

QUIRICO A. ABELA, PETITIONER, VS. HONORABLE CESARIO C. GOLEZ, JUDGE, COURT OF FIRST INSTANCE OF CAPIZ, BRANCH I, AND AGUSTIN ALMALBIS, RESPONDENTS.

G.R. No. L-32849. July 31, 1984

Ponente: RELOVA, J.

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RELOVA, J.:

Direct appeal by City Fiscal Quirico A. Abela, of Roxas City, from a decision dated August 27, 1970 of then Court of First Instance Judge Cesario C. Golez, compelling him to "file the proper action for estafa arising from the bouncing check Exhibit B. Without pronouncement as costs." (p. 41, Rollo)

On December 28, 1968, private respondent Agustin Almalbis filed with the Office of the City Fiscal of Roxas City a complaint for estafa against one Virginia Anisco. After conducting a preliminary investigation, herein petitioner Quirico A. Abela dismissed the complaint "for lack of merit." Thereafter, private respondent Almalbis commenced the action for mandamus in the Court of First Instance of Roxas City against herein petitioner Quirico A. Abela. In due course said court rendered the above-mentioned decision. Hence, this appeal.

The findings of the petitioner are contained in his Order, from which we quote:

"It appeared from the testimony of the complainant, that sometime in 1967, the complainant entered into a business arrangement with the respondent, Virginia P. Anisco. The former, who is both owner and operator of several fishing boats and fishponds, sends fish by the tons to the respondent to be sold at the Manila Divisoria Market. From the proceeds of such sales, which were entirely supervised and controlled by the respondent, respondent got four per cent (4%) commission from the gross proceeds plus whatever expenses she has advanced as expenses in the process. Respondent in turn has the obligation to remit the balance of the proceeds to the complainant.

"This business arrangement had continued for sometime at a more or less irregular interval of two weeks to the satisfaction of both parties, until the respondent later became late and irregular in her remittances of the balance of the proceeds due the complainant.

"Remittances of the net proceeds were mostly done by respondent by sending her personal checks and later, when respondent had been late in her remittances, complainant proposed that respondent give him a check book, each and every check of which is presigned in blank. The blanks corresponding to the amount and the payee to be filled in later by the complainant as the value of the shipment is determined after each sale. This was done and the business again continued under the above arrangement. Then Checks Nos. 378389 dated September 16, 1968, 392377 dated October 20, 1968, 392379 dated October 29, 1968, 392380 dated October 30, 1968, and 392381 dated October 30, 1968 drawn on the Prudential Bank and Trust Company of Manila as prepared and filled in by the complainant were all dishonored for lack of funds, when presented for payments by the complainant through the Roxas City Branch of the Philippine National Bank.

"The foregoing is the summary of the testimony of complainant, Agustin Almalbis, and with the submission of his aforementioned exhibits, rested his case.

"Respondent failed to appear on the dates scheduled for her turn and was considered to have waived her rights to present evidence in her defense.

"THE ISSUE

"The question is, has the respondent committed Estafa by giving, presigned blank checks to the complainant which were later dishonored by the bank for lack of funds, as defined under Art. 315 paragraph 2-d of the Revised Penal Code.

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"There is a deceit when one is misled, either by guile or trickery or by other means, to believe to be true what is really false.

"When, therefore, the parties agreed to the arrangement, that the respondent give a check book, all the individual checks contained therein already signed by the respondent as drawer in blank, leaving the complainant to fill in the payee and the amount to be drawn later after the amount is determined after the sale of each shipment of fish consigned to the respondent, such arrangement can only be considered as an agreement for business convenience between those concerned and no more.

"Certainly, deceit can not be attributed to the respondent if the checks from the aforesaid check book under the control of the complainant, prepared and filled in by him as to the date, the payee and amount, turned out to be dishonored as it did due to lack of funds for the simple reason, that except for presigning the checks the respondent had no hand in the preparation of the same thereby giving her no chance to determine the sufficiency of her original bank deposit or the necessary amount for replenishment of such deposit.

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"Considering, further, the element mentioned herein-before, that the check dishonored must have been issued in pay-ment of an obligation contracted at the same time without which the transaction would not have been consummated as held in the case of People vs. Obieta et al (CA-52 O.G. 065224), the inapplicability of the penal provision relied upon by the complainant becomes glaringly clear.

