

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLANT, VS. ROSALINA CASIANO, DEFENDANT AND APPELLEE.

G.R. No. L-15309. February 16, 1961

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

Appeal from an order of the Court of First Instance of Pangasinan granting a motion to dismiss of defendant Rosalina Casiano.

On October 19, 1955, Ricardo Macapagal filed, with the Justice of the Peace Court of Rosales, Pangasinan, a complaint, which was amended on or about December 6, 1955, charging Rosalina Casiano with "estafa". After conducting the first stage of the preliminary investigation and finding the existence of probable cause, said court issued a warrant of arrest, whereupon defendant posted a bail bond for her temporary release. When the case was called for preliminary investigation, defendant waived her right thereto, and, accordingly, the record was forwarded to the Court of First Instance of Pangasinan. Subsequently, the provincial fiscal filed therein an information for "illegal possession and use of a false treasury or bank notes", alleging:

"That on or about the 16th day of April, 1955, in the municipality of Rosales, Pangasinan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused with full knowledge that check No. 728681 is spurious and false and supposedly issued by the American Bankers Association of New York City, U.S.A., did then and there wilfully, and unlawfully and feloniously use and have in her possession said false check No. 728681 which she sold and cashed to one Ricardo Macapagal for P580 although the face value of said check is \$300, to the damage of the latter in said amount. Contrary to Article 168 of the Revised Penal Code."

Upon arraignment on November 16, 1956, defendant entered a plea of not guilty. Thereupon, the prosecution began to present its evidence by introducing the testimony of a witness—Pedro Punsalan, cashier of the Tarlac Branch of the Philippine National Bank—who was cross-examined by defense counsel. Then the case was set for continuation of the hearing on December 12 and 13, 1956. Owing to several postponements secured by the defendant, the hearing was not resumed, however, until October 15, 1958, on which date defendant appeared with a new counsel, Atty. Lorenzo Suyat, who prayed for and secured another postponement. On November 10, 1958, said counsel was granted permission to submit a "motion to dismiss", which was filed on November 24, 1958, on the ground that there had been no preliminary investigation of the charge of illegal possession and use of a false bank note, and that the absence of such preliminary investigation affected the jurisdiction of the court. The motion was granted and, a reconsideration of the order to this effect having been denied, the prosecution interposed the present appeal.

Defendant-appellee, maintains, and the Court of First Instance of Pangasinan held, that the waiver made by the defendant in the justice of the peace court did not deprive her of the right to a preliminary investigation of the crime of illegal possession and use of a false bank note, for this offense does not include, and is not included in, that of "estafa", to which her aforementioned waiver referred, the latter offense being covered by Article 315 of

the Revised Penal Code, which article forms part of Title Ten thereof, entitled "Crimes against Property", whereas the former is the subject matter of Article 168 of said Code, which is part of Title Four thereof, entitled "Crimes against Public Interest."

We are not concerned, however, with an abstract academic question. The issue before us is whether defendant is entitled to a preliminary investigation of the crime of illegal possession and use of a false bank note as charged in the information herein. The answer to this question depends upon whether or not such crime was included actually in the allegations of the amended complaint filed with the justice of the peace court, regardless of the term used in said pleading to designate the offense charged therein.

In this connection, the offended party Ricardo Macapagal, averred in the amended complaint that the

"accused under false manifestations and fraudulent representations which she made to Ricardo Macapagal, that a check on its face valued at \$300.00 and numbered 728681, was good and genuine as it was drawn by the American Bankers Association against the Guaranty Trust Company of New York in favor of Domingo Flores as Payee, sold to Ricardo Macapagal said check for P580.00 Philippine currency, which manifestations and representations the accused well knew were false and fraudulent and were only made to induce the aforementioned Ricardo Macapagal to buy said check as he in fact bought said check, paying to mentioned accused the stated amount of P580.00, which amount the accused converted unlawfully to her own use and benefit to the damage and prejudice of Ricardo Macapagal in said sum for the reason that the check upon presentation for collection was dishonored on the ground that it was fraudulent."

Thus, complainant alleged in said amended complaint—as he did in the original complaint—that defendant-appellee had knowingly had in her possession, with intent to use, and actually used, a false or falsified bank note or other obligation payable to bearer, which is the crime defined and punished in Article 168, in relation to Article 166, of the Revised Penal Code, and the substance of the charge contained in the information above quoted.

In other words, regardless of whether or not the crime of "estafa" includes or is included in that of illegal possession or use of a false bank note or other obligation payable to bearer, the Court of First Instance of Pangasinan erred in holding that the allegations of the information filed in this case were not included in those of the aforementioned amended complaint and that defendant-appellee was entitled to another preliminary investigation of the charge contained in the information. It erred, also, in dismissing the case for, even if defendant had a right to such other preliminary investigation, the same was deemed waived upon her failure to invoke it prior to or, at least, at the time of the entry of her plea in the court of first instance (*People vs. Solon*, 47 Phil., 443, 448; *People vs. Magpale*, 70 Phil. 176; *People vs. Lambino*,[*] 55 Off. Gaz., 1565). Independently of the foregoing, the absence of such investigation did not impair the validity of the information or otherwise rendered it defective. Much less did it affect the jurisdiction of the court of first instance over the present case. Hence, had defendant-appellee been entitled, to another preliminary investigation, and had his plea of not guilty upon arraignment not implied a waiver of said right, the court of first instance should have, either conducted such preliminary investigation, or ordered the Provincial Fiscal to make it, in pursuance of section 1687 of the Revised Administrative Code (as amended by Republic Act No. 732), or remanded the record for said investigation to the justice of the peace court, instead of dismissing the case, as it did in the order appealed from.

