

PEOPLE OF THE PHILIPPINES, PETITIONER, VS. HON. LEODEGARIO L. MOGOL, AS JUDGE OF THE COURT OF FIRST INSTANCE OF QUEZON, BR. IV, AND EDGARDO CABALLAS, RESPONDENTS.

G.R. No. L-37837. August 24, 1984

Ponente: GUERRERO, J.

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GUERRERO, J.:

This case commenced on December 27, 1971 in the Municipal Court of Lopez, Quezon where a criminal complaint was filed against herein private respondent Edgardo Caballas for Serious Physical Injuries allegedly committed as follows:

"That on or about the 21st day of December, 1971, at about 7:00 o'clock in the evening at Magsaysay District, municipality of Lopez, Province of Quezon, Philippines, and within the jurisdiction of this Honorable Court, the abovenamed accused, with deliberate intent, did then and there wilfully, unlawfully and feloniously assault, attack and stab one Ernesto Sandoval with unidentified knife, thus causing upon the latter physical injuries to wit: 1. Wound, stabbed, 1 cm. long, penetrating and perforating abdominal cavity, 1 cm. to right side of the Xyphoid process, non-involvement of the internal organs; 2. Wound, stabbed, 3 cm. long, penetrating and perforating posterior abdominal wall, cutting the terminal portion of the 10th rib, along the posterior axillary line, left which physical injuries will require medical treatment for a period of more than thirty (30) days and will incapacitate the said Ernesto Sandoval from the performance of his customary labors for the same period of time." [1]

Upon arraignment on February 5, 1972, the accused Caballas pleaded not guilty.[2] Before the presentation of evidence, the private prosecutor on February 23, 1972 filed an "Urgent Motion to Amend the Complaint" to charge the offense of Frustrated Murder, contending that a perusal of the affidavits of the witnesses for the prosecution patently shows that in the commission of the act complained of, the accused had the manifest intention to kill the offended party.[3] The defense, on the other hand, in its Memorandum argued that since the accused had already entered his plea, the Court could no longer entertain the Motion for amendment of the complaint, the intended amendment being a substantial one for a grave offense with a higher penalty, citing Section 13, Rule 110 of the Revised Rules of Court.[4] The Motion was denied in an Order of the Municipal Court dated April 6, 1972 stating that:

"Of course the law just pointed out, the facts of this case as well as the ground raised by the prosecution (that of not having charged in the complaint the proper offense) do not absolutely rule out the legal propriety of allowing amendment of the complaint so as to charge the proper offense. Reason, however, exists for a denial of the motion. In the first place all that is before the Court for its appreciation at this stage of the proceedings is the same evidence disclosed during the preliminary examination of this case and during that examination the investigating officer had before him a complaint for Serious Physical Injuries and was limited in his task to determining whether or not the evidence presented supports a reasonable ground to believe that the offense charged has been committed as alleged in the complaint.

"In the absence of a clear showing that there is no merit in the charge being investigated because the filing of the complaint for a graver offense is warranted by the evidence or unless what was found by the investigating officer to have been committed is manifestly different from the offense charged there would be no lawful sanction to the investigating officer's making a declaration that the complaint be amended to charge what may be the proper offense."[5]

The case, thereafter, proceeded to trial. Both parties rested their evidence and the case was submitted for decision.[6] No decision on the merits was rendered, however, for in an Order dated November 29, 1972, the Municipal Court ruled as follows:

"While considering the evidence of this case the court realized that the evidence on the injuries sustained by the accused and the circumstances surrounding the infliction thereof overwhelmingly point to the conclusion that the intention of the assailant was to inflict more than just injuries. Hence, the court is restricted by what it considers a legal obstacle to the validity of whatever judgment it renders, because whether it be one of acquittal or conviction - it shall have so ordered on a case outside its jurisdiction.

"The evidence is positive and uncontradicted that the person who inflicted the stab wounds on Ernesto Sandoval had evidently not by accident but by design, walked with the victim from a certain point on Real Street up to some 400 meters therefrom which is another spot on a quite unfrequented side street; that it was in that spot where the victim was stabbed four times, two of which hit the victim - one, on the abdominal region and another 'penetrating and perforating the posterior abdominal wall, cutting the terminal portion of the 10th rib'; that this was at about 7:00 o'clock in the evening of December 1971, at which time it must have been dark already; that the victim was alone, and that the attack was sudden and treacherous.