"That act of the respondent in signing the checks in blank, delivering the same to the complainant to be filled in later by the latter as to the date indicating the date of the issuance, the name of the payee and the amount to be drawn, in payment for the costs of future shipments of fish to be sold at the Manila Market, can never be interpreted or considered as checks issued in the pay-ment of an obligation contracted at the same time even by the wildest stretch of imagination. The law contemplates, as ruled in the case of People vs. Obieta aforesaid, of one uninterrupted transaction. The consummation of the transaction and the issuance must be concurrent." (pp. 17, 20, 21, 22, Rollo)

The Honorable Judge Golez overruled petitioner, saying:

"The first check so issued is PBTC (Prudential Bank and Trust Company) Check AD No. 378389, dated September 16, 1968, payable to the order of Mr. Agustin Almalbis in the amount of P6,000.00 and signed by Virginia P. Anisco (Exhibit B).

"The second check issued was PBTC Check AD No. 392377, dated October 20, 1968, payable to the order of Cash in the amount of P3,637.05 and signed by Virginia P. Anisco. (Exhibit C).

"The third check issued was PBTC Check No. 392379, dated October 29, 1968, payable to the order of Agustin Almalbis in the amount of P3,426.85 and signed by Virginia P. Anisco. (Exhibit D).

"The fourth and fifth checks issued were PBTC Check AD No. 392381, and PBTC Check AD No. 392380, both dated October 30, 1968, in the amount of P1,360.50 and P3,000.00, respectively, both payable to Cash,

both signed by Virginia P. Anisco. (Exhibits E and F).

"It also appears that Virginia P. Anisco, the respondent mentioned in the aforementioned letter-complaint Exhibit A, was handling the sales of the fish which the petitioner in Roxas City was shipping from time to time to Manila where the said fish was sold by Virginia P. Anisco in the Divisoria Market for which service Anisco was paid by Almalbis a commission of 4% on the gross proceeds of the sales.

"According to Almalbis it was their agreement that Anisco would remit to him here in Roxas City the net proceeds of the sales of fish made by Anisco in Manila after deducting her commission and other incidental expenses therefrom.

"The five checks Exhibits B, C, D, E and F adverted to elsewhere above represented the net proceeds realized from the sales made by Virginia P. Anisco of the fish of Agustin Almalbis.

"The petitioner Agustin Almalbis further narrated that the PBTC Check AD No. 378389, dated September 16, 1968 (Exhibit B), was hand-carried by Amador Anisco, from Manila to Roxas City where Amador delivered the said check Exhibit B to the said petitioner. Then Almalbis indorsed the check Exhibit B to the Philippine National Bank, Roxas City Branch, where it was accepted for deposit only. Later on the check Exhibit E was returned to Almalbis, dishonored by the Prudential Bank and Trust Company against which it had been drawn, for lack of funds. When the check Exhibit B had found its way back to Almalbis, the latter left for Manila to inquire from Virginia why the said check bounced back. Virginia begged of him to give her a little more time to get sufficient funds for the said check Exhibit B. But the funds never came.

"Meanwhile, and upon the plea of Virginia, the petitioner continued to make shipments of fish to her, and as part of this new understanding, Virginia agreed to sign, as she signed, checks in blank which she delivered to petitioner who was to fill the blanks therein with the amount and date corresponding to the sales of fish made by Virginia and reported by her by telegram to said petitioner. By virtue of this arrangement the checks Exhibits C, D, E and F were made out by Almalbis himself by filling up the pre-signed blank checks provided him by Virginia. But the said checks Exhibits C, D, E and F also bounced back for lack of funds or for the reason of "Exceeds Arrangements" (Exhibit D-5 and E-5).

"Almalbis declared that he placed all of the foregoing facts at the disposal of the respondent City Fiscal Quirico Abela who conducted the preliminary investigation on his within mentioned letter-complaint of 26th December 1968.

