

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLANT, VS. WILLY OBSANIA, DEFENDANT-APPELLEE. D E C I S I O N

G.R. No. L-24447. June 29, 1968

Ponente: CASTRO, J.

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CASTRO, J.:

Before us for review, on appeal by the People of the Philippines, is an order, dated January 8, 1965, of the Court of First Instance of Pangasinan dismissing, upon motion of the defense, an indictment for rape against Willy Obsania.

On November 22, 1964, barely a day after the occurrence of the alleged crime, Erlinda Dollente, the 14-year old victim, and her parents, Ciriaco Dollente and Carmelita Lureta, filed in the municipal court of Balungao, Pangasinan a complaint for rape with robbery,[1] alleging

"That on or about the 21st day of November 1964, at around 2:00 to 3:00 in the afternoon, particularly in sitio Cawakalan, barrio of Capulaan, municipality of Balungao, Province of Pangasinan, Philippines and within the jurisdiction of the Honorable Court, the said accused Willy Obsania, armed with a dagger, by means of violence and intimidation, willfully, unlawfully and feloniously did then and there have carnal knowledge of the complainant Erlinda Dollente, against her will and on the roadside in the ricefields at the above mentioned place while she was alone on her way to barrio San Raymundo."

After the case was remanded to the Court of First Instance of Pangasinan for further proceedings, the assistant provincial fiscal filed an information for rape against the accused, embodying the allegations of the above complaint, with an additional averment that the offense was committed "with lewd designs".

The accused pleaded not guilty upon arraignment, and forthwith his counsel moved for the dismissal of the case contending that the complaint was fatally defective for failure to allege "lewd designs" and that the subsequent information filed by the fiscal which averred "lewd designs" did not cure the jurisdictional infirmity. The court a quo granted the motion and ordered dismissal of the action, ruling that "the failure of the complaint filed by the offended party to allege that the acts committed by the accused were with 'lewd designs' does not give this Court jurisdiction to try the case." From this order, the fiscal brought the instant appeal.

Two issues are tendered for resolution, namely: first, are "lewd designs" an indispensable element which should be alleged in the complaint? and, second, does the present appeal place the accused in double jeopardy?

Both must be answered in the negative.

The accused, in his motion to dismiss, as well as the trial judge, in his order of dismissal, rely basically on the ruling in *People vs. Gilo* (L-18202, April 30, 1964). In that case which involve a prosecution for acts of lasciviousness, this Court, in passing, opined that "lewd design" is

"... an indispensable element of all crimes against chastity, such as abduction, seduction and rape, including acts of lasciviousness . . . an element that characterizes all crimes against chastity, apart from the felonious or

criminal intent of the offender, and such element must be always present in order that they may be considered in contemplation of law.”

Nothing in the foregoing statement can be reasonably interpreted as requiring an explicit allegation of "lewd design" in a complaint for rape. We hold in no uncertain terms that in a complaint for rape it is not necessary to allege "lewd design" or "unchaste motive," for to require such averment is to demand a patent superfluity. Lascivious intent inheres in rape and the unchaste design is manifest in the very act itself - the carnal knowledge of a woman through force or intimidation, or when the woman is deprived of reason or otherwise unconscious, or when the woman is under twelve years of age.[2]

It is clear that the complaint here satisfies the requirements of legal sufficiency of an indictment for rape as it unmis-takably alleges that the accused had carnal knowledge of the complainant by means of violence and intimidation. We therefore hold that the trial judge erred in dismissing the case on the prof-fered grounds that the complaint was defective for failure to al-lege "lewd design" and, as a consequence of such infirmity, that the court a quo did not acquire jurisdiction over the case. The error of the trial judge was in confusing the concept of jurisdic-tion with that of insufficiency in substance of an indictment.

We come now to the more important issue of double jeo-pardy. The accused maintains that "assuming, arguendo, that the argument is right that the court a quo has jurisdiction, the appeal of the Government constitutes double jeopardy."

An appeal by the prosecution in a criminal case is not available if the defendant would thereby be placed in double jeopardy.[3] Correlatively, section 9, Rule 117 of the Revised Rules of Court provides:

"When a defendant shall have been convicted or acquitted, or the case against him dismissed or otherwise terminated without the express consent of the defendant, by a court of competent jurisdic-tion, upon a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction, and after the defendant had pleaded to the charge, the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

In order that the protection against double jeopardy may inure in favor of an accused, the following requisites must have obtained in the original prosecution: (a) a valid complaint or in-formation; (b) a competent court; (c) the defendant had pleaded to the charge; and (d) the defendant was acquitted, or convicted, or the case against him was dismissed or otherwise terminated with-out his express consent.

The complaint filed with the municipal court in the case at bar was valid; the court a quo was a competent tribunal with jurisdiction to hear the case; the record shows that the accused pleaded not guilty upon arraignment. Hence, the only remaining and decisive question is whether the dismissal of the case was without the express consent of the accused.

