

**JOSE L. GAMBOA AND UNITS OPTICAL SUPPLY COMPANY,
PETITIONERS, VS. COURT OF APPEALS AND BENJAMIN LU HAYCO,
RESPONDENTS.**

G.R. No. L-41054. November 28, 1975

Ponente: MARTIN, J.

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MARTIN, J.:

This is a petition to review on certiorari the judgment of the respondent Court of Appeals in CA-G.R. No. SP-03877, promulgated on July 17, 1975, which We treat as special civil action (SC Resolution of September 2, 1975), involving the proper appreciation of the rule on plurality of crimes, otherwise known as "concursum delictuorum", and the theory of "continuous crime".

The private respondent Benjamin Lu Hayco was a former employee of petitioner company in its optical supply business at Sta. Cruz, Manila. On January 5, 1973, one hundred twenty-four (124) complaints of estafa under Article 315, para. 1-b of the Revised Penal Code were filed against him by the petitioner company with the Office of the City Fiscal of Manila. After the procedural preliminary investigation, the Office of the City Fiscal filed seventy-five (75) cases of estafa against private respondent before the City Court of Manila. Except as to the dates and amounts of conversions, the 75 informations commonly charged that " * * * the said accused, being then an employee of the Units Optical Supply Company * * *, and having collected and received from customers of the said company the sum of * * * in payment for goods purchased from it, under the express obligation on the part of the said accused to immediately account for and deliver the said collection so made by him to the Units Optical Supply Company or the owners thereof * * *, far from complying with his said aforesaid obligation and despite repeated demands made upon him * * * did then and there * * * misappropriate, misapply and convert the said sum to his own personal use and benefit by depositing the said amount in his own name and personal account with the Associated Banking Corporation under Account No. 171 (or with the Equitable Banking Corporation under Account No. 707), and thereafter withdrawing the same * * *."

A civil action for accounting (docketed as Civil Case No. 89373 of the Court of First Instance of Manila) was likewise filed by Lu Chiong Sun, the owner of the Units Optical Supply Company, complaining that during his hospital confinement from September 27, 1972 to October 30, 1972, private respondent initiated discharging the business functions and prerogatives of the company. And to paint a shade of validity to this exercise of powers, private respondent, thru fraud, deceit and machinations duped Lu Chiong Sun into affixing his signature and thumbprint on a general power of attorney in his (private respondent's) favor. With the use of this deed, private respondent closed the accounts of Lu Chiong Sun with the Equitable Banking Corporation and, thereafter, opened accounts in his own name with the same bank and with the Associated Banking Corporation.

While the criminal suits in particular were pending trial on the merits before the twelve branches of the City Court of Manila,[1] private respondent commenced on May 15, 1974 a petition for prohibition with preliminary injunction before the Court of First Instance of Manila (Branch XV) against the petitioners herein and the City

Court Judges of Manila, claiming that the filing, prosecution and trial of the seventy-five (75) estafa cases against him is not only oppressive, whimsical and capricious, but also without or in excess of jurisdiction of the respondents City Fiscal and the City Court Judges of Manila. Private respondent asserts that all the indictments narrated in the seventy-five (75) informations were mere components of only one crime, since the same were only impelled by a single criminal resolution or intent. On October 31, 1974, the lower court dismissed the petition on the ground that the series of deposits and the subsequent withdrawals thereof involved in the criminal cases were not the result of only one criminal impulse on the part of private respondent.

As a consequence, private respondent Benjamin Lu Hayco appealed to the Court of Appeals. On July 17, 1975, the Appellate Court reversed the order of the lower court and granted the petition for prohibition. It directed the respondent City Fiscal "to cause the dismissal of the seventy-five (75) criminal cases filed against petitioner-appellant, to consolidate in one information all the charges contained in the seventy-five (75) informations and to file the same with the proper court." The *raison d'être* of the ruling of the Court of Appeals is that:

"Where the accused, with intent to defraud his employer, caused the latter to sign a document by means of deceit and false representation, which document turned out to be a general power of attorney, and with the use of said document he closed the accounts of his employer in two banks and at the same time opened in his name new accounts in the same banks and then made collections from the customers of his employer, depositing them in the bank accounts in his name, the series of deposits made by him which he later withdrew for his own use and benefit, constitutes but one crime of estafa, there being only one criminal resolution and the different acts performed being aimed at accomplishing the purpose of defrauding his employer."

