Consolacion so that he could observe their demeanor and manner of testifying.

Those two orders are assailed in this certiorari and prohibition case which was filed on June 28, 1974 by the People of the Philippines through the city fiscal and private prosecutor.

The issue is whether Judge Ferandos committed a grave abuse of discretion in ordering the prosecution to present anew its evidence against Calang. A related issue is whether in the present posture of the case the charge against Calang is murder or homicide.

We hold that the trial court gravely abused its discretion in requiring the prosecution to present anew its evidence against Calang on the palpably erroneous assumption that the homicide charge is a new charge and, therefore, the prosecution should start all over again to prove an entirely new offense, as if Calang had never been tried before and the record is a complete blank or that the evidence already adduced against him is devoid of probative value.

The incontestable fact is that Calang is still charged with murder under the so-called amended information. He is charged with having conspired to kill Hall and the killing is qualified by abuse of superiority and price, promise or reward.

The fact that the word "murder" was changed to "homicide" and that treachery and evident premeditation were stricken out did not obliterate the murder charge. The truth has a way of remaining untouched or of surviving the clumsiness or gaucherie of the prosecutor or of frustrating the maneuver to lessen Calang's criminal liability.

From the record, it is deducible that the prosecution and the trial court, out of compassion and leniency, wanted to favor Calang's five co-accused who ran the risk of being sentenced to death.

As a rule, the amendment of the information as a matter of bargain, compromise or manipulation should not be allowed (See *People vs. Kayanan*, L-30353, May 31, 1978, 83 SCRA 437).

But since in this case two of the accused were discharged and used as witnesses against their co-accused and those who pleaded guilty were apparently the tools of a mastermind or inducer, it seemed that the proper thing to do was to extend some mercy to them.

Calang could have been included in that bargain or compromise but he did not take advantage of it. He chose to fight it out. In doing so, he relies on the preposterous technicality that the homicide is a different charge totally disconnected with the prior murder charge and, for that reason, he argues that the prosecution should again go through all the motions of presenting anew its evidence against him.

To countenance that technicality is to make form "the sovereign talisman" and to use it not as an aid to the administration of justice but as its "chief hindrance and great enemy".

Calang cannot complain that he was denied due process. He was present when the prosecution presented its evidence on the original murder charge. His counsel cross-examined the three prosecution witnesses. There is no injustice nor unfair-ness in using against him the evidence already presented by the prosecution.

That episode or interlude in the proceeding whereby a bargain was made as to the liability of Calang's five co-accused did not extinguish the murder charge and did not wipe out the evidence against him nor terminate the case. Calang was not included in that bargain.

The "homicide" charge is the same murder charge with the difference (favorable to Calang) that the prosecution can no longer use treachery and evident premeditation as aggravating circumstances against him. The subsequent proceeding is undoubtedly a continuation of the trial of the murder charge.

Under the singular facts of this case, the circumstance that Calang was re-arraigned did not mean that a new case was commenced against him. If that were so, then immediately after his five co-accused were sentenced, he should have asked the prosecution to re-introduce its evidence against him.

He did not do so. His counsel stipulated that the physi-cian need not be presented as a witness. He did not question the right of the prosecution to offer its documentary evidence. It was only when he was being required to present his evidence that he thought of harassing the prosecution by requiring it to re-introduce its evidence. Obviously, he was gambling on the hope that its failure to do so would result in his acquittal. We cannot sanction or tolerate that mischievous tactic.

WHEREFORE, the trial court's orders of June 19, 1973 and February 22, 1974 are set aside. The murder charge and the evidence already presented against Calang should stand. The lower court is directed to rule on Calang's demurrer to the evidence. The stenographers concerned should transcribe their notes of the proceedings held before Judge Consolacion. Costs against private respondent Calang.

SO ORDERED.

Barredo, (Chairman), Concepcion, Jr., Abad Santos, and De Castro, JJ., concur.

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