

**THE PEOPLE OF THE PHILIPPINES, PETITIONER, VS. THE
HONORABLE JUDGE MEYNARDO A. TIRO OF THE CIRCUIT
CRIMINAL COURT, 15TH JUDICIAL DISTRICT (ILIGAN CITY), MAJOR
FELIPE U. CARREON,...**

G.R. No. L-32479. December 16, 1970

Ponente: CASTRO, J.

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CASTRO, J.:

Petition for certiorari filed by the State to annul an order of the respondent Judge Meynardo A. Tiro (Presiding Judge of the Circuit Criminal Court, 15th Judicial District, at Iligan City), promulgated on August 6, 1970 in criminal case CCC-XV-14- Lanao del Norte, entitled "People of the Philippines vs. Major Felipe U. Carreon, Jr. and Corporal Sergio Atwil," which order directed the delivery of "Major Felipe Carreon and Cpl. Sergio Atwil to their Commanding General, the IV PC Zone Commander, at Camp Evangelista, Cagayan de Oro City, for safekeeping, pursuant to Executive Order No. 106, Series of 1937 and 'the original Order of Honorable Judge Hernando Pineda of the Court of First Instance of Lanao del Norte, dated June 16, 1970, with the instructions that the two accused should be kept within the camp pre-mises of Camp Evangelista, Cagayan de Oro City, and that should it be necessary for any of the accused to leave said premises for medical purposes and the like, the proper petition should be filed before this Court with prior notice to the prosecution."

The essential facts are not complicated.

On December 24, 1969 City Fiscal Cicero C. Jurado of Iligan filed an information charging Major Felipe U. Carreon, Jr. and Cpl. Sergio Atwil with the crime of murder, committed, in the language of the information, as follows:

"That on or about December 21, 1969, in the City of Iligan, Philippines, and within the jurisdiction of this Honorable Court, the said accused, conspiring and confederating together and mutually helping each other, armed with deadly weapons, to wit: .38 and .45 caliber firearms, by means of treachery and evident premeditation, and with intent to kill, did then and there willfully, unlawfully and feloniously attack, assault, shoot, hit and wound one Judge Erlito L. Echiverri, thereby inflicting upon him the following physical injuries to wit:

"Massive Hemorrhage Chest and Abdomen

"Gunshot wounds

which caused his death.

"Contrary to law and in violation of Article 248 of the Revised Penal Code, with the aggravating circumstances of treachery and evident premeditation."

At the end of the information appear the following words: "No Bail Recommended."

Application was thereafter made with the City Court of Iligan by defense counsel Major Jovito Pinatakan for the delivery of the two accused for safe-keeping, pending trial, to their commanding officer, invoking the provisions of paragraph 4, Executive Order 106, series 1937, which read as follows:

"4. In case the judge or justice of the peace will bind over any officer or enlisted man under arrest to answer a criminal charge, and such officer or enlisted man shall fail to give bail, the person so in custody shall be delivered to the provincial commander or to the commanding officer of the accused for safe-keeping and shall so remain until acquitted or convicted on final judgment by the court. It shall henceforth be the duty of such officer or provincial commander safely to keep and produce the prisoner before the proper court at the proper time. If necessary for the safe-keeping of the prisoner, he may be committed to the provincial jail or the Bureau of Prisons at Manila by the officer aforesaid."

In an order dated April 10, 1970, City Judge Pompeyo L. Palarca of Iligan ordered the commitment of the two accused to the custody of Major Jovito Pinatakan at Camp Evangelista, Cagayan de Oro City.

On April 30, 1970, because the accused had waived preliminary investigation, an information was filed with Branch II of the Court of First Instance of Lanao del Norte (criminal case no. 27) charging the two accused with murder. The information recites:

"That on or about December 21, 1969, in the City of Iligan, Philippines, and within the jurisdiction of this Honorable Court, the said accused, conspiring and confederating together and mutually helping each other, armed with deadly weapons, to wit: .38 and .45 caliber firearms, by means of treachery and evident premeditation, and with intent to kill, did then and there willfully, unlawfully and feloniously attack, assault, shoot, hit and wound one Judge Erlito L. Echiverri, thereby inflicting upon him the following physical injuries, to wit:

Massive hemorrhage, chest and abdomen,

"Gunshot wounds,

which caused his death.