The accused admits that the controverted dismissal was ordered by the trial judge upon his motion to dismiss. However, he vehemently contends that under the prevailing jurisprudence, citing *People vs. Bangalao, et al.* (94 Phil. 354, February 17, 1954), *People vs. Labatete* (L-12917, April 27, 1960), *People vs. Villarin* (L-19795, July 31, 1964), *People vs. Cloribel* (L-20314, August 31, 1964), an erroneous dismissal of a criminal action, even upon the instigation of the accused in a motion to quash or dismiss, does not bar him from pleading the defense of double jeopardy in a subsequent appeal by the Government or in a new prosecution for the same offense. The accused suggests that the above-enumerated cases have abandoned the previous ruling of this Court to the effect that when a case is dismissed, other than on the merits, upon motion of the accused personally or through counsel,

such dismissal is to be regarded as with the express consent of the accused and consequently he is deemed to have waived^[4] his right to plead double jeopardy and/or he is estopped^[5] from claiming such defense on appeal by the Government or in another indictment for the same offense.

This particular aspect of double jeopardy - dismissal or termination of the original case without the express consent of the defendant - has evoked varied and apparently conflicting rulings from this Court. We must untangle this jurisprudential maze and fashion out in bold relief a ruling not susceptible of equivocation. Hence, a searching extended review of the pertinent cases is imperative.

The doctrine of waiver of double jeopardy was enunciated and formally labelled as such for the first time in 1949 in *People vs. Salico*, supra, with three justices dissenting.^[6] In that case, the provincial fiscal appealed from the order of the trial court dismissing, upon motion of the defendant made immediately after the prosecution had rested its case, an indictment for homicide, on the ground that the prosecution had failed to prove that the crime was committed within the territorial jurisdiction of the trial court, or, more specifically, that the municipality of Victorias in which the crime was allegedly committed was comprised within the province of Negros Occidental. Rejecting the claim of the accused that the appeal placed him in double jeopardy, this Court held that the dismissal was erroneous because the evidence on record showed that the crime was committed in the town of Victorias and the trial judge should have taken judicial notice that the said municipality was included within the province of Negros Occidental and therefore the offense charged was committed within the jurisdiction of the court of first instance of the said province. In ruling that the appeal by the Government did not put the accused in peril of a second jeopardy, this Court stressed that with "the dismissal of the case by the court below upon motion of the defendant, the latter has not been in jeopardy," and "assuming arguendo that the defendant had been already in jeopardy in the court below and would be placed in double jeopardy by the appeal, the defendant has waived his constitutional right not to be put in danger of being convicted twice for the same offense." Mr. Justice Felicisimo Feria, speaking for the majority, reasoned that

"... when the case is dismissed with the express consent of the defendant, the dismissal will not be a bar to another prosecution for the same offense; because, his action in having the case dismissed constitutes a waiver of his constitutional right or privilege, for the reason that he thereby prevents the court from proceeding to the trial on the merits and rendering a judgment of conviction against him."

The Salico doctrine was adhered to and affirmed in *People vs. Marapao* (85 Phil. 832, March 30, 1950), *Gandicela vs. Lutero* (88 Phil. 299, March 5, 1951), *People vs. Pinuela, et al.* (91 Phil. 53, March 28, 1952), *Co Te Hue vs. Encarnacion* (94 Phil. 258, January 26, 1954), and *People vs. Desalisa* (L-15516, December 17, 1966).

In *Marapao*, the defendant was indicted for slight physical injuries in the municipal court of Sibonga, Cebu. After the prosecution had rested its case, a continuance was had, and when trial was resumed, the court, upon motion of the defense, ordered the case dismissed for failure of the prosecution to appear. However, the court reconsidered this order upon representation of the fiscal who appeared moments later, and ordered the defense to present its evidence. The accused moved to set aside the latter order on the ground that it placed him in double jeopardy. Acceding to this motion, the court dismissed the case. Subsequently, the accused was charged in the Court of First Instance of Cebu with the offense of assault upon a person in authority, based on the same facts alleged in the former complaint for slight physical injuries. Again, upon motion of the accused, the trial court dismissed the new indictment on the ground of double jeopardy. From this order, the prosecution appealed. In upholding the appeal of the Government, this Court observed that although the information for assault necessarily embraced the crime of slight physical injuries for which the accused was indicted in the justice of the peace court,

"... it appears that the appellee was neither convicted nor acquitted of the previous charge against him for

slight physical injuries, for that case was dismissed upon his own request before trial could be finished. Having himself asked for such dismissal, before a judgment of conviction or acquittal could have been rendered, the appel-lee is not entitled to invoke the defense of double jeopardy . . .”

In Gandicela, this Court had occasion to reiterate the Salico ruling:

"But where a defendant expressly consents to, by moving for, the dismissal of the case against him, as in the present case, even if the court or judge states in the order that the dis-missal is definite or does not say that the dis-missal is without prejudice on the part of the fis-cal to file another information, the dismissal will not be a bar to a subsequent prosecution of the defendant for the same offense. (People vs. Ylagan, 58 Phil. 851; People vs. Salico, 84 Phil. 722)."