Although not raised by any of the parties herein, one question has arisen in the course of the deliberations of this Court. May we entertain the appeal taken in this case by the prosecution ? This calls for a determination of the following issues, namely:

- (a) What is the effect of Rule 118, section 2, of the Rules of Court, upon the authority of this Court to pass upon the merits of the present appeal?

(b) Has defendant waived her constitutional right not to be twice placed in jeopardy of punishment for the same offense?

(c) May she still invoke such right?

Rule 118, section 2, of the Rules of Court reads:

"The People of the Philippines cannot appeal if the defendant would be placed thereby in double jeopardy. In all other cases, either party may appeal from a final judgment or ruling or from an order made after judgment affecting the substantial rights of the appellant."

Does the foregoing provision deny to this Court the authority or jurisdiction to entertain the present appeal by the prosecution? The answer must be in the negative, for the following reasons, namely:

- Apart from being inherently legislative in nature, the power to "define, prescribe and apportion the jurisdiction of the various courts" is explicitly vested by the Constitution in Congress (Article VIII, section 2, Constitution of the Philippines), not in the Supreme Court. An affirmative answer to the query would lead, therefore, to an encroachment by the Supreme Court upon the prerogatives of Congress, and, hence, to the unconstitutionality and nullity of the rule above quoted.

- The same was adopted by this Court in the exercise of its authority, under our fundamental law, "to promulgate rules concerning pleadings, practice and procedure in all courts", which rules "shall not diminish, increase or modify substantive rights". (Article VIII, section 13, Constitution of the Philippines.) If section 2 of Rule 118 were construed as limiting, either the jurisdiction of the Supreme Court to entertain appeals by the Government in criminal cases, or the right of the latter to appeal in such cases, the result would be that this Court has exceeded its rule making power under the Constitution, not only by legislating on a subject that concerns neither "pleadings, practice or procedure", but, also, by diminishing or modifying "substantive rights", namely (a) the exclusive jurisdiction of the Supreme Court to "review, revise, reverse, modify or affirm on appeal * * * final judgments or decrees of inferior courts in * * * all * * * cases in which only errors or questions of law are involved"—which is statutory (Republic Act No. 296, section 17 [6], as well as (with slight difference in phraseology) constitutional (Article VIII, section 2, Constitution of the Philippines) —and, hence, (b) the right of both parties in a case to appeal to the Supreme Court from the decision of the lower court and raise only questions of law, as in the case at bar.

A similar issue was settled in the case of *Marquez vs. Prodigalidad* (83 Phil., 813), an election protest involving municipal councilors, which was dismissed by the Court of First Instance. On appeal taken by the protestant, our jurisdiction to review the order appealed from was contested by the protestee, who relied on section 178 of the Revised Election Code (Republic Act No. 180) reading:

"From any final decision rendered by the Court of First Instance in protests against the eligibility or the elections of provincial governors members of the provincial board, city councilors, and mayors, the aggrieved party may appeal to the Court of Appeals or to the Supreme Court, as the case may be, within five days after being notified of the decision, for its revision, correction, annulment or confirmation, and the appeal shall proceed as in a criminal case. Such appeal shall be decided within three months after the filing of the case in the office of the clerk of the court to which the appeal has been taken." (Italics ours.)

Speaking, through Mr. Justice Pablo, we held:

"* * * Se pretende que, bajo esta disposicion legal, las decisiones de los Juzgado's de Primera Instancia en protestas contra la eleccion do concejales en los municipios regularmente organizados, no son apelables. Notese, sin embargo, que la orden, apelada en el presente caso no resuelve los meritos de la protesta, sino que sobresee la misma por supuesta falta de jurisdiccion en virtud de una supuesta omission de incluir como partes

a todos los candidatos electos. De modo que la orden apelada versa sobre una cuestion de jurisdiccion, o sobre una cuestion puramente de derecho. Y el articulo 2, Titulo VIII de la Constitucion dispone que: 'The Congress shall have the power to define, prescribe, and apportion the jurisdiction of the various courts, but may not deprive the Supreme Court of its original jurisdiction over cases affecting ambassadors, other public ministers, and consuls, nor of its jurisdiction to review, reverse, modify, or affirm on appeal, certiorari, or writ of error, as the law or the rules of court may provide, final judgments and decrees of inferior courts in—(1) All cases in which the constitutionality or validity of any treaty, law, ordinance, or executive order or regulations is in question. (2) All cases involving the legality of any tax, impost, assessment, or toll, or any penalty imposed in relation thereto. (3) All cases in which the jurisdiction of any trial court is in issue. (4) All criminal cases in which the penalty imposed is death or life imprisonment. (5) All cases in which an error or question of law is involved.'

"La Constitucion claramente autoriza a la Legislatura a definir, prescribir y distribuir la jurisdiccion de los tribunales; pero expresamente dispone que no puede privar al Tribunal Supremo de su jurisdiccion para revisar, reexaminar, revocar, modificar o conocer en apelacion o mediante certiorari o recurso de casacion las decisiones de Juzgados inferiores que versan, entre otras cosas, sobre la constitucionalidad de alguna ley, ordenanza, tratado, u orden ejecutiva o sobre la jurisdiccion del tribunal centenciador, o sobre otras cuestiones puramente de derecho. En otras palabras, la Constitucion ha querido establecer y conservar inalterable la jurisdiccion del Tribunal Supremo sobre cuestiones constitucionales o puramente de derecho, con el proposito evidente de convertirlo en arbitro supremo en la interpretacion de la Constitucion y de la Ley.