"Contrary to and in violation of Article 248 of the Revised Penal Code, with the aggravating circumstances of treachery and evident premeditation."

Private Prosecutors Juan Echiverri and Voltaire Rovira, on June 3, 1970, moved the said Court of First Instance for the commitment of the two accused to the city jail of Iligan City, contending that par. 4 of Executive Order 106 applies only to criminal cases where the offenses charged are bailable, and arguing that since the offense charged in this case is murder, which is a capital offense, and no bail was recommended, and the accused did not formally petition for bail, par. 4 of Executive Order 106 therefore does not apply. The court denied this motion on June 16, 1970.

After the case was transferred to the Circuit Criminal Court, and after the prosecution had rested its case, the defense counsel presented an oral demurrer to the evidence. This demurrer was denied on August 4, 1970, in the following words: "x x x the evidence so far presented by the prosecution, if not contradicted and rebutted by evidence of the defense, is sufficient to convict the two accused beyond a reasonable doubt." Two days later the said circuit criminal court issued the order of August 6, 1970, the legality of which is now challenged by the petition at bar.

The petitioner and the respondents are in agreement that Executive Order 106, series of 1937, is a valid executive order. The petitioner contends however that par. 4 of This executive order does not apply to capital offenses, as in the case at bar, whereas the respondents argue that the said provisions are mandatory upon courts of justice in

all cases.

We hereunder again quote in full the provisions of para-graph 4 of Executive Order 106:

"4. In case the judge or justice of the peace will bind over any officer or enlisted man under ar-rest to answer a criminal charge, and such officer or enlisted man shall fail to give bail, the person so in custody shall be delivered to the provincial com-mander or to the commanding officer of the accused for safe-keeping and shall so remain until acquitted or convicted on final judgment by the court. It shall henceforth be the duty of such officer or provincial commander safely to keep and produce the prisoner before the proper court at the proper time. If ne-cessary for the safe-keeping of the prisoner, he may be committed to the provincial jail or the Bureau of Prisons at Manila by the officer aforesaid." (emphasis ours)

Executive Order 106, series of 1937, which embodies fun-damental rules and regulations governing the arrest of officers and enlisted men of the armed forces, was issued and promulgat-ed by the then President Manuel L. Quezon of the Philippine Com-monwealth, presumably in the exercise of the powers vested in him as commander-in-chief of the armed forces by the provisions of section 10, clause 2, of article VII of the Constitution. There was no statute in existence, before the issuance of the said executive order, specifically and expressly empowering the President to issue the said executive order. However, subsequent legisla-tion has recognized the rules recited in the said executive order pertaining to the arrest and detention of members of the armed forces who are criminally charged before the civil courts. Arti-cle 75 of Commonwealth Act 408 (approved September 14, 1938), otherwise known as the Articles of War, requires the command-ing officer of a person accused before the civil courts "to use his utmost endeavor to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending and securing him, in order that he may be brought to trial. " Sec-tion 21 of Republic Act 138 (approved June 14, 1947), as amended by section 4 of Republic Act 1067 (approved June 12, 1954), takes it for granted that officers 'and enlisted n-en accused of crimes before the civil courts may or may not be held in the custody of the civil authorities. Thus the said section provides as follows:

"SEC. 21. (a) Except as hereinafter pro-vided in this section, officers and enlisted men lawfully detained or provisionally released on bail by the civil authorities pending the trial or final determination of their cases in the civil courts, or serving sentence of imprisonment, will receive no pay and allowances for the period of their ab-sence from military control or custody.

"(b) Except as hereinafter provided in this section, officers and enlisted men who have re-turned to military control following their release on bail or transfer to the custody of their respec-tive commanding officers for safekeeping, pend-ing the trial or final determination of their cases in the civil courts, will receive no pay, as distinguished from allowances, for any period of ab-sence from their regular duties by reason of the pendency of their cases before the civil courts.