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"The instant petition is also a two--fold action, firstly, for certiorari upon the ground that the respondent Fiscal gravely abused his discretion in dismissing the within mentioned complaint with the result that the petitioner herein has been deprived of his right as the aggrieved party in a criminal transaction - and, secondly, for mandamus to compel the said respondent to bring the corresponding criminal action. The second phase of the action, i.e., mandamus, depends entirely upon the success or failure of the first phase of the action, i.e., certiorari, in the sense that should it be found that the respondent herein did gravely abuse his discretion in dismissing petitioner's complaint mandamus would lie to rectify his error. (Bonilla, et al., vs. Sec. of Agriculture & Natural Resources, L-20083, April 27, 1967.)

"In the given state of facts such as spelled out elsewhere above the right of the petitioner, with specific reference to the check Exhibit B, cannot be said to be dubious, uncertain or nebulous, but in fact well-defined, clear and certain, not at all found within the sphere of speculation or probability, but is firmly secured within the realm of certainty, and this condition should entitle the petitioner herein to a relief for official inaction obtainable through the extraordinary remedy of mandamus. (See the following cases: Aquino v. General Manager, GSIS, L-24859, Jan. 31, 1968; Aprueba, et al. v. Ganzon, et al., L-20867, Sept. 3, 1966; Kwok Kam Lien v. Vivo, L-22354, Mar. 31, 1965; Alzate v. Aldana, L-18085, May 1963; Villamor, et al. v. Lacson, et al.,

L-15945, Nov. 28, 1964; *People v. Orais*, 65 Phil., 744, 747.)

"While as already shown the discretion of the court will not ordinarily be controlled by mandamus, it is not universally true that the writ will not issue to control such discretion or to require a judicial tribunal to act in a particular way. Where the discretion of the court can be legally exercised in only one way, mandamus will lie to compel the court to exercise it; and in some cases has been employed to correct the errors of inferior tribunals and to prevent a failure of justice or irreparable injury where there is a clear right, and there is an absence of any adequate remedy, as for instance where no appeal lies, or where the remedy by appeal is inadequate. It may also be employed to prevent an abuse of discretion or to correct an arbitrary action which does not amount to the exercise of discretion." (*Corpus Juris*, sec. 85, pp. 608-609, as quoted in *People v. Orais*, supra.)

"So that where the fiscal filed an information for homicide over the insistence of the aggrieved party that the crime committed was murder as shown by the declaration of witnesses disclosing the presence of qualifying circumstances the Supreme Court ruled that his failure to file the proper information rendered the Fiscal subject to the writ of mandamus. (*Bernabe v. Bolinas, et al.*, L-22000, Nov. 29, 1966.)" (pp. 33, 35, 39, 41, *Rollo*)

There is merit in the appeal. The public prosecutor is entitled to use his judgment and discretion in the appreciation of evidence presented to him and, in the exercise thereof, he may not be controlled by mandamus. Whether an information should be filed in court is a matter addressed to the sound discretion of the fiscal according to whether the evidence is in his opinion sufficient to establish the guilt of the accused beyond a reasonable doubt.

Otherwise stated, the fiscal can not be compelled to act in a distinct manner whether to prosecute or not to prosecute and, instead, is allowed to stand on his opinion and conviction, "reserving only to the Secretary, in any appropriate case when the latter believes public interest impels that a different course of action should be taken, to temporarily relieve the fiscal of the duty to act by designating somebody else to take his place solely and only for the purpose of such particular case. x x x Under Sections 1679 and 1689 of the Revised Administrative Code, in any instance where a provincial or city fiscal fails, refuses or is unable, for any reason, to investigate or prosecute a case and, in the opinion of the Secretary of Justice it is advisable in the public interest to take a different course of action, the Secretary may either appoint as acting provincial or city fiscal, to handle the investigation or prosecution exclusively and only for such case, any practicing attorney or some competent officer of the Department of Justice or office of any city or provincial fiscal, with complete author-ity to act therein in all respects as if he were the provincial or city fiscal himself, or appoint any lawyer in the government service or not in the govern-ment service, temporarily to assist such city or provincial fiscal in the discharge of his duties, with the same complete authority to act independently of and for such city or provincial fiscal, provided that no such appointment may be made without first hearing the fiscal concerned and never after the corresponding information has already been filed with the court by the corresponding city or provincial fiscal without the conformity of the latter, except when it can be patently shown to the court having cognizance of the case that said fiscal is intent on prejudicing the interest of justice. The same sphere of authority is true with the prosecutor directed and authorized under Section 3 of Republic Act 3783, as amended and/or inserted by Republic Act 5184." (*Estrella vs. Orendain Jr.*, 37 SCRA 640)

However, the matter of instituting an information should be distinguished from a motion by the fiscal for the dismissal of a case already filed in court. The judge may properly deny the motion where, judging from the record of the preliminary investigation, there appears to be sufficient evidence to sustain the prosecution. This is, as it should be, because the case already in court and, therefore, within its discretion and control.