"It has also been shown that the knife used by the assailant measures about 6 inches in length; that the victim was not able to walk by himself after having been stabbed but that he had to be carried to the hospital and that while there, the victim almost lost consciousness. By the medical certificate issued by a physician of the hospital (Magsaysay Memorial Hospital, Lopez, Quezon) the duration of treatment has been placed at 30 days.

"The Court believes that the foregoing evidence would support prima facie a complaint for the crime of frustrated murder and, as stated, prevents it from rendering judgment in this case. It cannot even rule that the parties have waived the question of jurisdiction having proceeded with the trial of the case up to its termination as this would be legally erroneous.

"The proceedings in the case, however, may not be considered to have been rendered useless because by it more than by a mere preliminary investigation, the court has arrived at a better supported finding that the proper complaint should have been for frustrated murder; that the crime of frustrated murder has been committed and that there is reason to believe that the accused Edgardo Caballas might have been the one who had committed the same.

"IN VIEW OF ALL THE FOREGOING, this case is hereby dismissed to give way to the filing of a complaint for frustrated murder. Since the proceedings from the preliminary examination up to the conclusion of the trial hereof has amounted to a compliance with the requirements of a preliminary investigation first and second stage, let the records hereof be forwarded to the Court of First Instance at Calauag, Quezon, under the jurisdiction of which court the case for frustrated murder pertains, through the office of the Provincial Fiscal so that the latter may act on this case and file the corresponding complaint as above recommended."[7]

In compliance with the foregoing Order, the Provincial Fiscal of Quezon on June 6, 1973 filed with the respondent Court, the Court of First Instance of Quezon, Branch IV, an Information for frustrated murder against the same accused Edgardo Caballas, which alleges:

"That on or about the 21st day of December, 1971, in the Municipality of Lopez, Province of Quezon,

Philippines, and within the jurisdiction of this Honorable Court, the said accused, Edgardo Caballas, armed with a knife, with intent to kill and with evident premeditation and treachery, did then and there wilfully, unlawfully and feloniously attack, assault and stab with the said knife one ERNESTO SANDOVAL, thereby inflicting upon the latter the following injuries, to wit:

"1. Wound, stabbed, 1 cm. long, penetrating and perforating abdominal cavity, 1 cm. to right side of the xyphoid process, non-involvement of the internal organs.

"2. Wound, stabbed, 3 cm. long, penetrating and perforating posterior abdominal wall, cutting the terminal portion of the 10th rib, along the posterior axillary line, left.

thus performing all the acts of execution which should have produced the crime of murder as a consequence, but which nevertheless did not produce it by reason of causes independent of his will, that is, by the timely and able medical attendance rendered to said Ernesto Sandoval which prevented his death." [8]

On October 22, 1973, the accused moved to quash the above-quoted Information on the ground of double jeopardy. The Motion was granted by respondent Court ruling that the "Information for Frustrated Murder is essentially barred by the rules on double jeopardy as defined in Rule 117, Section 9 of the Revised Rules of Court," for the reason that:

"x x x accused Edgardo Caballas had been placed in full jeopardy for the crime of Serious Physical Injuries under the Complaint marked as Exhibit '1' previously filed before the Municipal Court of Lopez, Quezon which was dismissed and otherwise terminated by the Presiding Judge of said Court after the accused had actually been arraigned and after the evidence by the prosecution and the defense have all been submitted to the Court and at a time when the parties have submitted the case for decision. Such being the case a new prosecution of the accused Edgardo Caballas under the present information for Frustrated Murder which necessarily includes the crime of Serious Physical Injuries as held by the Supreme Court in a long line of decisions, would inevitably place the accused Edgardo Caballas in second jeopardy for an offense for which he had been previously jeopardized." [9]

The foregoing Order is now sought to be reviewed by the instant Petition filed by the Office of the Solicitor General. The sole issue raised is whether or not the dismissal by the Municipal Court of Lopez, Quezon, of the complaint for serious physical injuries against the accused Edgardo Caballas is a dismissal which bars the filing of the information for frustrated murder in the Court of First Instance against the same accused on the ground of double jeopardy.