And in denying the motion for reconsideration filed by the accused in that case, this Court held:

"According to Section 9 of Rule 13, if a criminal case is dismissed otherwise than upon the merits at any stage before judgment, with-out the express consent of the defendant, by a court of competent jurisdiction, upon a valid complaint or information, and after the defen-dant has pleaded to the charge, the dismissal of the case shall be definite or a bar to another prosecution for the same offense; but if it is dis-missed upon the petition or with the express con-sent of the defendant, the dismissal will be with-out prejudice or not a bar to another prosecution for the same offense, because, in the last case, the defendant's action in having the case dismissed constitutes a waiver of his constitutional right not to be prosecuted again for the same offense."

In Pinuela, as in Salico, the prosecution had presented its evidence against the defendant, and the trial court, upon mo-tion of the accused, dismissed the criminal action for lack of evidence showing that the crime charged was committed within its territorial jurisdiction. On appeal by the Government, this Court found that the evidence showed otherwise and, like in Sa-lico, the majority rejected the plea of double jeopardy interposed by the accused on the ground that his virtual instigation of the erroneous dismissal amounted to a waiver of his right against a second jeopardy.

In Co Te Hue, it was the theory of the petitioner that the charge of estafa filed against him having been dismissed, albeit provisionally, without his express consent, its revival constitu-ted double jeopardy which bars a subsequent prosecution for the same offense. This claim was traversed by the Solicitor General who contended that considering what had transpired in the confe-rence between the parties, the provisional dismissal was no bar to the subsequent prosecution for the reason that the dismissal was made with the defendant's express consent. This Court sus-tained the view of the Solicitor General, thus:

"We are inclined to uphold the view of the Solicitor General. From the transcript of the notes taken at the hearing in connection with the motion for dismissal, it appears that a confe-rence was held between petitioner and the offen-ded party in the office of the fiscal concerning the case and that as a result of that conference the offended party filed the motion to dismiss. It also appears that as no action has been taken on said motion, counsel for petitioner invited the attention of the court to the matter who acted thereon only after certain explanation was given by said counsel. And when the order came the court made it plain that the dismissal was merely provisional in character. It can be plainly seen that the dismissal was effected not only with the express consent of the petitioner but even upon the urging of his counsel. This attitude of peti-tioner, or his counsel, takes this case out of the operation of the rule."

In essence, this Court held that where a criminal case is dismissed provisionally not only with the express consent of the ac-cused but even upon the urging of his counsel, there can be no double jeopardy under section 9, Rule 113, if the indictment against him is revived by the fiscal. This decision subscribes substantially to the doctrine on waiver established in Salico.

The validity and currency of the Salico doctrine were intimated in the recent case of People vs. Fajardo (L-18257,

June 30, 1966), and six months later were reaffirmed in *People vs. Desalisa*, *supra*.

In *Fajardo*, this Court, through Mr. Justice Querube Makalintal, observed:

"The record does not reveal that appellees expressly agreed to the dismissal of the information as ordered by the trial Judge or that they performed any act which could be considered as ex-press consent within the meaning of the rule. While they did file a motion asking that the case be quashed, or that a reinvestigation thereof be ordered, the court granted neither alternative. What it did was to order the prosecution to amend the complaint. This order was in effect a denial of the motion to quash, and it was only after the prosecution failed to amend that the court dismissed the case on that ground. Consequently, even under the theory enun-ciated in some decisions of this Court (*People vs. Salico*, etc.) that if a valid and sufficient information is erroneously dismissed upon motion of the defendant he is deemed to have waived the plea of double jeopardy in connection with an appeal from the order of dismissal, appellees here are not precluded from making such plea."

To paraphrase, had the dismissal been anchored on the motion to dismiss, the defendants would not have been entitled to protection against double jeopardy.

Then in *Desalisa*, this Court, in a unanimous decision penned by Mr. Justice Jesus Barrera, held that

"... The ruling in the case of *Salico*, that the act of the defendant in moving for the dis-missal of the case constitutes a waiver of the right to avail of the defense of double jeopardy, insofar as it applies to dismissals which do not amount to acquittal or dismissal of the case on the merits, cannot be considered to have been abandoned by the subsequent decisions on the mat-ter." (Underscoring supplied)

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"... an appeal of the prosecution from the order of dismissal (of the criminal complaint) by the trial court will not constitute double jeopar-dy if (1) the dismissal is made upon motion, or with express consent, of the defendant and (2) the dismissal is not an acquittal or based upon consideration of the evidence or of the merits of the case; and (3) the question to be passed upon by the appellate court is purely legal; so that should the dismissal be found incorrect, the case would have to be remanded to the court of origin for further proceedings, to determine the guilt or inno-cence of the defendant." (Underscoring supplied)

The doctrine of estoppel in relation to the plea of double jeopardy was first enunciated in *Acierto* which held that when the trial court dismisses a case on a disclaimer of jurisdiction, upon the instigation of the accused, the latter is estopped on appeal from asserting the jurisdiction of the lower court in support of his plea of second jeopardy. The doctrine of estoppel is in quintessence the same as the doctrine of waiver: the thrust of both is that a dismissal, other than on the merits, sought by the ac-cused in a motion to dismiss, is deemed to be with his express consent and bars him from subsequently interposing the defense of double jeopardy on appeal or in a new prosecution for the same offense.