"Se pretende que la prohibicion constitucional de privar al Tribunal Supremo de su jurisdiccion sobre las mencionadas cuestiones se refiere tan solo a aquellos asuntos sobre los cuales este Tribunal tenia jurisdiccion al tiempo de aprobarse la Constitucion y no a aquellos que, como el presente, no caian bajo su jurisdiccion de acuerdo con las leyes entonces vigentes, pues es obvio, segun se alega, que no se priva a un tribunal de una jurisdiccion que no tenia. Esta distincion, sin embargo, no halla fundamento en el lenguaje de la Constitucion, pues la prohibicion alli establecida es en sus terminos absoluta con un proposito claro y evidente que es el de situar en el Supremo Tribunal la autoridad suprema en la interpretacion de la constitucion y de la ley.

"Debe recordarse que antes de la aprobacion de nuestra Constitucion la jurisdiccion apelada del Tribunal Supremo no dependia, segun las leyes entonces vigente, de la naturaleza de las cuestiones planteadas, pues tenia esa jurisdiccion casi en todos los asuntos provenientes de los Juzgados de Primera Instancia independientemente de las cuestiones alli envueltas. De suerte que la Constitucion al hacer referencia a la jurisdiccion apelada del Tribunal Supremo sobre ciertas cuestiones de derecho, generales y especificas, no lo hace en relacion con la jurisdiccion apelada que el tribunal ya entonces tenia, sino que define una nueva jurisdiccion apelada del tribunal de la cual no quiere que este tribunal sea privado jamas.

"Por lo demas, si se ha de interpretar la Constitucion en la forma que se pretende, no habria uniformidad o simetria en la interpretacion de las leyes del pais, pues si este tribunal no pudiese corregir los pronunciamientos legales de los tribunales inferiores en algunos asuntos, esos pronunciamientos podrian ser contradictorios y el conflicto podria quedar sin solucion por algun tiempo por lo menos, y esto es lo que indudablemente ha querido evitar la Constitucion. Y pretender que en casos como el presente el Tribunal Supremo no puede ejercer jurisdiccion apelada aunque hubiese serias infracciones de la Constitucion en la decision del tribunal inferior, equivale claramente a frustrar el proposito evidente de la Constitucion.

"Creemos, por tanto, que el articulo 178 delCodigo Electoral Revisado, al disponer expresamente que son apelables las decisiones de los Juzgados de Primera instancia sobre protestas contra la elegibilidad o la eleccion de gobernadores provinciales, vocales de la junta provincial, concejales de ciudad y alcaldes, no ha tenido el proposito de vedar en otras protestas la apelacion al Tribunal Supremo sobre cuestiones puramente de derecho, particularmente sobre cuestiones de jurisdiccion, a de constitucionalidad de alguna ley, ordenanza, tratado u orden ejecutiva". (Marquez vs. Prodigalidad, 83 Phil., 813, 815-818; *Italic ours.*)

This view was ratified and reiterated in *Calano vs. Cruz* (94 Phil., 230; 50 Off. Gaz., 610), a quo warranto proceeding, in which the eligibility of a municipal councilor was impugned. From an order dismissing the case, petitioner therein appealed to the Supreme Court, which passed upon the merits of the appeal, despite respondent's objection, based upon said section 178 of the Revised Election Code, to our jurisdiction to entertain the appeal. The propriety thereof was upheld in the following language:

"In the past we had occasion to rule upon a similar point of law. In the case of *Marquez vs. Prodigalidad*, 46 Off. Gaz., Supp. No. 11, p. 204, we held that section 178 of the Revised Election Code limiting appeals from decisions of Courts of First Instance in election contests over the offices of Provincial Governor, Members of the Provincial Board, City Councilors and City Mayors, did not intend to prohibit or prevent the appeal to the Supreme Court in protest involving purely questions of law, that is to say, that protests involving other offices such as municipal councilor may be appealed, provided that only legal questions are involved in the appeal. Consequently, the appeal in the present case involving as it does purely questions of law is proper." (*Calano vs. Cruz*, 94 Phil., 230; 50 Off. Gaz., 610, 612; *Italics ours.*)

Insofar as the issue in the case at bar is concerned, there is a substantial parity between Rule 118, section 2, of the Rules of Court, and the aforementioned Section 178 of the Revised Election Code. The former says that the prosecution may not appeal when the accused would be placed thereby in double jeopardy. The latter clearly denies, without any qualification, the right to appeal in election protests involving municipal vice-mayor and municipal councilors. Yet, the latter gave way, as it had to, to the constitutional provision granting the Supreme Court jurisdiction over all appealed cases involving purely questions of law. So must, the provision of said Rule, whenever such are the issues raised in the appeal, unless there is some other valid objection thereto.

- Commenting on said section 2 of Rule 118, former Chief Justice Moran, who drafted our Rules of Court, says (Comments on the Rules of Court, by Moran, Vol. 2 [1957 ed.], p. 856) that said provision is "in conformity with a ruling laid down by the United States Supreme Court", citing *Kepner vs. U.S.* (11 Phil., 669). In that case, the Federal Supreme Court held that the prosecution may not, over the objection of the defendant in a criminal case, appeal from a decision of a court of first instance acquitting him of a crime of embezzlement, after due trial on the merits, because it would violate his right, under the Philippine Bill (Act of Congress of the U.S. of July 1, 1902)—which is identical to that existing under the Federal Constitution and analogous to that recognized under the common law—not to be placed twice in jeopardy of punishment for the same offense. The *Kepner* case is not authority for the proposition that an appeal by the Government, after jeopardy has attached in the lower court, cannot be taken without any objection or with the consent of the accused. Indeed, it is well settled that "the immunity from second jeopardy granted by the Constitution is a personal privilege which accused may waive" (22 C.J.S., 412-413). He may, accordingly, appeal from a decision adverse to him, even though such appeal clearly puts him, again, in danger of punishment for the same offense. Considering the background of the rule under consideration and the fact that it was adopted in the exercise of the constitutional power of the Supreme Court to promulgate rules on "pleadings, practice and procedure", it is reasonable—as well as necessary, to avoid 'the constitutional infirmity already adverted to—to conclude that it was incorporated into the Rules of Court merely as a procedural measure, for the purpose, not of affecting substantive rights, but of enforcing the constitutional immunity from double jeopardy," a personal privilege which accused may waive."

