

INDALECIO ELAGO, PETITIONER, VS. THE PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. L-1799. September 30, 1949

Ponente: MONTEMAYOR, J.

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MONTEMAYOR, J.:

In the Court of First Instance of Manila the petitioner appellant Indalecio Elago was charged with the crime of Frustrated Corruption of Public Official under the following information:

"The undersigned accuses Indalecio Elago of the crime of frustrated corruption of public official (Art. 212, Rev. Penal Code), committed as follows;

"That on or about the 30th day of May, 1945, in the City of Manila, Philippines, the said accused, manager and proprietor of the Elago Mfg. Co., engaged in the business of manufacturing liquor, willfully, unlawfully and feloniously performed all the acts of execution which would produce the crime of corruption of public official as a consequence, by offering and actually delivering a two thousand peso diamond ring to Major Dalton O'Brien, a duly appointed medical officer of the Manila Police Department, for the purpose of making the said public officer, who had previously ordered the closing of his business because of unsanitary condition of the place and for unlawful possession of United States government property, order the reopening of the said business, and making the said public officer refrain from doing his official duties, but the said accused did not succeed in corrupting the said Major Dalton O'Brien by reason of causes independent of the will of the said perpetrator, that is, the refusal of the said public officer to be so corrupted, because, as a matter of fact, he immediately denounced the said illegal offer to the Provost Marshall of Manila."

After trial he was found guilty of Frustrated Corruption of a Public Official and sentenced to h months and 20 days of arresto mayor and to pay a fine of Php.4, 000.00, with subsidiary imprisonment in case of insolvency and to pay the costs. The ring mentioned in the information was ordered confiscated. On appeal to the Court of Appeals the defendant was again found guilty but only of attempted corruption of a public official and sentenced to one month and 11 days of arresto mayor, to pay a fine of Php.2,000.00, with subsidiary imprisonment in case of insolvency and to pay the costs. The ring was forfeited to the Government. The case is now here on appeal by defendant by way of certiorari with the following assignment of errors:

"Error No. 1.-The Court of Appeals erred in sustaining the propriety of the action of the Court of First Instance of Manila proceeding to take je deposition of Maj. Dalton O'Brien and Col. Thomas Mcdade without the prosecution having given the petitioner at least one hour notice thereof.

"Error No. 2.-The Court of Appeals erred in giving probatory value to the deposition of Maj. O'Brien and Col. Mcdade, thereby approving he action of the trial court, notwithstanding the admitted case and even until the same was submitted for decision of the trial court, the deponents, Maj. O'Brien and Col. Mcdade, never left the jurisdiction of the court and were in fact present therein.

"Error No. 3.-The Court of Appeals erred in drawing a conclusion unfavorable to the petitioner from the fact that he had chosen not to go to the witness stand and deny the incriminatory statements contained in the

inadmissible deposition of Major O'Brien and Col. Mcdade.

"Error No. 4.-The court of appeals erred in convicting the petitioner of attempted corruption of a public official, and in not acquitting him of the charge, with costs de officio."

As to what happened in the Court of First Instance of Manila in relation with this case we are reproducing the pertinent portion of the decision of the Court of Appeals:

"Submitted the case to the City Fiscal's Office for action, Assistant Fiscal Pedro C. Mendiola. after conducting the corresponding preliminary investigation, filed on June 4, 1945, in the Court of First Instance of Manila, the following information against Indalecio Elago: (same information already reproduced)

"At the time of the filing of the preceding in-formation (June 4, 1945), the Clerk of the Court of First Instance of Manila received a communication from Assistant Fiscal Mendiola wherein the latter suggested that as the American witnesses in the case could be sent to the front at any time, the case beset for immediate trial, whereupon the defendant was cited to appear before Branch III of said Court on June 8, 1945, for arraignment and hearing on the same day. The corresponding notice was issued as requested and was couched as follows:

" 'To the accused Indalecio Elago

" '928 P. Margal.

" 'You are hereby directed to appear personally for arraignment and trial before the Court of First Instance of Manila, Branch III, on the 8th day of June. 1945 at 8:30 a.m., and to be present at the trial of the above numbered case.

" 'NOTE: Bring with you lawyer and witnesses.

"The defendant claims that he received this notice at about 11:00 a.m. of June 7, 1945, and on the following day, June 8, 1945, at the arraignment, his counsel filed a written motion to quash the complaint on the ground that it did not conform substantially to the prescribed form, because, according to defense counsel accused was entitled to be informed of the specific nature of the accusation against him under Article 212 of the Revised Penal Code in connection with the third paragraph of Article 210. This motion being right then over-ruled by the court, the defendant entered the plea of not guilty, and as the case was called for hearing, Atty. Federico Agrava remarked that the notice of the arraignment and hearing had been only received by the accused on the morning of the previous day, that is, less than two days before the date set for the arraignment that under the Rules of Court a defendant is entitled to two days after arraignment within which to prepare for trial, and prayed the court to grant the defendant at least two days for that purpose. To this the Fiscal retorted that the Government was not interested in having the trial disposed of immediately that day, but as some Government witnesses were likely to leave Manila at anytime, he desired, pursuant to Section 7, Rule 115 of the Rules of Court, to have the deposition or conditional examination taken of some of these Government witnesses connected with the Army, who were liable to be called to the front, to which Atty. Agrava objected, with no avail, because defense counsel's objection for postponement was denied by the court that ordered the Fiscal to present his first witness. On motion of Attorney Agrava, the session was, however, suspended for half an hour to give him an opportunity to confer with Attorney Vicente J. Francisco concerning their capability of entering into trial.