We thus readily recognize that the singular question in this present action is whether or not the basic accusations contained in the seventy-five (75) informations against private respondent constitute but a single crime of estafa.

It is provided in Article 48 of our Revised Penal Code, as amended by Act No. 4000, that "(w)hen a single act constitutes two or more grave or less grave felonies or when an offense is a necessary means for committing the other, the penalty for the most serious crime shall be imposed, the same to be applied in its maximum period." The intention of the Code in installing this particular provision is to regulate the two cases of concurrence or plurality of crimes which in the field of legal doctrine are called "real plurality" and "ideal plurality".[2] There is plurality of crimes or "concurso de delitos" when the actor commits various delictual acts of the same or different kind. "Ideal plurality" or "concurso ideal" occurs when a single act gives rise to various infractions of law. This is illustrated by the very article under consideration: (a) when a single act constitutes two or more grave or less grave felonies (described as "delito compuesto" or compound crime); and (b) when an offense is a necessary means for committing another offense (described as "delito complejo" or complex proper). "Real plurality" or "concurso real", on the other hand, arises when the accused performs an act or different acts with distinct purposes and resulting in different crimes which are juridically independent. Unlike "ideal plurality", this "real plurality" is not governed by Article 48.[3]

Apart and isolated from this plurality of crimes (ideal or real) is what is known as "delito continuado" or "continuous crime". This is a single crime consisting of a series of acts arising from a single criminal resolution or intent not susceptible of division. For Cuello Calon, when the actor, there being unity of purpose and of right violated, commits diverse acts, each of which, although of a delictual character, merely constitutes a partial execution of a single particular delict, such concurrence or delictual acts is called a "delito continuado". In order that it may exist, there should be "plurality of acts performed separately during a period of time; unity of penal provision infringed upon or violated and unity of criminal intent and purpose, which means that two or more violations of the same penal provision are united in one and the same intent leading to the perpetration of the same

criminal purpose or aim." [4]

It is not difficult to resolve whether a given set of facts constitutes a single act which produces two or more grave or less grave offenses or a complex crime under the definition of Article 48. So long as the act or acts complained of resulted from a single criminal impulse it is usually held to constitute a single offense to be punished with the penalty corresponding to the most serious crime, imposed in its maximum period. [5] The test is not whether one of the two offenses is an essential element of the other. [6] In *People v. Pineda*, [7] the Court even expressed that "to apply the first half of Article 48, * * * there must be singularity of criminal act; singularity of criminal impulse is not written into the law." Prior jurisprudence holds that where the defendant took the thirteen cows at the same time and in the same place where he found them grazing, he performed but one act of theft. [8] Or, the act of taking the two roosters, in response to the unity of thought in the criminal purpose on one occasion, constitutes a single crime of theft. There is no series of acts committed for the accomplishment of different purposes, but only of one which was consummated, and which determines the existence of only one crime. The act of taking the roosters in the same place and on the same occasion cannot give rise to two crimes having an independent existence of their own, because there are not two distinct appropriations nor two intentions that characterize two separate crimes. [9]

