

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
LEON CASTILLO ET AL., ACCUSED. NENA TANALEGA RAYMUNDO,
ACCUSED-APPELLANT.**

CA-No. 227. February 01, 1946

Ponente: DE JOYA, J.

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DE JOYA, J.:

Defendant-appellant Nena Tanalega Raymundo was accused of the crime of frustrated murder by poisoning through reckless imprudence, in the Court of First Instance of Laguna, under the following information:

"The undersigned Acting Provincial Fiscal accuses Dr. Leon Castillo and Mrs. Nena Tanalega Raymundo of the crime of 'FRUSTRATED MURDER BY POISONING THROUGH RECKLESS IMPRUDENCE,' committed as follows:

"That on or about the 18th day of February, 1941, in San Pablo City, Commonwealth of the Philippines, and within the jurisdiction of this Honorable Court, Mr. Silvino Belarmino presented for dispensation at the Escudero Drug Store and bought one-third formula of the following prescription of Dr. Antonio G. Sison, to wit:@

"Sparteinsulphate

.....

1.00

"Phenobarbital

.....

0.50

"Carbromal

.....

5.00

"Mx. Div. et pone in cap. No. XV

"Sig.; One capsule once a day

"Dr. Leon Castillo and Mrs. Nena Tanalega Raymundo mutually helped each other prepare and dispense the said prescription, but instead of mixing the required proportion of Spartein Sulphate, through carelessness and reckless imprudence, willfully, unlawfully and feloniously, they mixed and compounded in the formula a toxic dose of Strychnine Sulphate, which is a poisonous substance, and as a result of such carelessness and imprudence, Mr. Belarmino, upon taking one capsule of the medicine on the very same day, was poisoned and would have died, had it not been for causes independent of the will of the accused; that had the act committed

by the accused been intentional it would constitute the crime of frustrated murder.

"Contrary to law.

"Santa Cruz, Laguna, September 12, 1941."

After the corresponding trial, the Honorable Jose Ma. Paredes, presiding judge of the Court of First Instance of Laguna, on October 12, 1942, rendered judgment, finding said accused guilty of the crime of frustrated homicide through reckless imprudence, and sentenced her to suffer four (4) months of *arresto mayor* and to pay the costs of the proceedings, at the same time acquitting her co-accused Dr. Leon Castillo.

The private prosecution has reserved the right to file a separate civil action, and consequently the complainant did not present any evidence as to any damage he might have suffered by reason of the alleged negligence of the accused.

The accused, Nena Tanalega Raymundo, appealed from said decision to the Court of Appeals of Southern Luzon, claiming that the trial court had erred—

"1. In holding that a frustrated felony can be committed through reckless imprudence.

"2. In holding that a felony committed through reckless imprudence can exist when no material damage has been caused.

"3. In holding that a felony committed through reckless imprudence can exist when the relation of proximate cause to effect has not been proved.

"4. In holding that the complaining witness had taken strychnine sulphate.

"5. And in holding that defendant and appellant had dispensed strychnine sulphate."

After the corresponding hearing, on June 10, 1944, the Court of Appeals of Southern Luzon, in a decision penned by Justice Rufino Luna, concurred in by Associate Justices Fernando Jugo and Jose O. Vera, found the defendant and appellant Nena Tanalega Raymundo guilty of slight physical injuries through reckless imprudence, and sentenced her to pay a fine of two hundred pesos (P200) and to pay the costs. The Court of Appeals deemed it unnecessary to pass upon the defense of prescription urged by defendant and appellant, stating that the offense of which she was found guilty and the penalty imposed upon her are correctional in nature.

Having been duly notified of said decision of the Court of Appeals, defendant and appellant Nena Tanalega Raymundo, on June 21, 1944, filed a motion for the reconsideration of said decision, on the following grounds:

"1. That under the law there is no such thing as a correctional offense.

"2. That the light offense found by the Court of Appeals had already prescribed.

"3. That the prescription of the offense in question is not affected by the qualification correctional of the fine imposed.

"4. That the penalty imposed is not correction.

"5. That in case of doubt as to the law applicable to determine the question of prescription, the accused should be given the benefit of such doubt.

"6. That under the law the prescription of the offense and the prescription of the penalty are separate and distinct.

"7. That defendant and appellant has been found guilty of an alleged offense which does not exist under our

law.

"8. That defendant and appellant has been sentenced, without due process of law, that is, for an offense not specified in the information.

"9. That there is no evidence, beyond reasonable doubt, that the ailments suffered by the offended party, were due to the capsules purchased from the drug store in question.

"10. That the best evidence available was not secured, and very much less presented.

"11. The pecuniary interest of the offended party.

"12. That it has not been shown beyond reasonable doubt that the accused had given strychnine."

The evidence, testimonial and documentary, presented by the parties in the trial court, has satisfactorily established the following facts:

That for sometime prior to the filing of the information in this case on September 12, 1941, the complaining witness, Silvino Belarmino, had been suffering from a certain disease, for which Dr. Antonio G. Sison prescribed the following medicine:

"Sparteín sulphate 1.00

"Phenobarbital 0.50

"Carbromal 5.00

"Mx. Div. et pone in cap. No. XV

"Sig.; one capsule once a day."