In *Acierto*, the defendant was charged before a United States court-martial with having defrauded the Government of the United States, through falsification of documents, within a mili-tary base of the United States in the Philippines. The challenge by the accused against the jurisdiction of the military tribunal was brushed aside, and he was convicted. On review, the verdict was reversed by the Commanding General who sustained *Acierto's* po-sition on the ground of lack of jurisdiction. Subsequently, he was convicted of estafa and falsification based on the same facts by the Court of First Instance of Rizal. On appeal to this Court, he claimed former jeopardy in the court-martial proceedings, assert-ing that the military court actually had jurisdiction. In a unanimous[7] decision, this Court, through Mr. Justice Pedro Tuason, ruled:

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

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

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

The Acierto ruling was reiterated in *People vs. Amada Reyes, et al.*, (96 Phil. 927, April 30, 1955); *People vs. Reyes et al.*, (98 Phil. 646, March 23, 1956); *People vs. Casiano* (L-15309, February 16, 1961), and *People vs. Archilla* (L-15632, February 28, 1961).

The defendants in *People vs. Amada Reyes, et al.*, were charged as accessories to the crime of theft committed by their brother, Anselmo, the principal accused. The latter pleaded guilty to simple theft and was sentenced accordingly. The former pleaded not guilty and subsequently filed a motion to quash on the ground that being brothers and sisters of the principal accused, they were exempt from criminal responsibility for the acts charged against them in the information. Thereupon, the prosecution moved to amend the information so as to allege that the defendants profited from the effects of the crime. In view of this development, counsel for the defendants moved to withdraw their motion to quash and objected to the proposed amendment which sought to change ma-terially the information after plea without the consent of the accused. Without acting on the petition to withdraw the motion to quash, the trial court denied the motion of the prosecution on the ground that the proposed amendment would substantially affect the fundamental rights of the accused who were exempt from liability under the in-formation because of their relation to the principal culprit. Then the prosecution moved for the dismissal of the case against the al-legged accessories with reservation to file a new information. The court ordered the dismissal without ruling on the reservation. Sub-sequently, a new information was filed virtually reproducing the previous one except that now there was an added allegation of in-tent to gain. The lower court quashed the new information upon mo-tion of the accused on the ground of double jeopardy. On appeal by the prosecution, this Court, thru Mr. Justice J.B.L. Reyes, held that the plea of double jeopardy was erroneously sustained because

"In the first place, the accused-appellees herein filed a motion to quash on the ground that they incurred no criminal liability under the facts alleged in the information in the preceding case, No. Q-972, and the trial court instead of allowing the withdrawal of the motion to quash, virtually sustained the same when it denied the fiscal's mo-tion to amend, thereby forcing the latter to dis-miss the case; hence, it can not be held that the former case was terminated without the express consent of the accused. Secondly, the defendants themselves showed that the information in the previous case was insufficient to charge them with any criminal offense, in view of their rela-tionship with the principal accused; and it is well established doctrine that for jeopardy to attach, there must be an information sufficient in form and substance to sustain a conviction. Lastly, the herein accused having successfully contended that the information in the former case was insuffi-cient to sustain a conviction, they cannot turn around now and claim that such information was after all, sufficient and did place them in danger of jeopardy of being convicted thereunder. If, as they formerly contended, no conviction could be had in the previous case, they are in estoppel to contend now that the information in the second case places them in jeopardy for the second time. Their case comes within the spirit of the rule laid down in *People vs. Acierto*. . ."

Again, in *People vs. Reyes, et al.*, supra, this Court, speaking thru Mr. Chief Justice Paras, reiterated the *Acierto* ruling, thus:

"Where the complaint or information is in truth valid and sufficient, but the case is dismissed upon the petition of the accused on the ground that the complaint or information is invalid and insufficient, such dismissal will not bar another prosecution for the same offense and the defendant is estopped from alleging in the second information that the former dismissal was wrong because the complaint or information was valid."

In this particular case, upon motion of the defendants, the trial court dismissed the information because it did not allege the use of violence, notwithstanding the fact that the offense charged was coercion under article 287 of the Revised Penal Code. On appeal, however, this Court ruled that the dismissal was erroneous because "although the offense named in the information is coercion, it does not necessarily follow that the applicable provision is the first paragraph, since the second paragraph also speaks of 'coercions'. Inasmuch as the recitals in the information do not include violence, the inevitable conclusion is that the coercion contemplated is that described and penalized in the second paragraph."