Upon the other hand, defendant herein has filed a brief in which she limited herself to a discussion of the merits of the appeal. Thus, she not only failed to question, in her brief, either expressly or impliedly, the right of the prosecution to interpose the present appeal, but, also, conceded, in effect, the existence of such right. She should be deemed, therefore, to have waived her aforementioned constitutional immunity.

It is true that in *People vs. Hernandez* (94 Phil., 49; 49 Off. Gaz., 5342), *People vs. Ferrer*, 100 Phil., 124; 55 Off. Gaz., 620; *People vs. Bao*, 106 Phil., 243; 56 Off. Gaz., [51] 7768 and *People vs. Golez*, 108 Phil., 855; 59 Off.

Gaz., 388), we dismissed the appeal taken by the Government from a decision or order of a lower court, despite defendant's failure to object thereto. However, the defendants in those cases, unlike the defendant herein, did not file any brief. Hence, they had performed no affirmative act from which a waiver of the privilege under consideration could be implied.

It is urged, however, that, if the failure to file a brief does not warrant said inference, much less could the same be justified when the accused, like defendant herein, has filed a brief, without invoking therein the aforementioned privilege. This argument conflicts, however, with the spirit underlying the provisions of the Rules of Court governing comparable situations.

Upon arraignment, the defendant may move to quash the information, upon the ground, among others, that he "has been previously * * * in jeopardy of being convicted * * * of the offense charged" (Rule 113, sections 1 and 2, paragraph [b]). However, if he "does not move to quash the * * * information before he pleads thereto, he shall be taken to have waived all objections which are grounds for a motion to quash, except when the complaint or information does not charge an offense, or the court is without jurisdiction of the same" (Rule 113, section 10). Hence, if he pleads to the charge, without invoking his immunity from a second jeopardy, the same is deemed waived (People vs. Acierto, 92 Phil., 534; 49 Off. Gaz., 518; 14 Am. Jur. 958; Alexander vs. State, 176 So. 835; Branch vs. State, 78 So. 411; State vs. Warner, 205 N.W. 692; State vs. Mases, 199 P. 111; Fines vs. State 240 P. 1079; Fowler vs. State 120 S.W. 2d. 1054; Mann vs. State, 187 N.E. 343; Ballusky vs. People, 178 P. 2d. 433; People vs. McDonald, 10 N.W. 2d. 309; State vs. Davis, 238 P. 2d. 450).

Again, "material averments in the complaint, other than those as to the amount of damages, shall be deemed admitted when not specifically denied" in the answer filed by the defendant (Rule 9, section 8). Similarly, subject to specified exceptions, "defenses, and objections not pleaded either in a motion to dismiss or in the answer are deemed waived" by defendant (Rule 9, section 9). Thus, the foregoing waivers and admission by the defendant require a previous plea or answer by him.

No such waiver or admission is deemed made in the absence of a plea. If the defendant fails to answer plaintiff's complaint, the allegations thereof are deemed denied and plaintiff is bound, therefore, to prove them. The same rule applies to defendants in a counterclaim, or cross-claim, or third-party complaint. So too, when plaintiff does not file a reply, "all the new matters alleged in the answer" filed by the defendant "are deemed controverted" by the plaintiff (Rule 11 and Rule 35, section 6). In other words, when no answer to the pleading of an opponent is filed, all material allegations made or new matters contained in said pleading are, under our Rules of Court, deemed denied. Conversely, if an answer is filed, such allegations or new matters in said pleading of the opponent as have not been specifically controverted in the aforementioned answer, are deemed admitted, and such personal defenses as could have been or should have been set up therein are, in general, waived.

It is true that briefs in appellate courts are not "pleadings" in the technical legal meaning of this term. In such courts, there are no "pleadings", in the sense of formal concise statements of the ultimate facts constituting plaintiff's cause or causes of action, and specifying the relief sought, or on which the defendant relies for his defense (Rule 6, section 1, and Rule 9, section 1, Rules of Court). The appellant files with the appellate court a brief specifying the "errors intended to be urged" and the arguments in support of each assignment of error. (Rule 48, section 17), whereas the appellee sets forth in his brief "his arguments * * * on each assignment of error" (Rule 48, section 18). However, the briefs, like the pleadings, define and limit the issues submitted for determination, and, accordingly, should be subject to the general principles governing pleadings, insofar as the admission or denial of the claims of an opponent, as well as the waiver of defenses, are concerned. Hence, when the defendant-appellee in a criminal case does not file a brief, he—like a defendant who fails to answer the complaints—may, perhaps, be deemed to controvert the claim of plaintiff-appellant in all respects. However, if the

defendant-appellee files a brief contesting the merits of the contention of plaintiff-appellant in his brief, without objecting to plaintiff's appeal, which plaintiff may take if the defendant consents or does not object thereto, said defendant-appellee—like the defendant who pleads not guilty in the lower court, without invoking his immunity from a second jeopardy—must be deemed to have waived such immunity.