Belarmino presented the prescription to the Universal Drug Store, in the City of Manila, where he secured the medicine described therein contained in a bottle (Exhibit C) on which the prescription was written, and after taking said medicine his health was somewhat improved. When the symptoms of the said disease recurred, following the instructions given him by Doctor Sison to continue taking said medicine, he copied said prescription (Exhibit 2), and, in the morning of February 18, 1941, presented it to the Escudero Drug Store, in the City of San Pablo, Laguna, and asked Dr. Leon Castillo, the manager of the said drug store, and a friend of the complainant, whether they could prepare said medicine, after having failed to secure the same in other drug stores in the locality; and having been answered in the affirmative, the complaining witness requested Doctor Castillo to have prepared for him of the formula and Doctor Castillo himself wrote "1/3 f." on Exhibit 2, for P1, as the whole formula cost P3; as there was some doubt as to the figure appearing after the word "carbromal" on Exhibit 2, Belarmino requested Doctor Castillo to check it up, and the latter corrected the said figure by writing the figure "5" in ink in the figure "6" appearing after the word "carbromal." As Belarmino himself wanted to be sure about said figure, he proposed to return to said drug store in the afternoon with the bottle marked Exhibit C, on which the prescription was written ; and in fact he returned at about 2 o'clock in the afternoon of the same day. The pharmacist, Saturnino Gesmundo Cortes, of said drug store, was then in his house, and Doctor Castillo sent for defendant-appellant Nena Tanalega Raymundo, who was employed in said drug store as pharmacy clerk. Mrs. Raymundo was already a pharmacy graduate, but she had not yet taken and passed the government examination conducted by the Board of Pharmaceutical Examiners; and she had worked as a pharmacy clerk in different drug stores in the City of Manila, before her employment in the same capacity in the Escudero Drug Store in the City of San Pablo.

Before the arrival of the defendant and appellant, Doctor Castillo, took two bottles from the shelves and a

cardboard box and placed them on the dispensation table. Mrs. Raymundo then prepared the balance and began computing the formula contained in Exhibit 2 to reduce it to 1/3 after which she proceeded to compound the medicine, using, among others, the sub-stances contained in said two bottles.

The medicine compounded by defendant and appellant was placed in five (5) capsules and was delivered by Doctor Castillo to herein complainant contained in a cardboard box (Exhibit B), for which he paid P1, as previously agreed upon with Dr. Leon Castillo, manager of the Escudero Drug Store; that at about 5 o'clock in the afternoon of the same day, February 18, 1941, the complainant took one of the capsules with a glass of water, and left his house for a walk; and about 20 minutes after he had taken said medicine, he became ill. He felt dizzy and had difficulty in breathing, and he could hardly stand as his knees became shaky, and for that reason, he immediately consulted two physicians, namely, Dr. Felisa Celestino and Dr. Ricardo Reyes, and the latter advised him to go home and rest. About two hours afterwards, complainant's legs began to stiffen, his stomach to harden, his lips to draw back, and his 'tongue to shrink to his throat, and he could not talk and thought that he was in a serious condition; and so complainant's family sent for Dr. Ricardo Reyes, who advised complainant's wife to rub his body with hot water which produced some relief, after he had urinated; and the following day when Doctor Reyes returned, complainant explained to him all that had happened and showed him the remaining four capsules contained in the cardboard box, marked as Exhibit B, on which the prescription had not been written, and Doctor Reyes advised the complainant not to take any more of said remaining four capsules.

That believing that there must have been something wrong with the medicine which he had purchased from the Escudero Drug Store, on February 24, 1941, the complaining witness sent two of the four capsules (Exhibits E-2 and E-3) to the Bureau of Science for examination, and their contents were examined and analyzed by Eusebio Gutierrez, a chemist of the Institute of Hygiene, at the instance of the Board of Pharmaceutical Examiners, and said chemist submitted a report on the analysis made by him (Exhibit D), dated March 15, 1941, in which it was shown that the filling prescription Exhibit 2, defendant and appellant had erroneously used and mixed, instead of spartein sulphate as called for in the prescription (Exhibits C and 2), strychnine sulphate, a highly poisonous substance—50.5 milligrams in one and 61.75 milligrams in the other.

On March 26, 1941, the complainant came to the City of Manila and again consulted Dr. Antonio G. Sison, informing the latter of the medicine purchased by him from the Escudero Drug Store, consisting of 1/3 formula, contained in five (5) capsules, and that he had taken one of said capsules with a glass of water, and that about 25 minutes after he became ill, mentioning to Doctor Sison the symptoms already described above, and said physician informed him then that he had been a victim of poisoning.

It has also been shown by expert testimony presented in this case that herein complainant had been a victim of strychnine poisoning and that 50.5 milligrams of strychnine sulphate found in one of the capsules examined was sufficient to cause the death of herein complainant, if not for the fact that, in compounding said prescription, phenobarbital and carbromal had been mixed therewith, in the quantities specified in the prescription, which two substances diminished the deadly effect of strychnine sulphate as poison.

Having thus secured the necessary data, upon which to base a criminal action against the employees of the Escudero Drug Store, on September 12, 1941, herein complainant caused the filing of the information transcribed above, against Dr. Leon Castillo and herein defendant and appellant Nena Tanalega Raymundo, as manager and pharmacy clerk of the Escudero Drug Store, respectively. The pharmacist of said drug store, Saturnino Gesmundo Cortes, was not included in the information, because he was not in the drug store at the time that the said prescription was compounded, although it had always been the practice in said drug store for the pharmacist to be present every time herein defendant and appellant compounded any prescription, as pharmacy clerk.