In the case before Us, the daily abstractions from and diversions of private respondent of the deposits made by the customers of the optical supply company from October 2, 1972 to December 30, 1972, excluding Saturdays and Sundays, which We assume *ex hypothesi*, cannot be considered as proceeding from a single criminal act within the meaning of Article 48. The abstractions were not made at the same time and on the same occasion, but on variable dates. Each day of conversion constitutes a single act with an independent existence and criminal intent of its own. All the conversions are not the product of a consolidated or united criminal resolution, because each conversion is a complete act by itself. Specifically, the abstractions and the accompanying deposits thereof in the personal accounts of private respondent cannot be similarly viewed as "continuous crime". In the above formulation of Cuello Calon, We cannot consider a defalcation on a certain day as merely constitutive of partial execution of estafa under Article 315, para. 1-b of the Revised Penal Code. As earlier pointed out, an individual abstraction or misappropriation results in a complete execution or consummation of the delictual act of defalcation. Private respondent cannot be held to have entertained continuously the same criminal intent in making the first abstraction on October 2, 1972 for the subsequent abstractions on the following days and months until December 30, 1972, for the simple reason that he was not possessed of any foreknowledge of any deposit by any customer on any day or occasion and which would pass on to his possession and control. At most, his intent to misappropriate may arise only when he comes in possession of the deposits on each business day but not in futuro, since petitioner company operates only on a day-to-day transaction. As a result, there could be as many acts of misappropriation as there are times the private respondent abstracted and/or diverted the deposits to his own personal use and benefit. Thus, it may be said that the City Fiscal had acted properly when he filed only one information for every single day of abstraction and bank deposit made by private respondent. [10] The similarity of pattern resorted to by private respondent in making the diversions does not affect the susceptibility of the acts committed to divisible crimes.

Apropos is the case of *People v. Cid*, [11] where the Court ruled that the malversations as well as the falsifications in the months of May, June, July and August 1936 imputed to the accused "were not the result of only one resolution to embezzle and falsify, but of four or as many abstractions or misappropriations had of the funds entrusted to his care, and of as many falsifications also committed to conceal each of said case. There is nothing of record to justify the inference that the intention of the appellant when he committed the malversation in May, 1936 was the same intention which impelled him to commit the other malversations in June, July, and August." The ruling holds true when the acts of misappropriations were committed on two different occasions, the first in

January, 1955 to December, 1955, and the second in January, 1956 to July, 1956. It cannot be pretended that when the accused disposed of the palay deposit in January, 1955 to December, 1955, he already had the criminal intent of disposing what was to be deposited in January, 1956 to July, 1956.[12] There is no synonymy between the present case and that of *People v. Sabbun*,[13] where the Court held that the illegal collections made on different dates, i.e., December, 1949; January 1950 to February 1956; March 1956 to September 1957 constitutes a "continuing offense", because the said collections were "all part of the fees agreed upon in compensation for the service" to be rendered by the accused Sabbun in filing the claim of the spouses Dacquioag for U.S. Veterans benefit and collecting the pensions received by the widow from time to time. "The periodical collections form part of a single criminal offense of collecting a fee which is more than the prescribed amount fixed by the law" and "were impelled by the same motive, that of collecting fees for services rendered." As we have said, the various acts of defalcation perpetrated by private respondent in the present case from October 2, 1972 to December 30, 1972 are susceptible of division with separate criminal intents.

The respondent Court of Appeals harps upon the act of private respondent in allegedly inducing, with intent to defraud, Lu Chiong Sun "to sign a document by means of deceit and false representation, which document turned out to be a general power of attorney" and with the use of which, he closed the accounts of the latter in two banks, at the same time opening in his name new accounts in the same banks, for its conclusion that the acts complained of against private respondent constitute one continuous crime of estafa. It is striking to note, however, that the accusatory pleadings against private respondent are founded on Article 315, para. 1-b of the Revised Penal Code, which defines and penalizes estafa for conversion or misappropriation. In this form of estafa, fraud is not an essential element.[14] According to Groizard, "impudence, barefacedness, covetousness, and disloyalty employed in taking advantage of an opportunity take here the place formerly occupied by deceit.[15] "Fraudulent intent" in committing the conversion or diversion is "very evidently not a necessary element of the form of estafa here discussed; the breach of confidence involved in the conversion or diversion of trust funds takes the place of fraudulent intent and is in itself sufficient. The reason for this is obvious: Grave as the offense is, comparatively few men misappropriate trust funds with the intention of defrauding the owner; in most cases the offender hopes to be able to restore the funds before the defalcation is discovered. We may say in passing that the view here expressed is further strengthened by the fact that of the nine paragraphs of Article 535, the paragraph here under discussions is the only one in which the words "fraud", or "defraud" do not occur." [16] In other words, the alleged act of private respondent in causing, with intent to defraud, Lu Chiong Sun to affix his signature and thumbprint on the general power of attorney is immaterial and ineffective insofar as the charges of conversions are concerned. If at all, the said document may serve only the purpose of closing the accounts of Lu Chiong Sun with the banks and nothing more. Definitely, there is no necessity for it before private respondent could commit the acts of defalcation. As a matter of fact, private respondent resorted to this document only on October 17, 1972, or 15 days after he had already commenced the abstraction on October 2, 1972.[17]