We come now to the case of *People vs. Casiano*. In this case the accused was charged with estafa in a complaint filed with the justice of the peace court of Rosales, Pangasinan. The accused waived her right to preliminary investigation and the record was accordingly forwarded to the Court of First Instance of Pangasinan where the provincial fiscal filed an information of "illegal possession and use of false treasury or bank notes." Upon arraignment the defendant pleaded not guilty. Subsequently, the defense filed a motion to dismiss on the thesis that there had been no preliminary investigation of the charge of illegal possession and use of false treasury or bank notes, and that the absence of such preliminary investigation affected the jurisdiction of the trial court. The motion was granted on the ground that the waiver made by the defendant in the justice of the peace court did not deprive her of the right to a preliminary investigation of an entirely different crime. On appeal to this Court, it was held that the dismissal was erroneous because the allegations of the information filed in the Court of First Instance were included in those of the complaint filed in the justice of the peace court where the defendant had already waived her right to a preliminary investigation. On the question of whether the appeal placed the defendant in double jeopardy, this Court, thru Mr. Chief Justice (then Associate Justice) Concepcion, observed that the situation of *Casiano* was identical to that of the accused in *Acierto*

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

This Court then forthrightly stated that "the rule of estoppel applied in the *Acierto* case should be maintained, because:

"1. It is basically and fundamentally sound and just.

"2. It is in conformity with the principles of legal ethics, which demand good faith of the highest order in the practice of law.

"3. It is well settled that parties to a judicial proceeding may not, on appeal, adopt a theory inconsistent with that which they sustained in the lower court.

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"4. The operation of the principle of estoppel on the question of jurisdiction seemingly depends upon whether the lower court actually had jurisdiction or not. If it had no jurisdiction, but the case was tried and decided upon the theory that it had jurisdiction, the parties are not barred on appeal, from assailing such jurisdiction, for the same 'must exist as a matter of law, and may not be conferred by consent of the parties or by estoppel' (5 C.J.S. 861-863). However, if the lower court had jurisdiction, and the case was heard and decided upon a given theory, such, for instance, as that the court had no jurisdiction, the party who induced it to adopt such theory will not be permitted, on appeal, to assume an inconsistent position - that the lower court had jurisdiction. Here, the principle of estoppel applies. The rule that jurisdiction is conferred by law, and does not depend upon the will of the parties, has no bearing thereon."

Twelve days after *Casiano*, this Court, in *People vs. Archilla*, supra, invoked anew the doctrine of estoppel. In this case *Alfreda Roberts*, together with *Jose Archilla*, was charged with bigamy. After pleading not guilty, *Roberts*, through her counsel, filed a motion praying that the complaint be quashed with regard to her on the ground that the facts alleged therein did not constitute the offense charged for failure to aver that "insofar as *Alfreda Roberts* is concerned, her marriage to *Jose Luis Archilla* was her second marriage. . ." On appeal, the prosecution contended that the trial court erred in granting the motion to quash, because the complaint was sufficient and at least charged the accused as an accomplice. The defendant maintained that even if that were true, the quashing of the information amounted to her acquittal which prevented the prosecution from taking the said appeal as it would place her in double jeopardy. Mr. Justice Felix Bautista Angelo, writing for the majority, ruled that the trial court erred, and proceeded to emphasize that the accused

"... cannot now be allowed to invoke the plea of double jeopardy after inducing the trial court to commit an error which otherwise it would not have committed. In other words, appellee cannot adopt a posture of double dealing without running afoul with the doctrine of estoppel. It is well-settled that the parties to a justiciable proceeding may not, on appeal, adopt a theory inconsistent with that which they sustained in the lower court (*Williams v. McMicking*, 17 Phil. 408; *Molina v. Somes* etc.). Consequently, appellee is now estopped from invoking the plea of double jeopardy upon the theory that she would still be convicted under an information which she branded to be insufficient in the lower court."

The accused in this case now before us nevertheless insists that the *Salico* doctrine and "necessarily analogous doctrines" were abandoned by this Court in *Bangalao*, *Labatete*, *Villarin* and *Cloribel*.

In *Bangalao*, the complaint filed by the victim's mother alleged that the rape was committed "by means of force and intimidation" while the information filed by the fiscal alleged that the offended party was a "minor and demented girl" and that the defendants "successively had sexual intercourse with her by means of force and against the will of *Rosita Palban*." After the accused had pleaded not guilty, the defense counsel moved for the dismissal of the case on the ground that the trial court lacked jurisdiction to try the offense of rape charged by the fiscal since it was distinct from the one alleged in the complaint which did not aver that the victim was a "demented girl". The lower court sustained the motion and dismissed the case for lack of jurisdiction. On appeal by the prosecution, this Court held that the trial judge erred in dismissing the case for lack of jurisdiction, but ruled, however, that the appeal could not prosper because it placed the accused in double jeopardy.

"As the court below had jurisdiction to try the case upon the filing of the complaint by the mother of the

offended party, the defendants-appellees would be placed in double jeopardy if the appeal is allowed."

After mature analysis, we cannot agree that this Court in *Bangalao* impliedly abandoned the *Salico* doctrine on waiver. *Bangalao* was decided on the question of jurisdiction. This Court, after holding that the lower tribunal had jurisdiction, decided outright to repress the appeal by the Government on the ground of double jeopardy without considering whether the appealed order of dismissal was issued with or without the express consent of the accused (this aspect of double jeopardy not being in issue). Hence, the ruling in *Salico* - that the dismissal was with the express consent of the accused because it was granted upon his instigation thru a motion to dismiss - was not passed upon in *Bangalao*.