The foregoing facts have been sufficiently established by the evidence adduced during the trial of the case.

As already stated, the Court of First Instance of Laguna acquitted Dr. Leon Castillo, manager of the Escudero Drug Store, of the crime charged in the information, on the ground of reasonable doubt, but found herein defendant and appellant, Nena Tanalega Raymundo, guilty of the crime of frustrated homicide through reckless imprudence.

In view of the facts stated above, said judgment of conviction is untenable, on the ground that the offense of frustrated homicide requires the concurrence of the essential requisite of intent to kill, which is incompatible with the charge of reckless imprudence; although a charge for physical injuries, serious or less serious, through reckless imprudence, is legally proper under the law; as in that case the act sought to be punished is the material damage or injury actually done. (Sentencia de 15 de diciembre, 1883, Gaceta de 13 de marzo de 188 U; 7 Viada, 5." ed., pdgs. 69, 70.)

In the case at bar, the Court of Appeals modified the decision of the trial court, and concluded that the offense committed by the defendant and appellant Nena Tanalega Raymundo was slight physical injuries through reckless imprudence, and imposed upon her a fine of P200 and to pay the costs.

In the motion for reconsideration filed by counsel for defendant and appellant, it is claimed that there is no sufficient basis for such a judgment, on the ground, among others, that no evidence has been adduced to show the nature or extent of the injury, if any, sustained by the complaining witness, and whether such injury, if any, had been caused by the drug or medicine sold to him by the Escudero Drug Store, as no specimen had been taken from the contents of the stomach of the complainant for chemical examination and analysis; and that it has not been possible, of course, to make any examination of the stomach of the complainant.

Furthermore, counsel for defendant and appellant contends that, even admitting for the sake of argument, that the offense, of slight physical injuries through reckless imprudence were imputable to herein defendant and appellant, the corresponding action should have been instituted against her within the period of two (2) months as prescribed under article 90 of the Revised Penal Code; and that the alleged offense having been committed on February 18, 1941, and the corresponding information having been filed seven (7) months afterwards, to wit, September 12, 1941, the corresponding criminal action had already prescribed.

The legal question raised by counsel for defendant and appellant appears to be quite plausible, and defendant and appellant would appear to be entitled to a judgment of acquittal, under the Revised Penal Code.

On the other hand, human health is a most precious thing, and human life is most sacred. When a person gets sick or feels sick, he goes to, or sends for, a physician for consultation and treatment, so that he may secure the proper remedy for his malady. The physician, after a careful examination of the patient and study of the symptoms manifested, prescribes the treatment and remedy, which he deems most appropriate for the patient to give him relief, and orders the necessary medicine. When the patient goes to a drug store to secure or buy the medicine prescribed by his physician, he has the right to expect that the medicine so prescribed will be given to him, as it is the plain duty of each and everyone, whether a pharmacist or a pharmacy clerk, to give to the patient or purchaser the drug or medicine called for in the prescription. Said pharmacist or pharmacy clerk does not live up to this standard, when he gives one medicine for another, or delivers an adulterated medicine or drug, thus endangering the life and health of the patient or purchaser; and when they do so, said pharmacist and pharmacy clerk act in their peril. The law cannot countenance or tolerate or condone any negligence or act of negligence on their part. It so happens that the information filed in this case is a detailed one, reproducing the prescription (Exhibits 2 and C) given to the complainant by Dr. Antonio G. Sison; but when it was filled and the medicine compounded in the Escudero Drug Store by defendant and appellant, the result of its analysis did not tally with said prescription, as

shown by the report submitted by the Institute of Hygiene marked as Exhibit D.

Section 751 of the Revised Administrative Code (1940 ed.) provides as follows:

"SEC. 751. Responsibility for quality of drugs.—Every pharmacist shall be responsible for the quality of all drugs, chemicals, medicines, and poisons he may sell or keep for sale; and it shall be unlawful for any person whomsoever to manufacture, prepare, sell, or administer any prescription, drug, chemical, medicine, or poison under any fraudulent name, direction, pretense or to adulterate any drug, chemical, medicine, or poison so used, sold, or offered for sale. Any drug, chemical, medicine, or poison shall be held to be adulterated or deteriorated within the meaning of this section if it differs from the standard of quality or purity given in the United States Pharmacopoeia."

And the violation of any provision contained in said section 751 of the Revised Administrative Code (1940 ed.) is punished in accordance with the provisions of section 2676 thereof, which are as follows:

"SEC. 2676. General Violation of Pharmacy Law.—Any person engaging in the practice of pharmacy in the (Philippine Islands)Philippines contrary to any provision of the Pharmacy Law or violating any provision of said law for which no specific penalty is X provided shall, for each offense, be punished by a fine not to exceed five hundred pesos, or by imprisonment for not more than six months, or both, in the discretion of the court."

Numerous American decisions have laid down salutary rules for the protection of human life and human health, some of which have been cited with approval by this Court in a similar case.

The profession of pharmacy demands care and skill; and druggists must exercise care of a specially high degree, the highest degree of care known to practical men. In other words, druggist must exercise the highest practicable degree of prudence and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business, so that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicines. (*Tombari vs. Connors* [1912], 85 Conn., 235.)