The principle, founded upon reason, justice and conscience, that *nemo debet bis puniri pro uno delicto* is embodied in the Philippine Constitution as one of the basic rights of the citizens. [10] It is ordained in the Bill of Rights, Article IV, of the 1973 Constitution that:

"Sec. 22. 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." (Italics supplied.)

The same provision is found in Article III, Section 1 (20) of the Constitution of 1935. This constitutional mandate is restated in Rule 117 of the Revised Rules of Court, thus:

"Sec. 9. Former conviction or acquittal or former jeopardy. - 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 jurisdiction, 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." (Italics supplied.)

Commenting on the double jeopardy protection embodied in the Rules of Court, Chief Justice Enrique M. Fernando, in his book "The Bill of Rights", makes the following significant commentary and We quote: "It is to be noted that the Rules of Court in providing for a motion to quash, did extend further the reach of the double jeopardy protection. If the literal language of the constitutional provision were followed, either a previous acquittal or conviction is necessary before such a plea would lie. As already noted, the Rules adopted an expansive view with the mention of the termination or dismissal of the prosecution without the express consent of the defendant, a stage short of either acquittal or conviction. In specifying the grounds of a motion to quash, it was explicitly set forth therein that even prior to such a disposition of the case as above indicated, once jeopardy has attached, a motion to quash would lie." [11]

In the mind of the Court, the resolution of the instant Petition depends on the correct and proper interpretation and application of the phrase "dismissed or otherwise terminated without the express consent of the defendant" in Section 9, Rule 117, Rules of Court.

The Solicitor General, in his Memorandum for the Petitioner, contends that the aforementioned provision contemplates a dismissal which finally terminates and definitely disposes of a case, not a provisional or conditional dismissal such as that ordered by the Municipal Court in the case at bar. The Government counsel argues that while the Municipal Court dismissed the complaint for serious physical injuries, the very Order of dismissal shows that it was to be without prejudice, "to give way to the filing of a complaint for frustrated murder" in the Court of First Instance. Such a dismissal, it is submitted, is not within the purview of the double jeopardy provision hereinabove cited. The Solicitor General concludes that the Order of the Court of First Instance in question granting the Motion to quash filed by the defense is erroneous, invalid, and a nullity, for it deprived the State of its day in court and its duty to prosecute the accused Edgardo Caballas. [12]

On the other hand, the thrust of private respondent's arguments is that the literal language of the subject provision should be made to prevail, i.e., it is the absence of the express consent of the defendant to the dismissal or termination of the original criminal case which bars a subsequent prosecution, and wanting such express consent, jeopardy immediately and irrevocably attaches regardless of the nature or character of the dismissal or termination of the case. Private respondent contends that if a criminal case is dismissed otherwise than upon the merits at any stage before judgment without the express consent of the defendant, assuming that all the other requisites of Section 9, Rule 117 are present, the dismissal of the case shall be definite and a bar to another prosecution for the same offense. Thus, it is argued that although the Municipal Court dismissed the first case for serious physical injuries "to give way to the filing of a complaint for frustrated murder" in the Court of First Instance, said dismissal was nevertheless definite and unconditional in law because it was ordered without the express consent of the accused. [13]

A review of jurisprudence defining double jeopardy is necessary to resolve the legal issue.

In the case of *Jaca vs. Blanco*, 86 Phil. 452 (1950), this Court held that:

"x x x the dismissal contemplated in the above-quoted section of the rule (referring to Section 9, Rule 113 of the old Rules of Court, now Section 9, Rule 117 of the Revised Rules of Court) is a definite or unconditional dismissal which terminates the case, and not a dismissal without prejudice as in the present case. In the absence of any statutory provision to the contrary, we find no reason why the court may not, in the interest of justice, dismiss a criminal case provisionally, i.e., without prejudice to reinstating it before the order becomes final or to the subsequent filing of a new information for the same offense." (Page 454.)