Indeed, it is well settled that the immunity must be "specially" pleaded (14 Am. Jur. 956) ; that this must be done "at the earliest opportunity" (Territory of Lobato, 134 p. 222, Yates vs. State 17 So. 2d. 594) ; and that, otherwise, it is deemed waived (14 Am. Jur. 958; Branch vs. State, supra; State vs. Bohn, 248 p. 119; People vs. McDonald, supra; State vs. Harper, 184 S.W. 2d. 601; Driver vs. Seay, 32 S.E. 2d. 87). What is more, our Rules of Court are not satisfied with an express assertion of the immunity. Section 5 of Rule 113 requires the one invoking it to "state the name under which defendant was convicted or in jeopardy of conviction or acquitted, the name of the court in which he was convicted or in jeopardy or acquitted and the date and place of such conviction or jeopardy or acquittal." All of which goes to show that silence of the accused thereon must be construed as waiver of the immunity. Hence, Corpus Juris Secundum says that such "waiver may be express or implied; in fact generally implied." (22 C.J.S. 412-413.)

In the case at bar, there is another circumstance justifying the conclusion that defendant herein has waived said immunity. Upon issuance of the order of dismissal complained of, the prosecution filed a motion for reconsideration, to which the defendant objected upon the ground of double jeopardy. When defendant filed his brief with this Court, he was well aware, therefore, of the materiality or pertinence of said defense to the appeal taken by the prosecution. Yet, he did not avail himself of such defense. This, omission must be due, therefore, to neither ignorance nor oversight on his part. He advisedly and purposely refrained from invoking said defense. In other words, he waived it.

Regardless of the foregoing, could he have properly made-use of it in this instance? For him to do so, it would be necessary for him to assert that the lower court had Jurisdiction to hear and decide this case—which is exactly the opposite of the theory sustained by him in his motion to dismiss. His situation then would be substantially identical to that of the accused in People vs. Acierto, supra. Acierto was accused before a U.S. Court Martial having defrauded the Government of the United States, through falsification of documents, within a military base of the U.S. in the Philippines. Despite his objection to the jurisdiction of said court, which it overruled, he was, after trial, convicted therein. On review, the verdict was reversed by the Commanding General, who sustained Acierto's objection. Subsequently accused of estafa and falsification of said documents before one of our courts of first instance, Acierto was convicted therein. On appeal to the Supreme Court, he raised, among other questions, the following: former jeopardy and want of jurisdiction of the court a quo, both of which he claimed to have raised in the lower court and on both of which issues the Solicitor General sided with him, owing mainly to the provision of Article XIII, section 1 (a) of our Bases Agreement with the United States, reading:

"1. The Philippines consents that the United States shall have the right to exercise jurisdiction over the following offenses:

(a) Any offense committed by any person within any base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines."

Commenting on Acierto's contention this Court—in a unanimous decision, penned by Justice Tuason, and concurred in by Chief Justice Paras, and Justices Feria, Pablo, Bengzon, Padilla, Montemayor, Reyes [A.], Jugo, Bautista and Labrador—expressed itself as follows:

"This is the exact reverse of the position defendant took at the military trial. As stated, he there attacked the

court martial's jurisdiction with the same vigor that he now says the court martial did have jurisdiction and thanks to his objection, so we incline to believe, the Commanding General, upon consultation with, and the recommendation of the Judge Advocate General in Washington, disapproved the court martial proceedings.

* * * * *

"Construction of the United States Military Law by the Judge Advocate General or the United States Army is entitled to great respect, to say the very least. When such construction is a disclaimer of jurisdiction under the Bases Agreement, the Philippine Government certainly is not the party to dispute it; the fewer the lights asserted by the United States the more is enhanced the dignity of the Philippines and its interest promoted.

"Irrespective of the correctness of the views of the Military authorities, the defendant was estopped from demurring to the Philippine court's jurisdiction and pleading double jeopardy on the strength of his trial by the court martial. A party will not be allowed to make a mockery of justice by taking inconsistent positions which if allowed would result in brazen deception. It is trifling with the courts, contrary to the elementary principles of right dealing, and good faith, for an accused to tell one court that it lacks authority to try him and, after he has succeeded in his effort, to tell the court to which he has been turned over that the first has committed error in yielding to his plea.

"From another angle, it seems immaterial whether or not the court martial had jurisdiction of the accused and his crimes under the terms of the Bases Agreement. Granting that it had, the Court of First Instance of Quezon City nevertheless properly and legally took cognizance of the cases and denied the defendant's motion to quash.

"By the Agreement, it should be noted, the Philippine Government merely consents that the United States exercise jurisdiction in certain cases. This consent was given purely as a matter of comity, courtesy, or expediency. The Philippine Government has not abdicated its sovereignty over the bases as part of the Philippine territory or divested itself completely of jurisdiction over offenses committed therein. Under the terms of the treaty, the United States Government has prior or preferential but not exclusive jurisdiction of such offenses. The Philippine Government retains not only jurisdictional rights not granted, but also all such ceded rights as the United States Military authorities for reasons of their own decline to make use of. The first proposition is implied from the fact of Philippine sovereignty over the bases; the second from the express provisions of the treaty. The treaty expressly stipulates that offenses included therein may be tried by the proper Philippine courts if for any special reason the United States waives its jurisdiction over them.

* * * * *

"Partly for the reasons already shown, the plea of double jeopardy is without merit. If the court martial had no jurisdiction, jeopardy could not have attached. This proposition is too well established and too well known to need citation of authorities.