A case of striking factual resemblance with *Salico* is *People vs. Ferrer* (100 Phil. 124, October 23, 1956). In this case, after the prosecution had rested, the accused filed a motion to dismiss on the ground that the territorial jurisdiction of the trial court had not been established. Acting on this motion, the lower court dismissed the case. The prosecution appealed. This Court found that the evidence on record, contrary to the finding of the trial court, amply proved the jurisdiction of the lower tribunal. However, without the defendant interposing the plea of double jeopardy, this Court held that "the Government however meritorious its case cannot appeal the order of dismissal without violating the right of the defendant not to be placed in double jeopardy." Again, like in *Bangalao*, this Court did not consider the nature of the dismissal - whether it was with or without the express consent of the defendant.

The accused in the case at bar avers that the *Salico* doctrine was formally and expressly abandoned in *People vs. Labatete*, *supra*. In the latter case, the trial court, upon motion of the defendant, dismissed the original information for estafa on the ground that it did not allege facts constituting the offense charged. The information recited that the accused had contracted a loan from the complainant, giving as security the improvements and products of his property (a piece of land), without averring that the said property, which was allegedly mortgaged by the accused to the Rehabilitation Finance Corporation, formed part of the security. Consequently, the fiscal filed an amended complaint alleging that the accused also gave as security the land in question, which the later mortgaged to the damage and prejudice of the complaining creditor. This amended information was also dismissed upon motion of the defendant on the ground of double jeopardy. This Court, in sustaining the appealed order of dismissal, held:

"If the amended information were to be admitted, the accused will be deprived of his defense of double jeopardy because by the amended information he is sought to be made responsible for the same act of borrowing on a mortgage for which he had already begun to be tried and acquitted by the dismissal of the original information."

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"... the trial court found that the accused could not be found guilty of any offense under the information. The judgment entered was not one of dismissal but of acquittal, and whether the judgment is correct or incorrect, the same constitutes a bar to the presentation of the amended information sought to be introduced by the fiscal." (underscoring supplied)

In not applying the *Salico* doctrine, this Court, through Mr. Justice Alejo Labrador, expounded:

"... The judgment of the trial court (in *People vs. Salico*) was in fact an acquittal because of the failure on the part of the fiscal to prove that the crime was committed within the jurisdiction of the court. The judgment was in fact a final judgment of acquittal. The mere fact that the accused asked for his acquittal after trial on the merits (after the prosecution had rested its case) is no reason for saying that the case was 'dismissed' with his express consent and he may again be subjected to another prosecution. "

From the above-quoted statement, it is clear that what in *Salico* was repudiated in *Labatete* was the premise that

the dis-missal therein was not on the merits and not the conclusion that a dismissal, other than on the merits, sought by the accused, is deemed to be with his express consent and therefore constitutes a waiver of his right to plead double jeopardy in the event of an appeal by the prosecution or a second indictment for the same offense. This Court, In Labatete, merely pointed out that the con-troverted dismissal in Salico "was in fact an acquittal." Reason-ing a contrario, had the dismissal not amounted to acquittal, then the doctrine of waiver would have applied and prevailed. As a matter of fact we believe with the majority in Salico that the dismissal therein was not on the merits and therefore did not amount to an acquittal:

"If the prosecution fails to prove that the offense was committed within the territorial jurisdiction of the court and the case is dismissed, the dismissal is not an acquittal, inasmuch as if it were so the defendant could not be again prose-cuted for the same offense before a court of competent jurisdiction; that it is elemental that in such case the defendant may again be prosecuted for the same offense before a court of competent jurisdiction."

Granting, however, that the Salico doctrine was abandoned in Labatete, it was resurrected in Desalisa. Moreover, Labatete never mentioned the doctrine of estoppel enunciated in Acierto which had been repeatedly reaffirmed.

To bolster his contention that the Salico doctrine has been dropped from the corpus of our jurisprudence, the accused cites *People vs. Villarin*, supra. Here the accused appealed to the Court of First Instance his conviction in the inferior court for acts of lasciviousness with consent. After conducting the preliminary in-vestigation, the fiscal charged the accused with corruption of minors. Villarin pleaded not guilty, and before the case could be heard, his counsel filed a motion to dismiss on the ground that the information did not allege facts constituting the crime charged. Acting on this motion, the trial court dismissed the case. On ap-peal by the prosecution, this Court, thru Mr. Justice Felix Angelo Bautista, held that the dismissal was erroneous, but that this error:

"... cannot now be remedied by setting aside the order of dismissal of the court a quo and by remanding the case to it for further pro-ceedings as now suggested by the prosecution con-sidering that the case was dismissed without the express consent of the accused even if it was upon the motion of his counsel, for to do so would place the accused in double jeopardy. The only exception to the rule on the matter is when the dismissal is with the consent of the accused, and here this consent has not been obtained." (underscoring supplied)