The Jaca ruling was reiterated in *People vs. Manlapas, et al.*, L-17993, August 24, 1962, 5 SCRA 883, 887; *Republic vs. Agoncillo, et al.*, L-27257, August 31, 1971, 40 SCRA 579, 587; and *People vs. Hon. Surtida, et al.*, L-24420, January 26, 1972, 43 SCRA 29, 37. Moreover, as stated in the aforementioned case of *Republic vs. Agoncillo, et al.* (supra, p. 588):

"x x x the authoritative pronouncement in the x x x case of *People vs. Obsania* (L-24447, June 29, 1968, 23 SCRA 1249), with Justice Castro as ponente, had made clear beyond doubt that for dismissal to be a bar under the jeopardy clause of the Constitution, it must have the effect of an acquittal. Thus: '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 pre-supposed that the Government did not have a case against the accused, who in the first place, is presumed innocent.' "

There can be no question, as indeed it is quite clear, that in the case at bar, the Order of dismissal issued by the Municipal Court did not actually terminate or put an end to the prosecution against herein private respondent for the felonious act he was alleged to have committed. On the contrary, the dispositive portion of said Order expressly directed that the records of the case be forwarded to the Court of First Instance so that the Office of the Provincial Fiscal could file a complaint for frustrated murder.

Private respondent, however, insists that the dismissal must be considered in legal contemplation as a judgment of acquittal, calling attention to the state-ment of the Municipal Court in its dismissal Order that "there is reason to believe that the accused Edgardo Caballas might have been the one who committed the same" (Italics supplied by private respondent). This declaration, according to private respondent, gives rise to the inference that the evidence presented by the prosecution as to the identity of the offender fell short of proof beyond reasonable doubt and, therefore, he, as the accused, was entitled as a matter of right to a judgment of acquittal.[14] The inference is baseless and contrary to the express language of the subject Order. It is evident from a perusal of the Order of dismissal that the Municipal Court found private respondent guilty of the crime of frustrated murder but refrained from rendering a judgment of conviction on the ground of lack of jurisdiction over the offense proved by the evidence presented. It was precisely on the basis of this finding of guilt that the Municipal Court directed that a complaint for frustrated murder be filed against private respondent in the Court of First Instance.

In a number of cases, this Court has held a dismissal equivalent to an acquittal on the merits, and consequently, a bar to a subsequent prosecution for the same offense or an offense which necessarily includes or is necessarily included in the offense charged in the former complaint, but in said cases, the dismissal had been predicated either on the failure of the prosecution to prove the guilt of the accused beyond reasonable doubt,[15] or on the right of the accused to a speedy trial.[16] In the instant case, the right of private respondent as an accused to a speedy trial had never been invoked. Nor did the Municipal Court find that the prosecution failed to prove the guilt of private respondent beyond reasonable doubt for in fact said Court in effect stated that private respondent was guilty, not only of the crime charged of serious physical injuries, but of the graver offense of frustrated murder. There is, therefore, no reason why the dismissal Order of the Municipal Court should be deemed as a judgment of acquittal of the charge for serious physical injuries.

The fundamental question then in the case at bar is: Was the dismissal Order terminating the case before respondent Judge legal and valid? The answer is No. We hold and rule that respondent Judge erred in dismissing the case for serious physical injuries "to give way to the filing of a complaint for frustrated murder." For it is the duty of the respondent Judge to render the decision as the evidence presented warrant under the information as filed for serious physical injuries, and not dismiss the case on his idea or belief that there was evidence of intent to kill the intended victim. The Judge committed grave abuse of discretion amounting to excess of jurisdiction

thereby rendering his Order of November 29, 1972 null and void.

In the case of *People vs. Cabero*, 61 Phil. 121, the trial court dismissed the complaint or information on the ground that the facts alleged in the information filed in the case do not constitute perjury or a violation of the provisions of Article 183 of the Revised Penal Code. The Solicitor General appealed from the Order of dismissal. The Supreme Court, in setting aside the Order appealed from and declared of no value, the case remanded to the court of origin for an orderly determination of the case in the manner provided by law, said:

"Although not within the express language, there are many known exceptions to the jeopardy rule that have from time to time been declared by the court. Had the occasion arisen, it is just as reasonable to suppose that an exception to the rule would have been declared from an unlawful action of the court as it would for the existence of an exception in case of the insanity of the judge. The accused is no more harmed in the one case than in the other.

Even if following the *Ylagan* case we should ultimately hold that the accused was placed in jeopardy by her plea we must hold that the proceedings have not been terminated, as the action of the trial court was without authority and therefore null and void."