A druggist that sells to a purchaser or sends to a patient one drug for another or even one innocent drug, calculated to produce a certain effect, in place of another sent for y and designed to produce a different effect, cannot escape responsibility, upon the alleged pretext that it was an accidental or an innocent mistake. His mistake, under the most favorable aspect for himself, is negligence. And such mistake cannot be countenanced or tolerated, as it is a mistake of the gravest kind and of the most disastrous effect. (*Fleet vs. Hollenkemp* [1852], 56 Am. Dec, 563.)

One holding himself out as competent to handle such drugs, and having rightful access to them, and relied upon by those dealing with him to exercise that high degree of caution and care called for by the peculiarly dangerous nature of the business, cannot be heard to say that his mistake by which he furnishes a customer the most deadly of drugs for those comparatively harmless, is not in itself gross negligence. (*Smith's Admr. vs. Middleton* [1902], 56 L. R. A., 484.)

In reality, for the druggist, mistake is negligence and care is no defense. And in Criminal Law, run the same rigorous rules. Apothecaries, or apothecary clerks, who are guilty of negligence in the sale of medicine when death ensues in consequence, have been held guilty of manslaughter. (*Tessymond's Case* [1828], 1 Lewin, C. C., 169.) *United States vs. Pineda*, 37 Phil. 456, 458.

The delivery of one drug for another has been declared punishable in this jurisdiction. In a case in which the complainant asked for potassium chlorate, but received from the druggist barium chlorate, this Court declared that such act was tantamount to giving or dispensing medicine under a fraudulent name; and notwithstanding the fact that the potassium chlorate demanded and paid for was much cheaper than the barium chlorate which was actually

delivered by the druggist, the latter was held criminally responsible, and punished, in accordance with the provisions contained in said section 751 of the Revised Administrative Code, in connection with the provisions of section 2676 thereof, declaring that defendant had sold a drug under a fraudulent name. (United States vs. Pineda, 37 Phil., 456.)

In the Pineda case, the potassium chlorate demanded by the complainant had been intended for his race horses; and when the complainant mixed with water what he thought and believed was potassium chlorate, but which turned out to be barium chlorate, which is poisonous, his race horses died from poisoning a few hours after having drunk water in which barium chlorate had been dissolved and mixed.

The wisdom of such a decision is unquestionable. If the victims had been human beings instead of horses, the damage and loss would have been irreparable.

It is true that in the instant case, the complainant, Silvino Belarmino, did not die and that there was a great difficulty in determining the injury, if any, sustained by him, because of the impossibility of examining his stomach and other internal organs. In the Pineda case, this Court' declared, with reason and justified by experience, that the profession of pharmacy demands great care and skill, and that druggists must exercise and use the highest degree of care known to practical men; and that the care required must be commensurate with the danger involved, and the skill employed must correspond with the superior knowledge of the business which the law demands.

But it may be stated that the instant case is different from the Pineda case, in which the accused was a licensed pharmacist and druggist; whereas in the instant case, the defendant and appellant Nena Tanalega Raymundo, was only a pharmacy clerk. But it must be borne in mind that, at the time of the commission of the alleged offense, defendant and appellant was already a pharmacy graduate, and that she had worked as a pharmacy clerk in several drug stores in the City of Manila, although she had not yet taken and passed the examinations prescribed by the Board of Pharmaceutical Examiners.

But the offenses penalized under the provisions of section 751 of the Revised Administrative Code, in connection with the provisions of section 2676 thereof, may be committed not only by licensed druggists and pharmacists, but also by any other person preparing any drug, chemical, medicine or poison, under any fraudulent name.

After a careful consideration of the allegations made in the information filed in this case, and the facts fully established by the evidence adduced during the trial, the Court ' has reached the inevitable conclusion that defendant and appellant Nena Tanalega Raymundo, is guilty of a violation of the provisions contained in said section 751 of the Re-vised Administrative Code, in connection with the provisions of section 2676 thereof.

As already stated, the prescription (Exhibits C and 2) called for:

"Sparteine sulphate 1.00

"Phenobarbital 0.50

"Carbromal 5.00"

whereas, the medicine compounded by defendant and appellant contained strychnine sulphate, instead of sparteine sulphate (Exhibit D).

It is an elementary rule of criminal jurisprudence that the defendant in a criminal case may be found guilty of any offense necessarily included in the allegations made in the information, and fully established by the evidence. (Rule 116, section 4, Rules of Court; United States vs. Paua, 6 Phil., 740; United States vs. Jeffrey, 15 Phil, 391; United States vs. Lim San, 17 Phil., 273; United States vs. De Guzman, 19 Phil., 350; United States vs. Salvador,

22 Phil., 113; United States vs. Guzman, 25 Phil., 22; United States vs. Panlilio, 28 Phil., 608.)

Defendant and appellant cannot complain that she has been found guilty of a criminal offense, without due process of law. She had ample opportunity to defend herself against the charges filed against her.

With reference to the requirements of "due process of law" as applied to criminal procedure, in the language of the Supreme Court of the United States, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has had due process of law. (Rogers vs. Peck, 199 U. S., 425, 435; Twining vs. New Jersey, 211 U. S., 78.)