"(c) Should any officer or enlisted man fall-ing under subsections (a) or (b) of this section be unconditionally released by the civil authorities without trial, or after trial and acquittal, or if the case against him before the civil courts is dis-missed or otherwise terminated without conviction, or if he shall have been sentenced to the penalty of destierro under Article two hundred and forty-seven of the Revised Penal Code, he shall be entitled to receive the pay and allowances, or pay, as the case may be, for the period of his absence from military control and/or regular duties: Provided, That the status of a person as absent without leave or in de-sertion immediately prior to the time of his arrest or detention by the civil authorities, and/or follow-ing his provisional or unconditional release there-from, shall continue until his return to actual mili-tary control, irrespective of the final outcome of his case before the civil courts.

"(d) Any officer or enlisted man who has re-turned to military control and performed regular duties pending the trial or final determination of his case before the civil courts, shall be entitled to receive pay and allowances during the period such duties have been performed, irrespec-tive of the outcome of his case. The restoration to,

or relief from, full duty status of officers and enlisted men who have lawfully returned to military control or custody pending the trial or final determination of their cases before the civil courts; shall be as directed by the Chief of Staff, with the approval of the Secretary of National Defense: Provided, That nothing herein shall be construed as relieving the proper commanding officer or officers of military personnel accused before the civil courts from the responsibility of producing the person of the accused at the time and place required by the lawful order of the proper civil authorities." (emphasis ours)

A perceptive analysis of the, foregoing provisions of law will yield the inevitable conclusion that although the law considers as proper the transfer of an accused military personnel to the custody of the army authorities for safe-keeping pending trial, just as inescapably is to be implied from the said statutory enactments that the said transfer or commitment is not compulsory since the same legislative enactments likewise recognize the propriety of the accused remaining in the custody of the civil authorities.

The Legislature has thus impliedly retained in the civil courts the full discretion, unimpaired and undiminished, to determine whether or not to resort to the provisions of par. 4 of Executive Order 106 in the proper cases. This must be so because the said precise provisions of the said executive order have not been embodied in any statutory enactment and are a mere part of Army regulations issued by the President as commander-in-chief. Such regulations are only directory, as far as civil courts are concerned.

To this effect are the following authoritative comments of Colonel William Winthrop on pages 27 and 32 of his book entitled "Military Law and Precedents," 2nd edition:

"The authority for army regulations proper is to be sought - primarily - in the distinctive functions of the President as Commander-in-chief and as Executive. His functions as Commander-in-chief authorize him to issue, personally or through his military subordinates, such orders and directions as are necessary and proper to ensure order and discipline in the army."

"x x x whether or not resting upon any express authority of statute, the legal effect of army regulations - as of other regulations proper is - as already indicated, simply that of executive, administrative, instrumental rules and directions as distinguished from statutory enactment. It is indeed somewhat loosely said of the army regulations by some of the authorities, that they have 'the force of law' but this expression is well explained by the court in U. S. v. Webster, as follows: - 'When it is said that they have the force of law, nothing more is meant than that they have that virtue when they are consistent with the laws established by the Legislature. That is to say, while they have a legal force, it is a force quite distinct from, and inferior and subordinate to, that of the statute law. They have the force of law within their proper scope, not beyond it. They are thus not law in the sense of being a part of the 'law of the land,' nor are they embraced in the designation, 'laws of the United States,' but are law, and operative, as regulations only. As such they are law to the army and those whom they may concern, and so far are binding and conclusive. While regulations, 'intended for the government and direction of officers and agents under his authority, would not legally restrain, in the exercise of his executive powers, the President, or the head of the Department by whom the same were made, yet the President, as well as any other executive official, would be so far bound by general regulations framed by him that he could not justly except from their operation a particular case to which they applied. x x x

"The binding force and application to the army of the army regulations is illustrated by the fact that a failure to observe a regulation may constitute a military offence cognizable by court-martial under the 62d art. of War. On the other hand, officers and soldiers, in complying with an authorized regulation, will be justified in law and protected by the courts."