Since the order of dismissal was without authority and, therefore, null and void, the proceedings before the Municipal Court have not been lawfully terminated. Accordingly, there is no second proceeding to speak of and no double jeopardy. A continuation of the proceedings against the accused for serious physical injuries is in order for as the Supreme Court said in *Flores, Jr. vs. Enrile*, 115 SCRA 236:

"The constitutional mandate against putting a person twice in jeopardy of punishment for the same offense is to protect the accused from going through a trial a second time. But, since the first proceedings has not yet been terminated, there is no second proceeding to speak of, and, therefore, no double jeopardy."

WHEREFORE, IN VIEW OF ALL THE FOREGOING, the petition is hereby DISMISSED. The Order of respondent Judge dated October 25, 1973 quashing the information for frustrated murder is hereby AFFIRMED. The case is, however, REMANDED to the Municipal Trial Court of Lopez, Quezon for the proper and orderly decision on the charge for serious physical injuries. Costs de oficio. SO ORDERED.

Teehankee, Acting C.J., Abad Santos, Melencio-Herrera, Plana, Escolin, Relova, Gutierrez, Jr., De La Fuente, and Cuevas, JJ., concur.

Fernando, C.J., on official leave.

Makasiar, J., see dissent.

Aquino, J., in the result.

Concepcion, Jr., J., no part.

[1] Records, p. 1.

[2] Ibid., pp. 34-35.

[3] Ibid., p. 37.

[4] Ibid., p. 56. Section 13, Rule 110 of the Rules of Court provides that: "The information or complaint may be amended, in substance and form, without leave of court, at any time before the defendant pleads; and thereafter and during the trial as to all matters of form, by leave and at the discretion of the court, when the same can be done without prejudice to the rights of the defendant."

[5] Records, pp. 59-60.

[6] See Order of the Municipal Court dated November 29, 1972, Records, pp. 87-89.

[7] Records, pp. 87-89.

[8] Ibid., pp. 94-95.

[9] Ibid., pp. 106-109.

[10] Melo vs. People. 85 Phil. 766, 768; People vs. Gloria, L-39229, December 29, 1977, 80 SCRA 675, 678.

[11] 1972 edition, p. 286.

[12] Rollo, pp. 62-72.

[13] Rollo, pp. 39-40.

[14] Answer of Private Respondent, p. 4; Rollo, p. 48

[15] People vs. Hon. Doneso, et al., L-24162, January 31, 1973, 49 SCRA 281, 286-288, citing U.S. vs. Yam Tung Way, 21 Phil. 67; People vs. Bringas, 70 Phil. 528; Gandicela vs. Lutero, 88 Phil. 299; People vs. Bangalao, 94 Phil. 354; People vs. Diaz, 94 Phil. 714; Catilo vs. Abaya, 94 Phil. 1014; People vs. Opemia, 98 Phil. 698; People vs. Labatete, 107 Phil. 697; People vs. Cabarles, 102 Phil. 926; People vs. Bao, 106 Phil. 243; and City Fiscal of Cebu vs. Kintanar, 32 SCRA 601.

[16] Salcedo vs. Hon. Mendoza and People, L-49375, February 28, 1979, 88 SCRA 811, 815-818, citing Gandicela vs. Lutero, supra; People vs. Diaz, supra; People vs. Abaño, 97 Phil. 28; People vs. Tacneng, L-12082, April 30, 1959; People vs. Robles, 105 Phil. 1016; People vs. Labatete, supra; Lagunilla vs. Hon. Reyes and Motas, 1 SCRA 1364; People vs. Cloribel, 11 SCRA 805. See also People vs. Hon. Fuentesbella, et al., L-51759, October 30, 1980, 100 SCRA 672; People vs. Acosta, et al., L-23657, October 29, 1968, 25 SCRA 823.

DISSENTING OPINION

MAKASIAR, J.:

There is double jeopardy.

The records show that the accused Edgardo Caballas was charged in the defunct Municipal Court of Lopez, Quezon on December 27, 1971 for serious physical injuries (p. 27, rec.). Upon arraignment on February 5, 1972, the accused pleaded not guilty (p. 35, CFI rec.). After trial on the merits, the case was submitted for decision. No decision was rendered by the Municipal Trial Court judge. Instead, an order dated November 29, 1972 was issued, the pertinent portions of which are as follows:

"The Court believes that the foregoing evidence would support prima facie a complaint for the crime of frustrated murder, and, as stated, prevents it from entering judgment in this case. xx xx

"IN VIEW OF ALL THE FOREGOING, this case is hereby dismissed to give way to the filing of a complaint for frustrated murder. xx xx" (pp. 87-89, rec.).

