

**MARLOU YGAY Y MANTUA, FELIPE OGANG, JR. Y BABAYONON,
ROBERT PANE Y DELIMA AND ROBERT DELA TORRE Y ABILES,
PETITIONERS, VS. HON. ROMEO M. ESCAREAL, IN HIS CAPACITY AS
THE JUDGE O...**

G.R. No. L-44189. February 28, 1985

Ponente: RELOVA, J.

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RELOVA, J.:

This is a petition for certiorari and prohibition with a writ of preliminary injunction. Petitioners seek to annul and set aside the order, dated June 14, 1976, issued by respondent Judge Romeo Escareal of the then Circuit Criminal Court of Cebu remanding to the Military Court Criminal Case No. CCC-XIV-1385-Cebu, entitled "People of the Philippines vs. Marlou Ygay, et al.", and the order of June 25, 1976, denying their motion for reconsideration.

Records show that on May 19, 1976 Jose Lucero, Jr. filed a complaint with the Cebu City police accusing petitioners Marlou Ygay, Felipe Ogang, Jr., Robert Pane and Robert dela Torre of the crime of homicide for killing his son, Lexter Lucero. Attached to the complaint was the joint affidavit of Patrolmen Daniel Somosot and Exequiel Logales wherein they stated that upon apprehension of Ygay and Ogang a stainless steel knife and a fork with two (2) blades were recovered from them, respectively. The complaint was forwarded to the Office of the City Fiscal.

Assistant City Fiscal Edilberto P. Darantinao set the case for clarificatory examination on May 25, 1976 and issued the corresponding subpoena to herein petitioners.

On May 24, 1976, Gil Lucero and Mario Mondragon executed a more detailed affidavit concerning the incident. They stated that on the date of the incident all the four (4) accused (herein petitioners) were armed with weapons - Ygay with a stainless steel knife; Ogang, with a sharpened fork; Pane, with a long-bladed weapon and dela Torre, also with a bladed weapon, which they used in stabbing the deceased. On the same date, Manuel Gandionco gave a sworn statement in connection with the aforementioned incident, substantially corroborating the joint affidavit of Gil Lucero and Mario Mondragon.

The following day, May 25, 1976, Jose Lucero, Jr. and his wife filed a complaint for murder against the petitioners with the City Fiscal of Cebu.

The preliminary investigation of the case was held in the afternoon of May 25, 1976. The accused were absent but their counsels appeared and waived their right to preliminary investigation. Consequently, an information for murder against petitioners was filed with the respondent court which ordered the arrest of the petitioners.

On June 7, 1976, the Acting City Fiscal of Cebu filed an urgent motion to withdraw the case on the ground that the same was inadvertently filed with the Circuit Criminal Court considering that under General Order No. 54 the case falls within the exclusive jurisdiction of the military tribunal.

On June 14, 1976, after hearing, respondent judge issued an order transferring the aforementioned case to the military tribunal. Petitioners filed a motion for reconsideration of the said order but the same was denied.

Hence, this petition raising the following assignments of errors, to wit:

1. Respondent judge's act in railroading Criminal Case No. CCC-XIV-1385 to military tribunal does violence to due process of law insofar as the constitutional right of the accused (petitioners) to be informed of the nature and cause of the accusation against them is concerned;
2. Respondent judge acted without or in excess of jurisdiction or with grave abuse of discretion for having grievously erred in divesting the Circuit criminal Court of its original jurisdiction to hear and decide Criminal Case No. CCC-XIV-1385 in which the petitioners are charged for murder, an offense defined and penalized under the Revised Penal Code in favor of the Military Tribunal pursuant to General Order No. 54;
3. The respondent city fiscal committed a grave abuse of discretion in filing the information for murder instead of simple homicide, and without affording the petitioners their right to preliminary investigation and by reclassifying the crime from simple homicide, to murder committed by a band, thus, railroading the case to the Military Tribunal; and
4. Respondent judge failed to consider that the illegal and wrongful transfer of Criminal Case No. CCC-XIV-1385 in favor of the Military Tribunal unjustifiably deprives the petitioners of their constitutional right to bail.

In their first and second assigned errors petitioners contend that in transferring the case to the military tribunal, respondent court violated their right to be informed of the nature and cause of the accusation against them. Further, they argue that it is the respondent court which has jurisdiction over the case considering that the information does not allege the existence of a band in the commission of the crime of murder or that they were charged with violation of General Order No. 54.

Petitioners' contentions are untenable. Under Rule 110, Section 5 of the Revised Rules of Court, an information is sufficient if "it states the name of the defendant; the designation of the offense by the statute; the acts or omissions complained of as constituting the offense; the name of the offended party; the approximate time of the commission of the offense; and, the place wherein the offense was committed." All these requirements are contained in the information against the petitioners.

As defined in General Order No. 54, a band "consists of three or more persons, at least one of whom is armed, for use in the commission of a crime or offense (Sec. 3[b])." In the case at bar, the information alleges that the four defendants were armed with stainless knife and improvised forks. Thus, while not explicitly expressed, the existence of band is alleged in the information. The mere presence of band in the commission of murder, even without alleging that there is a violation of General Order No. 54, vests exclusive jurisdiction on the military tribunal. Nonetheless, whether or not a band really existed in this case is not important at this stage of the case as the allegations are the ones controlling for the purpose of determining the jurisdiction of the court.

Relative to the third assigned error, petitioners pointed out that based on the statements of the prosecution witnesses, the qualifying circumstance of superior strength is not present and, therefore, the filing against them of the crime of murder, instead of homicide, without affording them their right to a preliminary investigation, is a grave error, committed with grave abuse of discretion.

This contention of petitioners is devoid of merit. They are raising a factual issue which is not proper in certiorari proceedings. And, it must be stressed here that on the alleged denial of the right to preliminary investigation, petitioners had waived the same, through their counsels.

Finally, in their fourth assigned errors, petitioners argue that the transfer of their case to the military tribunal deprives them of their constitutional right to bail. Again, We find the same without merit. General Order No. 54 which vests in the military tribunal exclusive jurisdiction over offenses of murder committed by a band was promulgated by the President in the exercise of his martial law powers. The non-availability of bail in the military tribunals could not be questioned under martial law regime considering the existing conditions at the time. Moreover, this issue was rendered moot and academic by the subsequent return of the case to the respondent court in 1977, as stated in the Motion and/or Manifestations of petitioners filed with the Court on August 10, 1977, "[t]hat on August 2, 1977 respondent Judge Romeo M. Escareal issued an Order stating that the Judge Advocate General's Office, Armed Forces of the Philippines, Quezon City had returned the records of the instant case to the Circuit Criminal Court of Cebu pursuant to the General Order No. 59, dated June 24, 1977 implemented by Department of National Defense Order No. 94 dated July 16, 1977."

WHEREFORE, for lack of merit, the petition is DISMISSED and the Regional Trial Court of Cebu is hereby ORDERED to proceed with the trial of the case.

SO ORDERED.

De la Fuente, and Alampay, JJ., concur.

Teehankee, (Chairman), in the result, since the basic issue that civilians may not be tried by Military Commissions has been rendered moot, with the return of the case to regular civil courts.

Melencio-Herrera, and Plana, JJ., in the result.

Gutierrez, Jr., concurs, since the case is now back with the civil court.

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