

CARLOS B. GONZALES, PETITIONER-APPELLANT, VS. EULOGIO SERRANO IN HIS CAPACITY AS CITY FISCAL OF MANILA AND LIBRADA ASIS, RESPONDENTS-APPELLEES.

G.R. No. L-25791. September 23, 1968

Ponente: CONCEPCION, C.J.

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CONCEPCION, C.J.:

Direct appeal by Carlos B. Gonzales, hereinafter referred to as the complainant, from a decision of the Court of First Instance of Manila, dismissing his petition for a writ of mandamus to compel the City Fiscal of Manila, hereinafter referred to as the City Fiscal, to file an information for estafa against Librada S. Asis, hereinafter referred to as the respondent.

Sometime after November 17, 1964, complainant filed with the office of the City Fiscal a charge for estafa against the respondent, which was referred to Assistant Fiscal Rodolfo A. Nocon, hereinafter referred to as the prosecutor, for preliminary investigation. After conducting the same, the prosecutor submitted to the City Fiscal a report recommending that said charge be dropped, upon the ground that the obligation involved therein is civil in nature. This recommendation having been approved by the City Fiscal, complainant appealed to the Secretary of Justice, who upheld the action appealed from. Thereupon, complainant commenced the present action for mandamus, in the Court of First Instance of Manila, against the City Fiscal and respondent. In due course, said Court rendered the abovementioned decision dismissing the petition here-in, without pronouncement as to costs. Hence, this appeal by the complainant.

As stipulated by the parties, the facts are correctly set forth in the aforementioned report of the prosecutor, from which we quote:

"This is a complaint for estafa in that respondent bought from the complainant on October 27, 1964, assorted plastic flowers in the total amount of P10,172.00.

"It is the contention of complainant that the agreement is C.O.D. and for which respondent paid on the same date that she took delivery of the flowers, P2,000 cash and the balance of P8,172.00 by EBC Check No. B.C. 907516.

"The next day, however, respondent went back to complainant to request him not to deposit her check as she had no sufficient funds in the bank, as she was not able to make deliveries of the flowers to her customers during the night and subsequently she was unable to replenish her bank account.

"Apparently, complainant agreed by not depositing her check, and waited up to Nov. 17, 1964 for respondent to make a partial payment on account of said check by accepting P5,556.00 as evidenced by a receipt to that effect.

"The amount of P5,556.00 plus the P2,000.00 paid previously, show that respondent was able to make a total payment of P7,556.00, leaving a balance of P2,612.00.

"It is the theory of respondent that she and complainant had an agreement that those articles which could not be sold can be returned and she was willing to return the same to complainant at any time.

"Be that it may, it appears that there was a novation of contract between the parties, from a cash transaction, to an agreement to pay the balance later when complainant agreed not to cash the check and accepted partial payment on Nov. 17, 1964. Furthermore, the manifestation of respondent that she is ready and willing to return the articles unsold, negates criminal liability. The obligation is civil in nature, one for specific performance with damages and not for estafa.

" x x x x x x "

His Honor, the Trial Judge, sustained the City Fiscal's theory, stating:

"While the original agreement for the sale of plastic flowers and leaves was for cash on delivery (C.O.D.), nevertheless, the acceptance by Gonzales of part of the consideration in check, was in effect a modification of the terms thereof because a check is net it good tender of payment and need not be accepted by a creditor entitled to cash (*Keystone Grape Cc. vs. Hustis* 122 N. E. 269). This is so because a check is only means of payment and the debt will not be extinguished unless and until the check is presented to and honored by the drawee bank (see par. 2, Art. 1249, Civil Code).

"Moreover, early the day following the delivery of the check, Asis requested Gonzales not to present it for encashment because she did not have sufficient funds deposited in the bank to cover the payment thereof. Gonzales apparently agreed, and in effect the check in question was never deposited by him in his current account. On the other hand, on November 17, 1964 Asis tendered the sum of P7,556 to Gonzales, who accepted the same as partial payment on account of the check and he issued to the former the corresponding receipt. Under this situation, the original agreement of a cash sale transaction had been converted into a sale payable in installments and as a result the relation of the parties thereby became that of creditor and debtor. Hence, the failure of Asis to pay Gonzales the balance of P2,612 would give rise only to a cause of action for the collection thereof.

"But even granting that the issuance of the check by on October 27, 1964, would constitute a violation of paragraph 2, sub-paragraph (d) of Article 315 of the Revised Penal Code, nevertheless any incipient criminal liability was deemed avoided, because the parties, a short time after the delivery of the check, changed the original trust relation into an ordinary creditor-debtor situation.