The phrase "due process of law", used in the Constitution of the Commonwealth of the Philippines, should receive a comprehensive interpretation, and no procedure should be treated as unconstitutional which makes due provision for the trial of the accused before a court of competent jurisdiction, for bringing the accused into court and notifying him of the cause he is required to meet, for giving him an opportunity to be heard, for the deliberation and judgment of the court, and for an appeal from such judgment to the highest tribunal of the land.

(United

States vs. Grant and Kennedy, 18 Phil., 122.)

The offense enumerated under said section 751 of the Revised Administrative Code, and penalized under section 2676 thereof, prescribed after four (4) years. (Act No. 3326, section 2, as amended by Act No. 3585.) Consequently, the defense of prescription cannot be successfully raised by the defense in this case.

The claim of defendant and appellant that, in prosecuting this case, the complainant had been impelled by improper motives, in the sense that he intended to make money out of it, as the Escudero Drug Store was known to be the property of a wealthy family, in the opinion of the Court, is completely unfounded, considering the well-established facts that herein complainant has always been a friend of Dr. Leon Castillo, manager of said drug store, and former classmate of the complainant; and there is no evidence that herein complainant had not been on friendly terms with Arsenio Escudero, owner of said drug store.

In view of the foregoing conclusions, it is deemed unnecessary to consider the other questions raised by defendant and appellant in her motion for reconsideration.

The Court declares that the preparation of one medicine for another, by a pharmacy clerk, under a false name, whether it be through negligence, accident or mistake, is punishable under the law.

Defendant and appellant Nena Tanalega Raymundo is found guilty of having prepared one medicine for another, under a false name, in violation of the provisions of section 751 of the Revised Administrative Code; and, in accordance with the provisions of section 2676 thereof, she is hereby sentenced to pay a fine of two hundred pesos (P200), with subsidiary imprisonment in case of insolvency, and to pay the costs of this instance; and with this modification the judgment of the Court of Appeals for Southern Luzon is upheld, and the petition for reconsideration is consequently denied. So ordered.

Moran, C. J., Jaranilla, Feria, Pablo, Bengzon, and Briones, JJ., concur.

CONCURRING:

HILADO, J.,

Adopting by reference the clarification of my position as regards the question of validity or nullity of such judicial proceedings herein as were had in the Japanese-sponsored courts during the Japanese occupation of Manila, as set forth at length in my concurring opinion in G. R. No. 49158, *De Castro vs. Court of Appeals* (75 Phil., 824), I am prepared to go into the merits of this case.

And, doing so, I concur in the result of the majority opinion written by Justice De Joya.

DISSENTING:

PARAS, J., with whom concurs OZAETA, J.,

The information charges the appellant with the crime of frustrated murder through reckless imprudence. The Court of First Instance of Laguna convicted her of frustrated homicide through reckless imprudence. The Court of Appeals in turn found her guilty of slight physical injuries through reckless imprudence and imposed a fine of two hundred pesos, with subsidiary imprisonment in case of insolvency. In his motion for reconsideration counsel for the appellant has raised the question of prescription in that the offense of which she was convicted by the Court of Appeals was discovered in March, 1941 (see testimony of offended party regarding the statement of his physician, Dr. Antonio Sison, and the date, March 15, 1941, of the report of the Institute of Hygiene on the analysis of the drug) ; that in June, 1941, the offended party filed an administrative complaint against Gesmundo Torres, the pharmacist in charge of the drug store involved in this case; and that the information herein was filed only on September 12, 1941. I am of the opinion that, on the supposition that the appellant may be rightly convicted of slight physical injuries, the point raised in the motion for reconsideration is well taken. In fact, it is admitted by the majority of this Court (now called upon to pass on said motion) that "the legal question raised by counsel for defendant and appellant appears to be quite plausible, and defendant and appellant would appear to be entitled to a judgment of acquittal." But no sooner had they made such pronouncement than they thought of avoiding the issue of prescription by finding the appellant guilty of a violation of the Pharmacy Law. I entertain serious doubts as to whether the appellant may after technically being acquitted of an offense punished under the Revised Penal Code, be convicted of another offense punished under the Pharmacy Law. This is not a case where there is merely an alleged variance between the offense charged in the information and that established by the evidence so as to make Rule 116, section 4. of the Rules of Court applicable. This is a case where the appellant has to be convicted of another offense punished by a law other than that relied upon in the information and under which she was tried in the lower court, because the offense of which she had been convicted by the Court of Appeals has prescribed. In other words, if the latter offense had not prescribed the conviction therefor would undoubtedly have been sustained on the merits. Upon the facts of the case, I don't think the appellant can be held liable for any offense. Although a pharmacy graduate, the appellant has not yet passed the necessary board examination, and, at the time of the incident in question, was not even a pharmacy clerk. She was merely an apprentice in the drug store of which Arsenio Escudero was the owner, Gesmundo Torres the pharmacist in charge, and Dr. Leon Castillo the manager. The appellant did not have any dealing with the offended party. The evidence for the prosecution clearly shows that the latter approached Doctor Castillo who assured him that the store had all the ingredients needed for the prescription; that instead of entrusting the task of compounding the prescription to the pharmacist Gesmundo Torres, the appellant was summoned from her home and ordered by Doctor Castillo to fill the prescription after the latter had gathered and placed on a table all the necessary drugs; that the appellant had simply made the mixture in the proportions specified in the prescription, after which she delivered the prepared medicine in

capsules to Doctor Castillo who handed it over to the purchaser.