"Even if it be granted that the court martial did have jurisdiction, the military trial in the instant cases has not placed the appellant in jeopardy such, as would bar his prosecution for violation of the Philippine penal laws or, for that matter, a second trial under the Articles of War. Although under Rev. Stat. sec. 1342, art. 2, it has been held that a former trial may be pleaded when there has been a trial for the offense, whether or not there has been a sentence adjudged or the sentence has been disapproved (Dig. JAG [1912] p. 167), the rule is and should be otherwise when the disapproval was made in response to the defendant's plea based on lack of jurisdiction. (Ex. parte Castello, 8 F. 2nd. 283, 286). In such case the former trial may not be pleaded in bar in the second trial." (Italics ours.)

In other words, it was held that, granting that the Court Martial had jurisdiction over the crime or crimes with which he had been charged, and was permitted by the Treaty to exercise it, the Philippine Government did not thereby divest itself of its own jurisdiction to try and punish Acierto therefor, and that, even if he had, therefore,

been placed in jeopardy of punishment before said Court Martial, he was estopped from pleading it before the Philippine courts, for "a party will not be allowed to make a mockery of justice by taking inconsistent positions, which, if allowed, will result in brazen deception", and "it is trifling with the courts, contrary to the elementary principles of right dealing and good faith, for an accused to tell one court, that it lacks authority to try him, and, which he has succeeded in his effort, to tell the court to which he has been turned over that the first has committed error in yielding to his plea."

This would exactly be the position of defendant herein were she to plead double jeopardy in this case, for such plea would require the assertion of jurisdiction of the court of first instance to try her and that the same erred in yielding to her plea therein of lack of authority therefor. In the language of our decision in the *Acierto* case, it is immaterial whether or not the court a quo had said authority. It, likewise, makes no difference whether or not the issue raised by defendant in the lower court affected its jurisdiction. The fact is that she contested such jurisdiction and that, although such pretense was erroneous, she led the court to believe that it was correct and to act in accordance with such belief. The "elementary principles of fair dealing and good faith" demand, accordingly, that she be estopped now from taking the opposite stand, in order to pave the way for a plea of double jeopardy, unless the rule of estoppel laid down in the *Acierto* case is revoked. As a matter of fact, said rule applies with greater force to the case at bar than to the *Acierto* case, because the same involved two (2) separate proceedings before courts deriving their authority from different sovereignties, whereas the appeal in the case at bar is a continuation of the proceedings in the lower court, which like this Supreme Court, is a creature of the same sovereignty. In short, the inconsistency and impropriety would be more patent and glaring in this case than in that of *Acierto*, if appellant herein pleaded double jeopardy in this instance.

The issue eventually boils down, therefore, to whether the rule of estoppel applied in the *Acierto* case should be confirmed or revoked. Upon mature consideration, we are of the opinion that said rule should be maintained, because:

- It is basically and fundamentally sound and just.
- It is in conformity with the principles of legal ethics, which demand good faith of the highest order in the practice of law.
- It is well settled that parties to a judicial proceeding may not, on appeal, adopt a theory inconsistent with that which they sustained in the lower court (*Williams vs. McMicking*, 17 Phil., 408; *Molina vs. Somes*, 24 Phil., 49; *Agoncillo vs. Javier*, 38 Phil., 424; *American Express vs. Natividad*, 46 Phil., 208; *Toribio vs. Decasa*, 55 Phil., 416; *San Agustin vs. Barrios*, 68 Phil., 475; *Jimenez vs. Bucoy*, 103 Phil., 40; 54 Off. Gaz., 7560; *Northern Motors, Inc. vs. Prince Line, et al.*, 107 Phil., 253; *Medel vs. Calasanz*, 109 Phil. 348).

Thus, in *Atkins Kroll & Co., Inc. vs. B. Cua Hian Tek*, 102 Phil., 948; 54 Off. Gaz., 7892, we said:

" * * * when a party deliberately adopts a certain theory, and the case is tried and decided upon that theory in the court below, he will not be permitted to change his theory on appeal * * *."

The rule is stated in *Corpus Juris Secundum* as follows:

"* * * where the case was tried by the lower court and the parties on a certain theory, it will be reviewed and decided on that theory, insofar as the pleadings, liberally construed, permit, and not be approached from a different point of view." (5 C.J.S., section 1464, pp. 77-79; *Italics ours.*)

- The operation of the principle of estoppel on the question of jurisdiction seemingly depends upon whether the lower court actually had jurisdiction or not. If it had no jurisdiction, but the case was tried and decided upon the theory that it had jurisdiction, the parties are not barred, on appeal, from assailing such jurisdiction, for the same

"must exist as a matter of law, and may not be conferred by consent of the parties or by estoppel" (5 C.J.S., 861-863). However, if the lower court had jurisdiction, and the case was heard and decided upon a given theory, such, for instance, as that the court had no jurisdiction, the party who induced it to adopt such theory will not be permitted, on appeal, to assume an inconsistent position—that the lower court had jurisdiction. Here, the principle of estoppel applies. The rule that jurisdiction is conferred by law, and does not depend upon the will of the parties has no bearing thereon. Thus, *Corpus Juris Secundum* says:

"Where accused has secured a decision that the indictment is void, or has been granted an instruction based on its defective character directing the jury to acquit, he is estopped, when subsequently indicted, to assert that the former indictment was valid. In such case, there may be a new prosecution whether the indictment in the former prosecution was good or bad. Similarly, where, after the jury was impaneled and sworn, the court on accused's motion quashed the information on the erroneous assumption that the court had no jurisdiction, accused cannot successfully plead former jeopardy to a new information." * * * (22 C.J.S., sec. 252, pp. 388-389; *Italics ours.*)

"Where accused procured a prior conviction to be set aside on the ground that the court was without jurisdiction, he is estopped subsequently to assert, in support of a defense of previous jeopardy, that such court had jurisdiction." (22 C.J.S. p. 378.)