Villarin gives the impression, as gleaned from the above statement, that this Court therein sustained the plea of double jeopardy on the ground that the dismissal was without the express consent of the defendant as it was ordered "upon the motion of his counsel" and not upon motion of the defendant himself. This con-clusion is rather unfortunate and must be rectified, for the settled rule is that the acts of counsel in a criminal prosecution bind his client. Thus, in *People vs. Romero* (89 Phil. 672, July 31, 1951), this Court held categorically that

"The fact that the counsel for the defendant, and not the defendant himself personally moved for the dismissal of the case against him, had the same effect as if the defendant had personally moved for such dismissal, inasmuch as the act of the counsel in the prosecution of the defendant's cases was the act of the defendant himself, for the only case in which the defendant cannot be represented by his counsel is in pleading guilty according to Section 3, Rule 114, of the Rules of Court." (underscoring supplied)

On this consideration alone, we cannot agree with the accused in the case at bar that this Court in Villarin intended to abandon the Salico ruling. Had the motion to dismiss filed by Villarin's counsel been considered as one made by the defendant himself, as should have been done, the Villarin case should have been resolved consistent with the doctrine of waiver in Salico and/or that of estoppel in Acierto.

As a final citation in support of his theory, the accused in the case at bar invokes *People vs. Clorible*, supra, where this Court, in sustaining the plea of double jeopardy interposed by the defendants, stated inter alia:

"In asserting that Criminal Case No. 45717 may still be reinstated, the petitioner adopts the ruling once

followed by this Court to the effect that a dismissal upon the defendant's own motion is a dismissal consented to by him and, consequently, will not be a bar to another prosecution for the same offense, because, his action in having the case dismissed constitutes a waiver of his constitutional right or privilege, for the reason that he thereby prevents the court from proceeding to the trial on the merits and rendering a judgment of conviction against him. (People v. Salico, 84 Phil. 722) But, this authority has long been abandoned and the ruling therein expressly repudiated.

"Thus, in the case of People v. Robles, G.R. No. L-12761, June 29, 1959, citing People v. Bangalao, L-5610, February 17, 1954; People v. Diaz, L-6518, March 30, 1954; People v. Abaño, L-7862, May 17, 1955; and People v. Ferrer, L-9072, October 23, 1956, We said:

'x x x. In reaching the above conclusion, this Court has not overlooked the ruling in People vs. Salico, 47 O.G. 4765, to the effect that a dismissal upon defendant's motion will not be a bar to another prosecution for the same offense as said dismissal was not without the express consent of the defendant, which ruling the prosecution now invokes in support of its appeal; but said ruling is not now controlling, having been modified or abandoned in subsequent cases where-in this Court sustained the theory of double jeopardy despite the fact that the dismissal was secured upon motion of the accused. (Underlining supplied).'

"Also, the rule that a dismissal upon defendant's motion will not be a bar to another prosecution for the same offense as said dismissal is not without the express consent of the defendant, has no application to a case where the dismissal, as here, is predicated on the right of a defendant to a speedy trial. (People vs. Tacneng, et al., G.R. No. L-12082, April 30, 1959)." (underscoring supplied)

The above statements must be taken in the proper context and perspective. As previously explained, Bangalao, Ferrer, and even Labatete, did not actually abandon the doctrine of waiver in Salico (and not one of the said cases even implied the slightest departure from the doctrine of estoppel established in Acierto). In Diaz, Abaño, Tacneng, and Robles which are cited above, like in Cloribel, the dismissals therein, all sought by the defendants, were considered acquittals because they were all predicated on the right of a defendant to a speedy trial and on the failure of the Government to prosecute. Therefore, even if such dismissals were induced by the accused, the doctrines of waiver and estoppel were obviously inapplicable for these doctrines presuppose a dismissal not amounting to an acquittal.

This Court, through Mr. Justice Marceliano Montemayor, held in People vs. Diaz (94 Phil. 714, March 30, 1954):

"Here the prosecution was not even present on the day of trial so as to be in a position to proceed with the presentation of evidence to prove the guilt of the accused. The case was set for hearing twice and the prosecution without asking for postponement or giving any explanation, just failed to appear. So the dismissal of the case, though at the instance of defendant Diaz may, according to what we said in the Gandicela case, be regarded as an acquittal." (underscoring supplied)

A similar result was reached by this Court, thru Mr. Justice Sabino Padilla, in People vs. Abaño (97 Phil. 28, May 27, 1955), in this wise:

"After a perusal of the documents attached to the petition for a writ of certiorari, we fail to find an abuse of discretion committed by the respondent judge. He took pains to inquire about the nature of the ailment from which the complaining witness claimed she was suffering. He continued the trial three times, to wit: on 27 May, 1 and 12 June. The defendant was entitled to a speedy trial. When on 15 June, the last day set for the resumption of the trial, the prosecution failed to secure the continuance thereof and could not produce further evidence because of the absence of the complaining witness, the respondent judge was justified in dismissing the case upon motion of the defense. . . The defendant was placed in jeopardy for the offense charged in the information and the annulment or setting aside of the order of dismissal would place him twice in jeopardy of punishment for the same offense." (underscoring supplied)