The characterization or description of estafa as a continuing offense cannot be validly seized upon by private respondent as basis for its inference that the acts of abstraction in question constitute but a single continuing crime of estafa. The sole import of this characterization is that the necessary elements of estafa may separately take place in different territorial jurisdictions until the crime itself is consummated. The moment, however, that the elements of the crime have completely concurred or transpired, then an individual crime of estafa has occurred or has been consummated. The term "continuing" here must be understood in the sense similar to that of "transitory" and is only intended as a factor in determining the proper venue or jurisdiction for that matter of the criminal action pursuant to Section 14, Rule 110 of the Rules of Court.[18] This is so, because "a person charged with a transitory offense may be tried in any jurisdiction where the offense is in part committed. In transitory or continuing offense in which some acts material and essential to the crime and requisite to its consummation occur

in one province and some in another, the court of either province has jurisdiction to try the case, it being understood that the first court taking cognizance of the case will exclude the other." [19]

ACCORDINGLY, the judgment of the Court of Appeals, subject matter of this proceeding, is hereby reversed and set aside. The temporary restraining order issued by this Court on August 7, 1975, enjoining the enforcement or implementation of the said judgment is hereby made permanent. No costs.

SO ORDERED.

Castro, (Chairman), Teehankee, Makasiar, Esguerra, and Muñoz Palma, JJ., concur.

[1] N.B.: In some cases, the prosecution has already rested its case; in others, the case have already been submitted for decision, see Petition at 4.

[2] The Revised Penal Code, Albert, at 193-94.

[3] See The Revised Penal Code, Aquino, Vol. I 1961 ed., at 555-56.

[4] Cuello CaIon, Derecho Penal, II, 520-21; see Ganchero vs. Bellosillo, L-26340, June 30, 1969, 28 SCRA 673; Puig Peña, Derecho Penal, II, 282-290.

[5] The Revised Penal Code, Albert, at 193-94.

[6] Parulan vs. Rodas, 78 Phil. 855 (1947).

[7] L-26222, July 21, 1967, 20 SCRA 754.

[8] People vs. Tumlos, 67 Phil. 322-23 (1939).

[9] People vs. De Leon, 49 Phil. 440-41 (1926); see also People vs. Jaranilla, L-28547, February 22, 1974, Second Division, per Aquino, J., 55 SCRA 575.

[10] See Petitioners' Brief Reply to Comment of Private Respondents at 55, Case Records.

[11] 66 Phil. 262-63 (1938).

[12] People vs. Dichupa, L-16943-44, October 28, 1961, 3 SCRA 329.

[13] L-18510, January 31, 1964, 10 SCRA 157-58.

[14] U.S. vs. Pascual, 10 Phil. 624-25 (1908).

[15] See U.S. vs. Morales, 15 Phil. 246 (1910).

[16] U.S. vs. Sevilla, 43 Phil. 189 (1922).

[17] Comment, private respondents, at 7.

[18] "(a) In all criminal prosecution, the action shall be instituted and tried in the court of the municipality or province wherein the offense was committed or any one of the essential ingredients thereof took place.

[19] Tuzon vs. Cruz, L-27410, August 28, 1975, Second Division, per Aquino, J.

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