The alleged offense was made possible by the inclusion of strychnine sulphate in the mixture, when the ingredient called for in the prescription was spartein sulphate. According to the testimony of Doctor Castillo and the appellant, the two drugs are white, and the powder used in the prescription was spartein sulphate. Undoubtedly, if any mistake was committed, it must have been in the labeling, since the two ingredients were contained in bottles of the same kind and shape. There is no proof that the appellant was the person who placed the labels. I would under the circumstances, lay the blame, first, on the pharmacist (Gesmundo Torres) who must be presumed to have labeled the drugs in the store personally or under his direction, and who has in fact been found guilty of anomalies in connection herewith by the Board of Pharmacy, and, secondly, on the manager (Doctor Castillo) who, instead of calling the pharmacist, gathered the ingredients and ordered the appellant to compound the medicine. The appellant cannot be charged with any culpable act or negligence, since her participation was limited to the mechanical act of mixing the ingredients previously placed by Doctor Castillo on the table, and it is not alleged that the harm, if any, done to the offended party resulted from an error in following the proportions shown in the prescription. The appellant had every reason to believe that a physician, supposed to be versed in medicine, had rightly selected the necessary ingredients, especially when it is remembered that poisonous drugs are required to be kept in separate cabinets which should be securely locked when not in use. Indeed, it may be said that the ingredients mixed by her were the ones specified in the prescription according to the labels of the drugs placed on the table, because the presumption is borne out by the circumstance that said ingredients were seen to be as represented by the containers not only by the appellant but by Doctor Castillo who gathered them from the shelves. And this presumption can be the only justification for the acquittal in the trial court of Doctor Castillo, appellant's co-defendant in this case. The fact that the appellant is a pharmacy graduate, if it is to have any bearing, serves to strengthen the belief that her trained eyes could not make a mistake as to the identity of the labeled ingredients she was mixing in conformity with the prescription.

I have no quarrel with the majority in so far as they intend to convey the idea and warning that pharmacists and their authorized assistants are to fill prescriptions with utmost honesty and precision and will be held criminally accountable for any slight error and carelessness; but I regret to see that the appellant is convicted for having acted most regularly in a fitting situation, while Doctor Castillo, who had usurped the duties of a pharmacist, and Gesmundo Torres, the absent pharmacist in charge of the drug store who, as already stated, can fairly be held responsible for the labeling of the drugs and for not leaving a standing order in the store prohibiting the filling of prescriptions during his absence, remain unpunished. The effect should not be mistaken for the cause.

DISSENTING:

PERFECTO, J.,

This is a most unusual case. Appellant Nena Tanalega had to face the following situations for the same and absolutely identical facts:

- (1) Accused of frustrated murder by poisoning through reckless imprudence by the acting provincial fiscal of Laguna on September 12, 1941, and of which she was not found guilty;
- (2) Convicted of frustrated homicide through reckless imprudence and sentenced to four months of arresto mayor by the Court of First Instance of Laguna on October 12, 1942;
- (3) Convicted of slight physical injuries through reckless imprudence and sentenced to pay a fine of P200 by the Court of Appeals of Southern Luzon under the Japanese regime on June 10, 1944, acquitting her, therefore,

of frustrated homicide;

(4) Pronounced entitled to a judgment of acquittal, under the Revised Penal Code, in the majority resolution, which means she is acquitted of slight physical injuries;

(5) Convicted once more, but this time of a violation of section 751 of the Administrative Code by the same Supreme Court and in the same resolution in which she is acquitted of slight physical injuries, and sentenced again to pay a fine of P200.

We beg to disagree with the majority's action upon two important grounds, viz.:

(1) Because, under the facts as declared proved whether by Judge Jose Ma. Paredes, of the Court of First Instance of Laguna, by the Court of Appeals of Southern Luzon, or by this Supreme Court, appellant is not and cannot be guilty of a violation of section 751 of the Administrative Code.

(2) Because of her two former convictions and one acquittal, may be, it is more exact if we say three acquittals, she cannot be put again in "jeopardy of punishment for the same offense" without violating a constitutional injunction in the Bill of Rights. (Section 1:20, Article III, Constitution of the Philippines.)

There are three offenses defined in said section 751, namely:

(a) The one which may be committed only by a pharmacist, who is declared responsible "for the quality of all drugs, chemicals, medicine and poisons he may sell or keep for sale."

(b) The one committed by any person whomsoever "manufacture, prepare, sell, or administer any prescription, drug, chemical, medicine, or poison under any fraudulent name, direction, pretense."

(c) Any person who "adulterated any drug, chemical, medicine, or poison so used, sold, or offered for sale."

As to offense (a), we are not concerned here because appellant is not a pharmacist.

Offense (c) cannot also be considered, because here there is no question as to any adulteration having been made, and it is neither pretended nor had it been pretended that any drug, chemical, medicine, or poison, differed from the standard quality or purity given in the United States Pharmacopoeia.

Offense (b) is the one which we have to discuss, being the one which the majority claim to have been committed by appellant, invoking to such effect the case of Pineda (37 Phil., 457), where accused was convicted for selling a drug under a "fraudulent name"; and in the present case the majority find appellant guilty "of having prepared one medicine for another, under a false name".