"It is true that after a crime has been committed, the criminal liability of the offender cannot be compounded by subsequent agreements between the offender and the offended party (*U.S. vs. Montañez*, 8 Phil. 620; *People vs. Velasco*, 42 Phil. 76), but there seems to be no prohibition in our law to prevent the parties to a contract to novate it so that any incipient criminal liability under the first contract is thereby avoided (*People vs. Trinidad*, 53 O.G. 731)." (See also *People vs. Galsim*, 45 O.G. 3466; and *People vs. Doniog*, 43, O. G. 4500.)

"The 'novation theory,' which was originally enunciated by the Court of Appeals, was impliedly recognized by the Supreme Court in the case of *People vs. Nery* (L-19567, Feb. 15, 1964), x x x

" x x x x x x "

"Considering that the novation of the contract between Asia and Gonzales was made shortly after the delivery of the check and long before the filing of a complaint by Gonzales with the Office of the City Fiscal, this official was x x x justified in not filing an information for 'estafa' against Asis.

"Another fundamental barrier to the granting of the relief prayed for is that the duty of the City Fiscal to prosecute involves discretion and, for this reason, it cannot be controlled by mandamus. To this effect was the ruling of the Supreme Court in the case of *Beatriz Ramos Vda. de Bagatua vs. Pedro Revilla* (55 O.G. 10399) x x x".

We find no plausible reason to disturb the conclusions thus reached in the decision appealed from, for;

1. Complainant alleges that the sale to respondent was on a C.O.D. basis. The City Fiscal did not explicitly find it to be so, and was seemingly reluctant to so characterize the transaction between them. Indeed, pursuant to complainant's petition herein, respondent made a P2,000 cash deposit several days before October 27, 1964. When the goods were delivered on that date, complainant accepted a check for P8,172, which does not extinguish the obligation for this sum until cashed. When early the next day, respondent asked complainant to hold off encashment, because, having failed to deliver the goods to her customer the night before, she had been unable to deposit sufficient funds to cover the amount of the check, complainant agreed thereto.

2. As stated in the decision appealed from, in the preliminary investigation conducted by the prosecutor:

"x x x the version of Gonzales (complainant) was to the effect that Asis (respondent) received from him, on consignment, plastic flowers and leaves valued at P10,172, with the obligation to sell them and to deliver to him the proceeds thereof or to return those which she could not sell; that Asis did not return any unsold goods and turned over to him only P7,556, thereby failing to account for the sum of P2,612. On the other hand, Asis claimed that the agreement she had with Gonzales was that she could return the goods which could not be sold and that she was willing to do so at any time.

“ x x x x x x “

Respondent's "obligation to sell" the goods aforementioned and "to deliver" to the complainant "the proceeds thereof or to re-turn those which she (respondent) could not sell," is inconsistent with complainant's theory to the effect that the transaction between them was a C.O. D. sale, and suggests that their deal was more in the nature of a sale on commission. This explains complainant's behavior after delivery of the flowers to respondent, particularly the acceptance of a check, in lieu of cash, complainant's acquiescence to withholding encashment of said check, and the fact that complainant had never presented it to the payee bank for the collection of its face value.

3. The City Fiscal and the lower court have correctly held that, even if the original agreement had been a C.O.D. sale, the same should be deemed novated into a sale on credit, in consequence of the subsequent acts of the parties to said agreement, and that respondent's failure to pay the balance of P2,612 produced no more than a civil responsibility.

4. As pointed out in *People vs. Nery*[1] novation prior to the filing of the criminal information - as in the case at bar - may convert the relation between the parties into an ordinary creditor-debtor relation, and place the complainant in estoppel to insist on the original transaction or "cast doubt on the true nature" thereof.

5. Damage, or prejudice² as an essential element of estafa, has not been sufficiently established. Although the balance of P2,612 has not been paid, complainant is admittedly entitled to the return of the goods which have not, as yet, been sold by respondent. The latter is willing to turn them over to him but, apparently, complainant is not interested in getting them back, for he has never demanded the return thereof.

6. Since the City Fiscal is entitled to use his judgment and a measure of discretion in the appreciation of the evidence presented to him, it is clear that the exercise of such judgment and discretion, under the facts and circumstances already adverted, may not be controlled by mandamus.³

WHEREFORE, the decision appealed from is hereby affirmed, with costs against petitioner, Carlos B. Gonzales.

IT IS SO ORDERED.

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

[1] L-19567, February 5, 1967.

2 People v. Habana, 76 Phil. 1.

3 People v. Agasang, 60 Phil. 182; Gonzalez v. Court of First Instance, 63 Phil. 846; Suarez v. Platon, 69 Phil. 556; People v. Sope, 75 Phil. 810; Guiao v. Figueroa, 94 Phil. 1022; Maddela v. Aquino, 104 Phil. 433; Sy Ha v. Galang, L-18513, April 27, 1963; Hodges v. Ganzon, L-18086, August 31, 1964, Llanto v. Dimaporo, L-21905, March 31, 1966; Perez v. Monetary Board, L-23307, June 30, 1967.

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