But then, the question may be asked: What are the remedies of the offended party or complainant when the

prosecuting officer refuses or fails to file an information or to prosecute the criminal action? As stated above, "[i]n case the provincial fiscal should fail or refuse to act even when there is sufficient evidence on which action may be taken, the offended party may take up the matter with the Secretary of Justice who may then take such measures as may be necessary in the interest of justice under Section 1679 of the Revised Administrative Code. (Pañgan vs. Pasicolan, 103 Phil. 1143)." He may also file with the proper authorities or courts criminal and administrative charges against the prosecuting officer. As held in Bagatua vs. Revilla, 104 Phil. 393, "[w]hile it is the duty of the fiscal or the City Attorney, as prosecuting officer, to prosecute persons who, according to the evidence received from the complainant, are shown to be guilty of a crime, said officer is likewise bound by his oath of office to protect innocent persons from groundless, false or malicious prosecution. The prosecuting officer would be committing a serious dereliction of duty if he files the information based upon a complaint, where he is not convinced that the sufficiency and strength of the evidence would warrant the filing of the action in court against the accused. This duty of the prosecuting officer involves discretion, hence, it cannot be controlled by mandamus unless there has been a grave abuse thereof which is not shown in the case at bar." Or, he may file a civil action for damages under Article 27 of the New Civil Code.

WHEREFORE, the decision, dated August 27, 1970, of respondent judge is hereby SET ASIDE.

SO ORDERED.

Concepcion, Jr., Guerrero, Abad Santos, Melencio-Herrera, Plana, Gutierrez, Jr., De la Fuente, and Cuevas, JJ., concur.

Fernando, C.J., and Escolin, J., no part.

Teehankee, J., reserves his vote.

Makasiar, J., in the result.

Aquino, J., see concurrence.

CONCURRING OPINION

AQUINO, J.:

I concur. As a general rule, mandamus does not lie to compel the fiscal to file an information because that duty involves the exercise of discretion and judgment. It is not ministerial (Gonzales vs. Serrano, L-25791, September 23, 1968, 25 SCRA 64; Vda. de Bagatua vs. Revilla, 104 Phil. 392; Gonzales vs. Court of First Instance of Bulacan, 63 Phil. 846; People vs. Natoza, 100 Phil. 533, 536; Alberto vs. De la Cruz, L-31839, June 30, 1980, 98 SCRA 406; Aquino vs. Mariano, L-30485, May 31, 1984).

It is not fair to compel the fiscal to prosecute a person whose guilt may not, in his opinion, be established with the evidence submitted to him (People vs. Santos, L-25413, October 31, 1969, 30 SCRA 100).

But if the fiscal acts with grave abuse of discretion in not prosecuting the accused, he may be compelled by mandamus to file the proper information.

For example, it is grave abuse of discretion on the fiscal's part to file an information for homicide only when the evidence presented before him warrants the filing of a murder charge because the killing was treacherous. He may be compelled by mandamus to file a charge for murder (Bernabe vs. Bolinas, Jr., L-22000, November 29, 1966, 18 SCRA 812).

Against the unjust action or inaction of a fiscal, the remedy is an appeal to the Minister of Justice who has control of fiscals, or to file an administrative charge against him. (Presidential Decree No. 1275, Reorganizing the Prosecution Staff; Circular No. 36 dated July 1, 1980, Ministry of Justice; *Estrella vs. Orendain, Jr.*, L-19611, February 27, 1971, 37 SCRA 640; *Noblejas vs. Salas*, L-31788, September 15, 1975, 67 SCRA 47; *Caeg vs. Abad Santos*, L-40044, March 10, 1975, 63 SCRA 96; *Pañgan vs. Pasicolan*, 103 Phil. 1143 unpublished.)

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