The most essential element of the offense and which individualizes it with a character that cannot be confounded is that the manufacture, preparation, sale or administering of any prescription, drug, chemical, medicine, or poison be made "under any fraudulent name, direction, pretense."

We wish to emphasize that the authors of the law did not content themselves with using the adjectives "mistaken" or "erroneous". Not even the stronger word "false".

They have, undoubtedly, with deliberate purposefulness, chosen instead the word "fraudulent".

We know that the idea involved in the adjective "fraudulent" implies necessarily willful mistake, voluntary error, purposeful falsehood, in one word, malice.

Synonymous with "fraudulent" are: guileful, crafty, wily, cunning, deceiving, cheating, deceptive, insidious, treacherous, designing. The antonyms are: honest, above-board, straightforward. There is fraudulence when there is deliberate deceit, when there is fraud, which means trickery, an intentional perversion of truth for the purpose

of inducing another in reliance upon it to part with some valuable thing belonging to him, or to surrender a legal right; a false representation of a matter of fact (whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed) which deceives or is intended to deceive another so that he shall act upon it to his legal injury. (Webster's New International Dictionary, 2d ed., 1938.) To be fraudulent, it must be willful, malicious. The element of voluntariness is absolutely indispensable.

Applying this test to the facts in this case, there is absolutely no scintilla of evidence to show that any act done by Nena Tanalega had ever been or could be in any way fraudulent. There is even no showing of any motive why she should act fraudulently. When she prepared the medicine, she acted only in compliance with specific orders from Dr. Leon Castillo, the physician who was the manager of the pharmacy. She made the mixture of the component elements which were gathered on the dispensation table by Doctor Castillo himself who, for some unknown reason, instead of sending for Saturnino Gesmundo, the pharmacist of the drugstore, who was then in his house instead of fulfilling his professional duties in the proper place, sent for appellant. Doctor Castillo himself took two bottles from the shelves and placed on the dispensation table with a cardboard box.

Doctor Castillo went even to the extent of checking up the prescription presented by complainant Belarmino and correcting one figure thereof. Nena Tanalega had no dealings at all with Silvino Belarmino. Complainant's dealings were all had with Dr. Leon Castillo, who appears to be his friend.

The fact that instead of the spartein sulphate mentioned in the prescription, strychnine sulphate was mixed in the medicine, in the hypothesis that we must accept prosecution's theory in this alleged substitution, there is absolutely no evidence to the effect that Nena Tanalega had any knowledge at all that the bottle which Doctor Castillo took from the shelves and placed in the dispensation table supposed to contain spartein sulphate, in fact, it did not, but strychnine sulphate. When Nena Tanalega, therefore, took the ingredient from said bottle, she did it under the conviction that she was taking spartein sulphate. She entertained that conviction honestly, innocently, with unquestionable good faith, which is the very opposite of malice in a fraudulent action.

Our conclusion to the effect that nothing fraudulent can be attributed to Nena Tanalega is supported implicitly, although no less strongly and convincingly, by the very text of the majority's resolution. No malicious act, no fraudulent purpose, no deceitful trickery, is attributed to appellant. The majority have abstained completely from applying the word "fraudulent" to any act or action of appellant. The strongest words used by the majority are "false name", but this cannot be interchanged or confounded with "fraudulent name". "False" is what is not true; but what is not true may be either a mistake committed in good faith or a misrepresentation maliciously made. The first is innocent; the last is fraudulent.

The second ground for our dissent is no less stronger than the first.

When appellant was convicted of frustrated homicide through reckless imprudence by the Court of First Instance of Laguna, she was in fact acquitted of the crime of frustrated murder by poisoning through reckless imprudence charged in the information. When she was convicted by the Court of Appeals of Southern Luzon of slight physical injuries, she was in fact acquitted of the crime of frustrated homicide through reckless imprudence. Now she is again acquitted of slight physical injuries. All the members of the Court agree that appellant, as it is stated in the resolution, is "entitled to a judgment of acquittal under the Revised Penal Code", a majority holding that she is entitled to the benefits of prescription of the offense of slight physical injuries, and a minority—we among them—because appellant did not commit any offense at all, she being completely blameless of anything wrong, having acted in absolute good faith when she complied with the order of Doctor Castillo, as becoming in an obedient and loyal employee, as she was. At any rate, for the same acts, under the same facts, under the same information, and in the same case, appellant has been and is being put at least twice in jeopardy of being punished

for the same offense.

(a) She has been prosecuted and has been in jeopardy of punishment for frustrated murder by poisoning through reckless imprudence, if any of the courts which tried this case had accepted prosecution's theory as stated in the information filed.

(b) For the same act, she was again placed in jeopardy of punishment for frustrated homicide through reckless imprudence.

(c) For the same act, she again was placed in jeopardy of punishment for slight physical injuries.

And now, (d) for the very same act, she is not only put in jeopardy of punishment for violation of section 751 of the Administrative Code, but she is punished for it, as we have already shown, though evidently innocent of said violation.

In this case, we have a startling example of a violation of one of the fundamental injunctions of our Constitution in protecting the civil rights of all persons living under the pale of our government.

The Constitution provides:

"No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act". (Article III, section 1:20, Constitution of the Philippines.)

The purpose of this provision is to avoid punishment being meted to a person more than once for the same criminal act, whether punished by just one provision of law or by two or more provisions imposing different penalties or using different nomenclature for purposes of definition.