On June 6, 1973, an information for frustrated murder was filed in the Court of First Instance of Quezon, Branch IV, in compliance with the foregoing order (pp. 4 5, rec.). A motion to quash on the ground of double jeopardy was acted upon favorably by the respondent judge in favor of the accused.

This Court has held that there is double jeopardy only when all the following requisites obtain in the original prosecution: (a) a valid complaint or information; (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 without his express consent (*Almeda vs. Villaluz*, 66 SCRA 46; *People vs. Obsania*, L-24447, June 29, 1968, 23 SCRA 1249, 1254). If the above requisites have been shown to exist in the former prosecution, a subsequent action for the same offense would be barred (see Rule 117, Sec. 9) on the ground of double jeopardy.

The facts of the case show that the accused was charged with serious physical injuries upon a valid indictment, before a competent court and he entered a plea of not guilty upon arraignment.

The second question for our consideration is whether or not the first jeopardy has terminated. The majority opinion rules that the dismissal is "provisional" in character and therefore, no double jeopardy could be appreciated in favor of the accused. This view finds support in the case of *Jaca vs. Blanco* (86 Phil. 452) and reiterated in the subsequent cases of *People vs. Manlapas, et al.* (5 SCRA 883), *Republic vs. Agoncillo* (40 SCRA 579), and *People vs. Surtida, et al.* (43 SCRA 29).

The facts of the above-mentioned cases are not analogous to the present case.

In *Jaca vs. Blanco*, *supra*, the case was called for trial but the fiscal did not appear. The court then and there dismissed the case without prejudice. Four minutes after the order of dismissal, the private prosecutor arrived, followed a little later by the City Fiscal together with the witnesses for the prosecution. They explained to the court that their tardiness was due to traffic problems. Satisfied with the explanation, the order of dismissal was set aside and the case was reset for trial. The High Court held that "in the absence of any statutory provision to the contrary, there is no reason why the court may not, in the interest of justice, dismiss a criminal case provisionally, i.e., without prejudice to re-instating it before the order becomes final or to the sub-sequent filing of a new information for the same offense."

In *People vs. Manlapas, et al.*, *supra*, the defendants were charged with attempted rape with robbery before the Justice of the Peace Court of Baleno, Masbate. Having pleaded not guilty to the charge and having waived their right to the preliminary investigation, on motion of the accused, the court forwarded the record of the case to the court of first instance. The fiscal moved that the case be returned to the court of origin for further proceedings on the ground that the complaint was not signed by the offended woman. The case was returned as prayed for and a new complaint for attempted rape with robbery was subscribed by the offended woman, after which the record was again forwarded to the court of first instance, where the fiscal filed the corresponding information. The defendants entered a plea of not guilty. The court, finding that no preliminary investigation was conducted by the justice of the peace on the amended complaint, *motu proprio*, dismissed the case "without prejudice to the refiling of the same in the proper court."

Another complaint subscribed by the offended party was filed before the Justice of the Peace Court. The accused waived their right to the second stage of the preliminary investigation and the case was forwarded to the court of first instance, where the fiscal filed the corresponding information. Thereafter, the court dismissed the case on the ground of double jeopardy upon motion of the accused.

The order of dismissal was reversed on appeal by this Court. Thus, We held:

"The stand taken by the Court of First Instance when it dismissed the case *motu proprio* 'without prejudice to the refiling of the same in the proper court' on the wrong premise that the amended complaint was given due course by the justice of the peace court without first conducting a preliminary investigation, and when the same court granted the motion to quash on the ground of double jeopardy after the case was refiled, is erroneous because the right to a preliminary investigation, being waivable, does not argue against the validity of the

proceedings, the most that could have been done being to remand the case in order that such investigation could be conducted. The second dismissal is unwarranted, because the first dismissal was expressly provided to be without prejudice to the refiling of the case in the proper court.

xx xx xx

"The dismissal by a competent court *motu proprio* of a valid information, after the accused has pleaded not guilty, does not bar further prosecution for the same offense under Section 9, Rule 113 (now Sec. 9, Rule 117) of the Rules of Court, if such dismissal was made without prejudice to the refiling of the case in the court" (People vs. Manlapas, et al., *supra*, 883--884).