The following is quoted from the Annotated Cases:

"Waiver of Objection to Second Jeopardy by Procuring Quashal of First Indictment.—It may be stated as a general rule that where a person after being put in jeopardy procures a quashal of the indictment upon which he is being prosecuted, he cannot thereafter plead former jeopardy when placed on trial upon another indictment for the same offense. His action in procuring a quashal of the indictment constitutes a waiver of his constitutional privilege. *Brown vs. State*, 109 Ga. 570, 34 S.E. 1031; *Joy vs. State*, 14 Ind. 139; *State vs. Scott*, 99 Ia. 36, 68 N.W. 451. See also *Miller vs. State*, 33 Ind. App. 509, 71 N.E. 248; *Jones vs. Com.* 124 Ky. 26, 97 S.W. 1118; *Com. vs. Gould*, 12 Gray (Mass.) 171; *State vs. Priebnow*, 16 Neb. 131, N.W. 628; *Van Rueden vs. State*, 96 Wis. 671, 71 N.W. 1048.

"In *Brown vs. State*, 109 Ga. 570, 34 S.E. 1031, in effect overruling *Black vs. State*, 36 Ga. 447, 91 Am. Dec. 772, it appeared that the court, though at first it overruled the demurrer, reversed its former ruling after the admission of evidence and quashed the accusation. At a subsequent trial the defendant pleaded former jeopardy. The court said: 'Although the demurrer filed by the accused was at first overruled by the judge, the subsequent ruling sustaining the same was the one that the accused himself invoked, and it does not distinctly appear that he objected at the time to the judge sustaining the demurrer at that stage of the case and ordering the accusation to be quashed. It therefore does not lie in his mouth on a subsequent trial to say that the accusation was good, and that for that reason he was in jeopardy on the former trial. Whether the first accusation was good or bad is immaterial. The accused obtained a ruling that it was bad, accepted the benefit of that ruling, and he will not be allowed to bring in question the propriety of a ruling which he himself invoked.' In *Joy vs. State*, 14 Ind. 139, it appeared that after the jury had been selected and sworn the defendant moved to quash the count in the indictment on which the district attorney had elected to go to trial. The motion to quash was sustained. On a subsequent trial the plea of former jeopardy was interposed. The court said: 'It (the quashal of the count) was for his benefit, and he is presumed to waive any future peril he may incur, in view of the advantage he derives by getting rid of the present pressing jeopardy. So in the case at bar, the defendant was charged in two counts with having produced the death of a human being—first, by fire; second, by blows. The counts were properly joined; but by his own motion, and therefore certainly with his consent, he procured an order of the court which operated to withdraw the second count from the consideration of the jury as fully as if it had charged a separate offense. To that count no evidence could have been directed, if the trial had progressed. By that act, it appears to us, for these reasons and those heretofore advanced, he consented to waive any constitutional rights which might have apparently attached, just as he would have

waived those rights if he had consented to the discharge of the jury, or after verdict moved for a new trial or in arrest.'

"In the reported ease it appears that after the jury had been impaneled and sworn and the defendant placed on the stand in the first trial the defendant moved to quash the indictment on account of a material variance therein. The indictment was quashed. The defendant pleaded former jeopardy on the second trial. The court held that inasmuch as the former indictment was gnashed at the instance of the defendant, he was not in a position to urge that he was place in jeopardy thereunder, and that having once urged the invalidity of the indictment lie was estopped from thereafter claiming it to have been valid." (14 Ann. Cas. 426; Italics ours.)

To the same effect is the following passage of our decision in the Acierto case:

"Even if it be granted that the court martial did have jurisdiction, the military trial in the instant cases has not place the appellant in jeopardy such as would bar his prosecution for violation of the Philippine penal laws or, for that matter, a second trial under the Articles of War.....Although under Rev. Stat. see. 1342 art. 5, it has been held that a former trial may be pleaded when there has been a trial the offense, whether or not there has been a sentence adjudged or the sentence has been disapproved (Dig. JAG [VTVB] p. 167), the rule is and should be otherwise when the disapproval was made in response to the defendant's plea based on lack of jurisdiction. (Ex parte Castello, 8 F. 2nd 283, 286.) In such case the former trial may not be pleaded in bar in the second trial." (Italics ours.)

Lastly, pursuant to the last sentence of Section 10, Rule 113 of the Rules of Court:

" * * * If, however, the defendant learns after he has pleaded or has moved to quash on some other ground that the offense with which he is now charged is an offense for which he has been pardoned, or of which he has been convicted or acquitted or been in jeopardy, the court may in its discretion entertain at any time before judgment a motion to quash on the ground of such pardon, conviction, acquittal or jeopardy."

A court thereby has "discretion" to entertain or not to entertain a motion to quash filed by the defendant based upon a former jeopardy, which came to his knowledge "after he has pleaded." Although this provision regulates the procedure of courts of first instance, we find no plausible reason to depart from its policy in proceedings before appellate courts. Although, as adverted to above, there are no "pleadings"—in the technical sense of the term—in appealed cases, the briefs therein filed play the role of said pleadings insofar as said briefs concretize the issues raised and submitted for determination by the appellate court. However, defendant herein has not tried to avail himself of said provision, for she has not moved to dismiss the appeal upon the ground of double jeopardy. At any rate, she cannot invoke, by analogy the above quoted provision of Section 10, Rule 113, because the same requires that knowledge of the former jeopardy be acquired after the plea, whereas defendant herein knew, before filing her brief with this Court, that the attempt by the prosecution to seek a review of the order appealed from opened the door to the issue of double jeopardy. In fact, when the prosecution moved, in the lower court, for a reconsideration of said order, defendant objected upon the ground of double jeopardy.