Then in *People vs. Tacneng* (L-12082, April 30, 1959), Mr. Justice Pastor Endencia, speaking for a unanimous Court, stressed that

"... when criminal case No. 1793 was called for hearing for the third time and the fiscal was not ready to enter into trial due to the absence of his witnesses, the herein appellees had the right to object to any further postponement and to ask for the dismissal of the case by reason of their constitutional right to a speedy trial; and if pursuant to that objection and petition for dismissal the case was dismissed, such dismissal amounted to an acquittal of the herein appellees which can be invoked, as they did in a second prosecution for the same offense." (underscoring supplied)

And this Court proceeded to distinguish the case from *People vs. Salico*, thus:

"We are fully aware that pursuant to our ruling in the case of *Peo. v. Salico*, 45 O.G. No. 4, 1765-1776, and later reiterated in *Peo. v. Romero*, L-4517-20, July 31, 1951, a dismissal upon defendant's motion will not be a bar to another prosecution for the same offense as said dismissal was not without the express consent of the defendant. This ruling, however, has no application to the instant case, since the dismissal in those cases was not predicated, as in the case at bar, on the right of the defendant to a speedy trial, but on different grounds. In the *Salico* case, the dismissal was based on the ground that the evidence for the prosecution did not show that the crime was committed within the territorial jurisdiction of the court which, on appeal, we found that it was, so the case was remanded for further proceedings; and in the *Romero* case the dismissal was due to the non-production of other important witnesses by the prosecution on a date fixed by the court and under the understanding that no further postponement at the instance of the government would be entertained. In both cases, the right of a defendant to a speedy trial was never put in issue." (underscoring supplied)

The gravamen of the foregoing decisions was reiterated in *People vs. Robles* (L-12761, June 29, 1959) where the trial court, upon motion of the defendant, dismissed the case on the ground that the failure of the prosecution to present its evidence despite several postponements granted at its instance, denied the accused a speedy trial. In rejecting the appeal of the Government, this Court held:

"In the circumstances, we find no alternative than to hold that the dismissal of Criminal Case No. 11065 is not provisional in character but one which is tantamount to acquittal that would bar further prosecution of the accused for the same offense."

In *Cloribel*, the case dragged for three years and eleven months, that is, from September 27, 1958 when the information was filed to August 15, 1962 when it was called for trial, after numerous postponements, mostly at the instance of the prosecution. On the latter date, the prosecution failed to appear for trial, and upon motion of the defendants, the case was dismissed. This Court held "that the dismissal here complained of was not truly a 'dismissal' but an acquittal. For it was entered upon the defendants' insistence on their constitutional right to speedy trial and by reason of the prosecution's failure to appear on the date of trial." (underscoring supplied)

Considering the factual setting in the case at bar, it is clear that there is no parallelism between *Cloribel* and the cases cited therein, on the one hand, and the instant case, on the other. Here the controverted dismissal was predicated on the erroneous contention of the accused that the complaint was defective and such infirmity affected the jurisdiction of the court *a quo*, and not on the right of the accused to a speedy trial and the failure of the Government to prosecute. The appealed order of dismissal in this case now under consideration did not terminate the action on the merits, whereas in *Cloribel* and in the other related cases the dismissal amounted to an acquittal because the failure to prosecute presupposed that the Government did not have a case against the accused, who, in the first place, is presumed innocent.

The application of the sister doctrines of waiver and estoppel requires two *sine qua non* conditions: first, the dismissal must be sought or induced by the defendant personally or through his counsel; and second, such

dismissal must not be on the merits and must not necessarily amount to an acquittal. Indubitably, the case at bar falls squarely within the periphery of the said doctrines which have been preserved unimpaired in the corpus of our jurisprudence.

ACCORDINGLY, the order appealed from is set aside. This case is hereby remanded to the court of origin for further proceedings in accordance with law. No costs.

Concepcion, C.J., Reyes, J.B.L., Dizon, Makalintal, Zaldivar, Sanchez, Angeles, and Fernando, JJ., concur.

[1] During the preliminary investigation, the municipal court, at the instance of the defense counsel and without any objection from the private prosecutor, issued an order dated December 12, 1964 deleting the third paragraph of the complaint with respect to the charge of robbery.

[2] See article 335 of the Revised Penal Code.

[3] Section 2, Rule 118, Revised Rules of Court.

[4] Doctrine of waiver established in *People vs. Salico* (84 Phil. 722, October 13, 1949).

[5] Doctrine of estoppel enunciated in *People vs. Acierto* (92 Phil. 534, January 30, 1953).

[6] Chief Justice Ricardo Paras (then Associate Justice) dissented together with Justices Cesar Bengzon and Marceliano Montemayor.

[7] Justices Paras, Bengzon and Montemayor, who dissented in *Salico*, concurred in the *Acierto* ruling.

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