In Republic vs. Agoncillo, et al. (40 SCRA 579), this Court, speaking through then Associate Justice, now Chief Justice Enrique M. Fernando, held:

"xx It appeared that in the previous case, the lower court judge, taking note that the Solicitor entrusted with the prosecution needed additional time for a more thorough study of the case, took such a step, the parties thus being chargeable with knowledge that a new action could thereafter be filed. Such dismissal, being without prejudice, the lower court in the present suit instituted afterwards ought not to have sustained the claim of twice being put in jeopardy. xx xx" (*Italics supplied*).

In People vs. Surtida, *supra*, the case was "provisionally dismissed" by the trial judge because the Provincial Fiscal was not able to attend the hearing. It was later found out that the absence was justified. WE held that no double jeopardy can be pleaded where the dismissal of the criminal prosecution was "provisional" and a subsequent prosecution for the same offense can be done.

In the cases relied on in the majority opinion, the State has not yet presented its evidence when the case was dismissed "without prejudice". The "dismissal without prejudice" in the aforementioned cases merely provided for the resurrection of the action to afford the prosecution the right to present its side. The rationale is to afford procedural due process to the prosecution in accordance with the maxim *Qui aliquid statuerit parte inaudita altera, aequum licet dexterit, haud aequum facerit* (He who decides anything, one party being unheard, though he should decide right, does wrong). A trial court cannot dismiss outright a case if it will lead to the deprivation of due process for the State.

Procedural due process is a fundamental right under the Constitution. In the case of People vs. Navarro (63 SCRA 265), We held that:

"xx The State is entitled to due process in criminal cases, that is, it must be given the opportunity to present its evidence in support of the charge. The Court has always accorded this right to the prosecution, and where the right had been denied, had promptly annulled the offending court action. We have heretofore held that a purely capricious dismissal of an information deprives the State of fair opportunity to prosecute and convict; it denies the prosecution of its day in court. For this reason, it is a dismissal (in reality an acquittal) without due process, and, therefore, null and void.

xx xx xx

"Such dismissal is invalid for lack of a fundamental prerequisite, that is, due process, and, consequently, will not constitute a proper basis for the claim of double jeopardy."

The above ruling was consistently adhered to in the case of People vs. Pablo (98 SCRA 289) where We held that there is no double jeopardy in a case where the order of dismissal or acquittal was made with grave abuse of discretion amounting to lack of jurisdiction.

A denial of due process as in a purely capricious dismissal of an information deprives the State of its day in court,

and the fair opportunity to prosecute and convict (*People vs. Gomez*, 20 SCRA 293). Grave abuse of discretion amounting to lack of jurisdiction nullifies the proceedings including the order of dismissal itself. There could be no double jeopardy to speak of because the requisite of a competent court would be lacking.

Denial of a constitutional right -- due process ---ousts the court of jurisdiction.

In the case at hand, however, the trial had already terminated. Both parties had already rested their evidence. Worse, the case was already submitted for decision. It is crystal clear that the People were not deprived of their day in court.

The "dismissal" of the case by the erroneous order of the trial judge was a dismissal or termination of the case without the express consent of the accused. The addition of such words "without prejudice," "provisionally," or "definitely" to an order of dismissal is a mere surplusage if the legal effect under the law is otherwise (*Gandicela vs. Lutero*, 88 Phil. 299).

The last question for consideration is whether or not the second indictment for frustrated murder can be considered a same offense as the first offense of serious physical injuries.

Under the present Rules, there is identity between the two offenses not only when the second offense is exactly the same as the first, but also when the second offense is an attempt to commit the first or a frustration thereof, or when it necessarily includes or is necessarily included in the offense charged in the first complaint or information (Rule 117, Sec. 9, Rules of Court).

The test for determining whether or not a prosecution for one crime constitutes an obstacle to a subsequent action for another crime upon the same facts is to inquire whether the facts alleged in the second information, if proven, would be sufficient to support the former information of which the accused may be acquitted or convicted (*People vs. Martinez*, 55 Phil. 10).