But, even if she may claim the benefits of the aforementioned provision of Section 10, Rule 113, it should be noted that the, same confers upon the Court "discretion" to entertain the plea of double jeopardy or not. Under the circumstances surrounding the case—considering particularly that defendant had induced the lower court to believe erroneously that the crime charged in the information was not included in allegations of the complaint, that another preliminary investigation of the crime charged in the information was necessary, and that in the absence of such other preliminary investigation the lower court had no jurisdiction over the case, and that the ends of justice would be defeated, by entertaining now a plea of double jeopardy, which up to this late stage of the proceedings, has not been set up in this Court—we are of the opinion, and so hold, that the interest of the proper administration of justice would be served best by a determination of the merits of the charge against defendant

herein.

Wherefore, the order appealed from is hereby reversed, and the case remanded to the lower court for further proceedings not inconsistent with this decision, without special pronouncement as to costs. It is so ordered.

Padilla, Bautista Angelo, Labrador, Reyes, J. B. L., Barrera, Paredes, and Dizon, JJ., concur.

Bengzon, J., concurs in the result.

[*] 103 Phil., 504.

DISSENTING OPINION

PARAS, C. J.:

The Constitution provides:

"(20) No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by law and an ordinance, conviction or acquittal either shall constitute a bar to another prosecution for the same act." (Art III—Bill of Rights.)

The Rules of Court provides:

"Sec. 2. Who may appeal. The People of the Philippines can not appeal if the defendant would be placed thereby in double jeopardy. In all other cases either party may appeal from a final judgment or ruling or from order made after judgment affecting the substantial rights of the appellant." (Rule 118)

Even before the foregoing section of Rule 118 of the Rules of Court was promulgated, all the decisions of this Court from the time the doctrine in the Kepner case was laid down had consistently been the denial of an appeal by the government when the accused has been discharged or acquitted. Only a favorable ruling upon a motion to dismiss equivalent to a demurrer could be appealed.

GENERAL ORDERS NO. 58 PROVIDED:

"Sec. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant or in any case now permitted by law. The United States may appeal from a judgment for the defendant rendered on a demurrer to an information or complaint, and from an order dismissing a complaint or information."

The opening sentence in the Rules of Court not found in General Orders No. 58 or its amendments is, therefore, a mere reiteration of the doctrine in the Kepner case. In *People vs. Borja*, 43 Phil, 618, upon appeal by the Government, the Solicitor General's Office, instead of filing a brief moved to dismiss the appeal. And so in other cases. Recently, we held that the Government cannot appeal an order of dismissal or on the merits of a criminal case although said order is erroneous (*People vs. Labatete*, 107 Phil., 627; *People vs. Bao*, 106 Phil., 243; 56 Off. Gaz., 7768; *People vs. Robles*, 105 Phil., 1016; 57 Off. Gaz., 61; *People vs. Tacneng*, (No. L-120821, April 30, 1959).

In the instant case, after a witness had testified for the prosecution, the Court of First Instance ordered the dismissal of the case upon motion of the accused on the ground that there was lack of previous preliminary investigation. In fact, there has been such an investigation but the court erroneously granted the motion on that sole ground. When the fiscal asked for reconsideration of the order of dismissal, defense counsel immediately

objected on the ground that such motion would place the accused in double jeopardy. The fiscal has appealed the case. Under the repeated ruling of this Court, it is our bounden duty to dismiss the appeal without any further discussion. But after the Solicitor General's Office has filed its brief, the counsel for the defense or appellee made no reference to nor claim double jeopardy, and now it is contended that such an omission is equivalent to waiver of the defense. I regret to dissent. Such waiver is only possible when after an accused has been prosecuted and acquitted or convicted, a new complaint or prosecution would entitle the accused to the defense of double jeopardy, and it is only in this instance that said defense could be waived. (See Sec. 1 (h) and Sec. 5, Rule 113). That waiver has no application to an appeal for the reason that that remedy is completely banned or prohibited. It should be remembered that while in the Salico case (47 Off. Gaz., 1765; 84 Phil., 722), this Court in a divided opinion had ruled otherwise, subsequent decisions had abandoned the doctrine.

It can be conjectured that when the counsel for appellee prepared his brief, he had not read the latest doctrine on the matter, for the simple reason that the Official Gazette and the Philippine Reports have not published the decisions containing said doctrine. Even the 1960 edition of the Comments on Criminal Procedure by Judge Ruperto Kapunan, Jr., still contains the doctrine in the Salico case as the latest. No wonder, therefore, that the counsel for appellee had failed to mention in his brief that the doctrine in said case has been completely abandoned.

Reference is made to the doctrine in the case of Acierto (92 Phil., 534; 49 Off. Gaz. 518). To my mind, there is no relevancy for that case refers to the jurisdiction of the military court of the United States, on the one hand, and the civil court or court of first instance of the Philippine Government, on the other. And it is clear that in the present appealed case, the question involved is not one of jurisdiction but irregularity in the proceeding based on the false ground that there has been no preliminary investigation of the case before it was tried by the court of first instance. Needless to say, preliminary investigation is a step that can be waived expressly or impliedly.

As stated above, the record shows that the counsel for defendant-appellee had already invoked the defense of double jeopardy when the fiscal filed a motion for reconsideration. In a criminal case, even if the brief does not mention such detail, under our power to review, revise, reverse, modify, or affirm decisions of lower courts, we can consider any error we can detect in deciding the case.

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