Applying the above time-tested and time-honored principles, it is our view, and we so hold, that while the provisions of par. 4 of Executive Order 106 may bind the military compulsorily, they do not so bind the judicial tribunals. Nor is any modicum of judicial power vested in the military by the mere commitment of an accused to

his commanding officer for safe-keeping, for the duty of an officer in executing the mandate of a judicial order "is purely ministerial, and his power with respect thereto is limited to compliance with its terms." [1]

That the provisions of par. 4 of Executive Order 106 are not to be regarded as mandatory upon judicial tribunals is like-wise compellingly inferred from the following portions of the ex-planatory note to House Bill 1443, which later became Republic Act 1067 (supra):

"Military personnel awaiting trial before the civil courts, or the result thereof, may or may not be under military control; and those who return to military control may or may not be present and available for their regular duties. Those de-tained by the civil authorities will receive pay and allowances for the period of their absence only if they are acquitted, or if the case is otherwise ter-minated without a conviction. But so long as per-sons who have lawfully returned to their units are placed on full duty status and are in the perform-ance of their regular duties, the outcome of the case against them should have no effect on their right to receive pay and allowances for the period during which actual duty has been performed. And on the other hand, if they have been prevented from performing regular duties because of the pen-dency of such cases against them, their right to receive pay and allowances for the period of such absence from regular duties should logically de-pend upon the final outcome of the case. If convicted, their absence is due to their fault; therefore, no pay accrues. The wisdom or desirability of placing such persons (who lawfully return to mi-litary control) on full duty status, or of placing them under some form of restraint pending their trial, will of course depend upon the gravity of the offense, and likelihood of the accused's at-tempting to escape, and the military exigencies. It is proposed to leave the matter of the restora-tion to, or relief from, full duty status of mili-tary personnel awaiting trial, to the discretion of the Chief of Staff and the Secretary of National Defense alone. This discretion is for purposes of determining the pay status of the accused only. It has been expressly provided that in no way can the exercise of this discretion by the Chief of Staff relieve the commanding officer of the accused (who is under military control or custody) of the duty of producing the accused when lawfully required by the proper civil authorities."

Thus, the provisions of par. 4 of Executive Order 106, we repeat, are to be construed as merely directory upon the civil courts. Stated otherwise, in a case where the offense charged is bailable, a civil court, with respect to the commitment of the accused, may, in the proper exercise of its discretion, avail of the provisions of par. 4 of Executive Order 106, as an alternative recourse for the commitment of the accused and his custody and safe-keeping until acquitted or convicted by final judgment.

Coming now to the case at bar, we hold that the provisions of par. 4 of Executive Order 106 have no application. The accused are charged with murder, which is a capital offense. No bail was recommended by the City Fiscal when he filed the information. Nor was any formal application for bail ever made by the accused. Even if we regard the repeated petitions of the accused for their commitment, pending trial, to their commanding officer as, cons-tructively, petitions for bail, what the respondent court should have priorly done was to determine, in accord with the pertinent provisions of the Rules of Court, whether the evidence of guilt against the said accused is strong. On an affirmative finding, the respondent court cannot avail of the provisions of par. 4 of Exe-cutive Order 106, as this paragraph, we have already held, is applicable only to offenses which are bailable.

In view of the finding of the respondent court, embodied in its order of August 4, 1970, that "the evidence so far presented by the prosecution, if not contradicted and rebutted by evidence of the defense, is sufficient to convict the two accused beyond a rea-sonable doubt," which means, in essence, that the evidence of guilt is strong, the questioned order of the respondent court dated August 6, 1970 directing the re-delivery of the two accused to their commanding officer for custody and safe-keeping, pending trial, is clearly a nullity.

ACCORDINGLY, the present petition is granted; the chal-lenged order of the respondent Circuit Criminal Court dated Aug-ust 6, 1970 is hereby annulled and set aside; and the said respon-dent Court is hereby directed to

forthwith order the commitment of the two respondents-accused, Major Felipe U. Carreon, Jr. and Cpl. Sergio Atwil, to the city jail of Iligan, or, if the environmental circumstances so warrant, to any other suitable place of detention, pending termination of the trial of, and rendition of judgment in, its criminal case CCC-XV-14-LANAO DEL NORTE. No costs.