The majority maintain that for the same act appellant may be punished either for slight physical injuries, under the Penal Code, or for a violation of section 751 of the Administrative Code, or both. As appellant must be, and actually is, acquitted of slight physical injuries, the majority choose to sentence her for a violation of the Administrative Code. As we understand the Constitution, we regret to have to differ from this position, which we believe fundamentally wrong and unjust.

We have the privilege of having taken part in the deliberations of the Constitutional Convention and in all the proceedings of the Committee on Style which, as a matter of fact, drafted the final text of the Constitution, and we are in a position to state that, in approving the constitutional injunction we have now under consideration, the members of the Convention adopted it with the definite and avowed purpose—and we have stated so clearly in our deliberations—that no man shall be punished or placed in jeopardy of punishment for the same act, whether in one or more criminal cases, whether punishable by one or more provisions of law. The members of the Convention revolted against the circumventing of the double jeopardy constitutional guarantee under the judicial theory permit-ting the same act to be punished under two or more legal provisions, thereby authorizing a man to be twice or more put in jeopardy of punishment for the commission of the same offensive act.

We were then fully aware of the decisions of this Supreme Court which uphold the unfair doctrine that for the same act a person may be prosecuted and punished f more than once if the same act is punishable under an act of the legislature and under a municipal ordinance, based on a fictitious or artificial duality or, even multiplicity, of sovereign representations, as if the State, government, or sovereignty which punishes an act under a legislative act is different from the one which punishes the same act under a municipal ordinance. The distinction is wholly preposterous and irrational. It is absurd to give the State a double personality. It cannot be a Doctor Faustus or a Doctor Jekyll and Mr. Hyde so it could wantonly make a mockery of a constitutional injunction enacted by itself.

To wipe out the pernicious consequences of the wrong theory and to avoid any further circumvention of the double jeopardy constitutional guarantee, we purposely inserted the second sentence of the provision which says: "If an act is punished by law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act."

It should be noticed that in this provision, we have used twice the word "act." The purpose was to emphasize the idea so as to avoid any possibility of mistake or misunderstanding. We could have used the word "offense" instead of the word "act", but we insisted in using the word "act" because we wanted to correct the theory which permitted the same act to be punished as two offenses, if punishable under an act of legislature or under an ordinance, a theory which, furthermore, may result in circumventing the constitutional injunction against the imposition of "excessive fines" or "cruel or unjust punishment" because if municipal councils are authorized to approve penal ordinances, there is nothing to preclude the grant of the same power to provincial boards, to regional councils, to district committees, and so on, giving way to a situation wherein the same act may be made punishable under provisions enacted, not only by the legislature, but also by so many local organs it may create and authorize to pass penal provisions.

The injustice committed against appellant appears to be more serious, making her situation highly pitiful, if we take into consideration that, being innocent of any offense, she appears to be a victim of a series of official and judicial blunders which amount to a veritable game of surprises not wholly becoming in the administration of justice, which, as Voltaire once said, is the most beautiful function of humanity.

She was made to answer for frustrated murder. Then she was convicted of frustrated homicide. Then, again, it was neither frustrated murder nor frustrated homicide, but for slight physical injuries that she was found guilty. All these under the provisions of the Penal Code. But the last and greatest surprise was yet to come. Without any intimation, either in the information or in the two decisions rendered against her, of what finally is about to happen, she is now, after being acquitted under the Penal Code, convicted of a violation of section 751 of the Administrative Code, of which neither the acting provincial fiscal, the judge of the court of first instance, nor the justices of the Court of Appeals of Southern Luzon, had ever dreamed.

If all these highly competent public officials, all trained in law, appointed to their respective high positions for outstanding qualities of legal preparation, of mind, of character, of efficiency, never thought that appellant could be found guilty of a violation of section 751 of the Administrative Code—and they certainly will be among the more surprised by this unexpected turn of events in these unusual proceedings—how could we expect defendant to know that it is for said violation that she would be convicted? And what kind of fairness there will be if she is not granted any opportunity, before conviction, to face and defend herself from this new charge, instituted against her without the benefit of any complaint or information, because in the very same unique and indivisible proceeding (the resolution here in question), she is charged, proceeded against and, without any hearing and without giving her a day in court to which she is by right entitled, convicted and sentenced?

The fact is that she represents the weakest end of a triangle formed by the persons who might be responsible for the suffering of Silvino Belarmino due to a mistake in the use of ingredients in the prescription he bought. The pharmacist, Gesmundo, who was found guilty by the Board of Pharmaceutical Examiners, is one of the two strong angles. He was not even included in the information in this case. He was the one charged with the duty and responsibility of compounding the ingredients in the drug store. It was his duty to stay there, but he was absent. The second strong angle is represented by Dr. Leon Castillo, who was acquitted by the court of first instance.

The remaining angle, the weakest, Nena Tanalega, is made to suffer as a scapegoat, without the benefit of any escape, which was possible in the Hebrew tradition. As is usual, the line is broken at the weakest point.

But if there is nothing that can be done to right the wrong perpetrated against her, let this dissenting opinion be, at least, considered as a contribution to her moral revindication.

Our vote is to set aside the decision which appellant seeks in her petition for reconsideration and to acquit her of all criminal responsibility.

Judgment modified and petition for reconsideration denied.

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