In other words, the evidence to support the second information should have been already existing when the first information or complaint was filed.

In the instant case, there can be no denial of the fact that the evidence for the second prosecution for frustrated murder already existed at the time of the filing of the first complaint for serious physical injuries. Moreover, the offense of serious physical injuries is necessarily included in the crime of frustrated murder.

Neither can the theory of supervening facts be made applicable here. The doctrine of supervening facts, enunciated in the case of *Melo vs. People* (85 Phil. 769) and reiterated in the case of *People vs. Manolong* (85 Phil. 829) has no applicability with the facts on record.

In accordance with the principle that a charge bars another which necessarily includes or is necessarily included in the former, it has been held that: "As the Government cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the 'lowest and ascent to the highest with precisely the same result'" (*People vs. Cox*, 107 Mich. 435, 438, cited in *U.S. vs. Lim Suco*, 11 Phil. 484 and *People vs. Tarok*, 73 Phil. 260).

In the case of *Dionaldo vs. Dacuycuy* (108 SCRA 736, Oct. 30, 1981), an amendment of the information to change the crime charged from homicide to the more serious offense of murder after the accused had pleaded not guilty, was not allowed on the basis of double jeopardy. Thus, this Court held:

"It is admitted that the provision which is relevant to the problem is Rule 110, Sec. 13 of the Rules of Court which stipulates:

"Section 13. -- -Amendment -- The information or complaint may be amended, in substance or form, without leave of court, at any time before the defendant pleads; and thereafter and during the trial as to all matters of form, by leave and at the discretion of the court, when the same can be done without prejudice to the rights of the defendant.

"If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court may dismiss the original complaint or information and order the filing of a new one charging the proper offense, provided the defendant would not be placed thereby in double jeopardy, and may also require the witnesses to give bail for their appearance at the trial.'

xx xx xx

"To amend the information so as to change the crime charged from homicide to the more serious offense of murder after the petitioner had pleaded not guilty to the former is indubitably proscribed by the first paragraph of the abovequoted provision. For certainly a change from homicide to murder is not a matter of form; it is one of substance with very serious consequences.

"But can the amendment be justified under the second paragraph? The answer is, No. For the provision speaks not of amendment but of dismissal of the information. In other words, the provision contemplates the filing of a substitute, not an amended information. But, it may be asked, can not the information for homicide against the petitioner be dismissed since no judgment has yet been rendered and another information for murder be filed? The answer, again, is No. **FOR THE PETITIONER HAVING PLEADED NOT GUILTY TO HOMICIDE, TO DISMISS THE CHARGE AGAINST HIM SO AS TO FILE ANOTHER CHARGE FOR MURDER WILL PLACE HIM THEREBY IN DOUBLE JEOPARDY**" (*Dionaldo vs. Dacuycuy*, supra, 738; *Italics supplied*).

It is apparent that the municipal court judge was of the opinion that the evidence supports a case for the more serious offense of frustrated murder, instead of serious physical injuries as charged in the complaint. However, the dismissal of the case for serious physical injuries when the case was submitted for decision after the conclusion of the trial to give way to the filing of a complaint for frustrated murder (pp. 87-89, rec.) was a dismissal without the express consent of the accused. The second information for frustrated murder placed the accused in double jeopardy. The action of the municipal court judge cannot even find justification under Section 12, Rule 119 of the Rules of Court. Said section provides:

"Section 12. -- When mistake has been made in charging the proper offense -- When it appears at any time after trial has begun and before judgment is taken, that a mistake has been made in charging the proper offense, and the defendant cannot be convicted of the offense charged, nor of any other offense necessarily included therein, the defendant must not be discharged, if there appears to be a good cause to detain him in custody, but the court must commit him to answer for the proper offense, and may also require the witnesses to give bail for their appearance at the trial" (Sec. 12, Rule 119).

Section 12, Rule 119 cannot apply for the simple reason that the accused in the instant case could have been convicted for the offense of serious physical injuries in the first indictment.

NEMO BIS PUNITUR AUT VEXATUR PRO DELICTO (No one is to be twice punished or vexed for the same fault or offense).

The dismissal of the second information by respondent Judge Mogol is valid and should be sustained. Hence, this petition should be dismissed.

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