Reyes, Makalintal, Zaldivar, Teehankee, Barredo, and Villamor, JJ., concur.

Fernando, J., concurs in a separate opinion.

Concepcion, C.J., no part.

Dizon and Makasiar, JJ., on official leave.

[1] Whalen v. Cristell, 173 P 2d 252, 161 Kan. 747.

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CONCURRING OPINION

FERNANDO, J.:

The decision reached by this Court is to grant the writ of certiorari prayed for, the challenged order of August 6, 1970 being thereby annulled. I am fully in agreement. It must be acknowledged likewise, that the opinion of the Court penned by Justice Castro, is notable for the meticulous care with which both the relevant facts and the applicable law is appraised. If it were a question solely of whether or not paragraph 4 of Executive Order No. 106, Series of 1937, as tested by applicable principles of statutory construction would govern, then full concurrence would not be inappropriate. In view of the fact, however, "that respondent Judge did feel bound to submit to such a provision, and even petitioner, as noted in the opinion of the Court, did not impugn its validity, I feel constrained to write a separate opinion to express the grave and serious doubt I entertain concerning the power of the President to include in the aforesaid Executive Order such a requirement by virtue of his prerogative as Commander-in-Chief.

It is to be admitted that under the Constitution now in force, the President of the Philippines, in the language of Justice Laurel, "is endowed with broad and extraordinary powers" and "is expected to govern with a firm and steady hand without vexatious or embarrassing interference and much less dictation from any source * * *.[1] Moreover, there has been no reluctance on the part of this Court to recognize the wide ambit of authority possessed by him as commander-in-chief of the armed forces. Nonetheless, there is no justification consistent with the principle of the supremacy of the Constitution for any assertion of any prerogative, that would infringe on the fundamental principle of separation of powers and would contravene the dearly-cherished concept of civilian supremacy. The most serious reflection has convinced me that questions of such a character are unavoidably raised by virtue of such a command in Executive Order No. 106, Series of 1937 to which obeisance was paid by respondent Judge.[2]

1. The paragraph in question appearing in Executive Order No. 106, Series of 1937, is quite explicit. The tone is imperative, the language one of command. No wonder the lower court acted as it did. It must have felt that it had no choice on the matter. That such an attitude is erroneous does not argue against the apparently peremptory

character of such paragraph.

Wisely has the Constitution vested in the Presidency control over all executive departments, bureaus and offices. It must be thus as he and he alone is the Executive.[3] He has the final say. So adherence to the fundamental principle of separation of powers requires. That is but right and proper. It is not for him, though, to exercise control over judges. They belong to a separate and independent department. Any such attempt would be lacking in support in our constitutional scheme. That would be not to honor but to disregard the basic concept of coordinate and equal branches of government. What is worse, the matter of granting bail and the effects thereof do appertain to the Supreme Court. So the Constitution in express language ordains.[4] It is in that sense that I find extreme difficulty in accepting the view that the judiciary is even called upon to take notice of the aforesaid paragraph.

Respondent Judge, however, was entirely of a different mind. As above noted, he accorded it more than due deference. As a result, he was much too generous in the appraisal of its terms. It is not too much to say that he did thus convert his Sala into what Justice Laurel referred to as a "receptacular agency" into which may flow whatever the Executive in his wisdom may pour. To repeat, that is not in accordance with the doctrine of separation of powers. Perhaps though respondent Judge cannot be blamed overmuch. It could be that he is the victim of a system that tolerates executive guidance and supervision over inferior courts even if in the guise of its being limited to administrative matters. The result as unfortunately did happen here is one of judicial abdication.

2. It may be out of excess of caution, but I am likewise bothered by the thought that the paragraph in question appears to run counter to the equally cardinal postulate of civilian supremacy. Its source is traceable to the powers of the President over the armed forces. It is not for this Court, of course, to curtail the vast scope of authority that is rightfully his as Commander-in-Chief. It is equally well-settled, however, that there should be no unwarranted extension of such a competence. If the matter involved were limited to the appropriate discipline of the members of the defense establishment, the President should have his way. There could be no question as to the correctness of what was ordered. It was not, however, limited to that. Its wording, mandatory in character, would place the judiciary, at least on the trial court level, in a subordinate position. They would be compelled to grant officers and men of the military establishment, solely because of their status as such, a distinct privilege. It is not their predicament as indictees but their enrollment in the ranks of the military that is to prove decisive as to where they would be confined. I find difficulty then in resisting the conclusion of its repugnancy to the concept of civilian supremacy. A quotation from former Chief Justice Warren is illuminating: "Thus it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, 'it is so deeply rooted in our national experience that it must, be regarded as an essential constituent of the fabric of our political life.'"[5]

3. This is not to impugn the good faith of President Quezon in issuing the aforesaid provision in the Executive Order. It is to be conceded that such a move must have been prompted by what he considered to be the best interest of public service. Nor can it be gainsaid that there could have been compelling considerations from the standpoint of military discipline and prestige of the officers and members of the armed forces that called for a measure of this character. It is undoubted, however, that the only question before the courts is one of power. Whether wisdom or unwisdom resides in the act or executive order under scrutiny is not pertinent. To repeat, it is the existence of authority that is crucial. Nor is it to be presumed. It must be shown to exist, whether by express grant or by necessary implication. That principle applies to every one in officialdom from the highest to the lowest. If I am correct in my assumption, the commander-in-chief clause does not lend support to such assertion of competence. For it is not to be lost sight of that the Constitution is not only a source of power but imposes limits beyond which it cannot go, again whether categorically set forth or by way of necessary implication. It is a truism that unlimited power is not conferred on any public official. The Constitution saw to that; it must be respected. It is paramount and binding on all in the government service, the President not excluded. Only thus

may its supremacy be upheld.

4. Before closing, may I refer to statements in the opinion of Justice Castro which are worth commending. Thus: "The Legislature has thus impliedly retained in the civil courts the full discretion, unimpaired and undiminished, to determine whether or not to resort to the provisions of par. 4 of Executive Order 106 in the proper cases. This must be so because the said precise provisions of the said executive order have not been embodied in any statutory enactment and are a mere part of Army regulations issued by the President as commander-in-chief. Such regulations are only directory, as far as civil courts are concerned." Also: "Applying the above time-tested and time-honored principles, it is our view, and we so hold, that while the provisions of par. 4 of Executive Order 106 may bind the military compulsorily, they do not so bind the judicial tribunals. Nor is any modicum of judicial power vested in the military by the mere commitment of an accused to his commanding officer for safe-keeping, for the duty of an officer in executing the mandate of a judicial order 'is purely ministerial, and his power with respect thereto is limited to compliance with its terms.'" Undoubtedly, they are steps in the right direction, but for reasons which for me are of decisive weight, I must say that they do not go far enough. Hence, this brief concurring opinion.

[1] Planas v. Gil, 67 Phil. 62, 78 (1939). Cf. Villena v. The Secretary of the Interior, 67 Phil. 451. (1939).

[2] Cf. Ruffy v. Chief of Staff, 75 Phil. 875 (1946); Kuroda v. Jalandoni, 83 Phil. 171 (1949); and Arula v. Espino, G.R. No. L-28949, June 23, 1969, 28 SCRA 540.

[3] Villena v. Secretary of Interior, 67 Phil. 451 (1939).

[4] The Constitution provides: "The Supreme Court shall have the power to promulgate rules concerning pleading, practice, and procedure in all courts, and the admission to the practice of law. Said rules shall be uniform for all courts of the same grade and shall not diminish, increase, or modify substantive rights. The existing laws on pleading, practice, and procedure are here-by repealed as statutes, and are declared Rules of Courts, subject to the power of the Supreme Court to alter and modify the same. The Congress shall have the power to repeal, alter, or supplement the rules concerning pleading, practice, and procedure, and the admission to the practice of law in the Philip-pines." Art. VIII, Section 13.

[5] The Great Rights, 95 (1963).

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