"When the proceedings were resumed, Attorney Francisco inquired from the court as to whether the procedure to follow was a hearing or the taking of depositions, to which Fiscal Mendiola answered that it was for the taking of the deposition of Sgt. McGovern and Major O'Brien, then present in court, that were liable to be called to the front at any moment, to which proceeding Attorney Francisco objected on the ground that no motion in regular form had been presented for such deposition, nor the necessity or propriety of the same justified, as required by the Rules of Court. He claimed that defendant would be caught unaware, because the notice, that he only received

the day previous, merely stated that on that day he would be arraigned and tried, and that defendant was not prepared to cross-examine the witnesses for the prosecution and asked for the postponement of the hearing to some other day. In this Incident the Court resolved to deny the petition for postponement and, over the objection and exception of defense counsel, ordered the case to go on with the taking of the deposition of Sgt. McGovern and Maj. O'Brien. Atty. Francisco then made of record that defense counsel and the defendant Indalecio Elago were abandoning the session hall of the court.

"Authorized by the court, the Fiscal then proceeded to take the depositions of the witnesses offered, but in so doing the prosecution called Maj. Dalton O'Brien and Col. Thomas M. McDade, the latter in lieu of Sgt. McGovern. At the completion of the depositions of these two witnesses, in which the court intervened, the proceedings were suspended and on motion of Fiscal Mendiola the hearing of the case was set for June 14, 1945, for the purpose of receiving evidence for the prosecution and the defense.

"On that day-June 14, 1945-defendant Indalecio Elago appeared assisted by his Attorneys Francisco and Agrava, and Just at the start of the hearing Fiscal Mendiola stated to the court that

" 'Before presenting the next witness, and the deposition of two witnesses, that is. Major O'Brien and Col. McDade had already been taken on June 8, 1945 and the same having already been furnished the defense. I am submitting said deposition which now forms part of the record of this case as part of the evidence for the prosecution. I am now ready to present the next witness.'

Because of this announcement an incident arose, and it was made clear that the regular hearing of the case started then, because the testimonies of O'Brien and McDade, given in a previous session were, as required by law, only taken in the form of deposition. On that occasion Col. McDade and Maj. O'Brien were present in court, and while the Fiscal maintained that the defense was not entitled to cross-examine them, for they had waived that right, the prosecution offered said witnesses for cross-examination by the defense in view of the fact that they had not yet been sent to the front though they had been liable to be called at any moment to the battle front somewhere either within or without the Philippines. To this offer defense counsel retorted that they objected to the submission as evidence of the deposition of said witnesses, but the objection was overruled without the defense having taken advantage of the cross-examination offer made by the Fiscal." (pp. 5-9. Decision of the Court of Appeals)

The Court of Appeals found and held the taking of the depositions of Col. McDade and Maj. O'Brien, valid and regular despite the fact that no written motion was filed by the prosecuting attorney for the taking of the depositions on June 8, 1945 and that less than one hour notice has been given to defendant or his counsel prior to the taking of the deposition. The petitioner in his first assignment of errors assails this action of the Court of Appeals. After considering the circumstances surrounding this case, particularly those at the time that the depositions were taken, and interpreting the law on this point, we agree with the Court of Appeals that the depositions were properly and validly taken. The law applicable is Rule 115, Section 7 of the Rules of Court which reads as follows:

"SEC. 7. Deposition of witnesses if he cannot procure bail.-Where, however, it shall satisfactorily appear that the witness cannot procure bail as directed by the order of the court, or has to leave the Philippines with no definite date of returning thereto, he may forthwith be conditionally examined or his deposition immediately taken. Such examination or deposition must be by question and answer, in the presence of the defendant, or after one hour notice to attend the examination or the taking of the deposition has been served on him and will be conducted in the same manner as an examination at the trial. Failure or refusal on the part of the defendant to attend the examination or the taking of the deposition after notice hereinbefore provided shall be considered a waiver. The statement or deposition of the witness thus taken may be admitted in behalf of or against the defendant. His testimony taken, the witness must thereupon be discharged, if he has been detained." (Italics is ours)

In the first place, the defendant and his counsel were given practically one hour within which to attend and prepare for the taking of the depositions. It will be remembered that when the Fiscal in open court made known his desire to have the depositions of the two American officers taken, Atty. Agrava, counsel for defendant, discussed the point for some time and later was given half-hour by the Court to consult Atty. Francisco, leading counsel for the accused. When court proceedings were resumed, Atty. Francisco appeared in court and again argued the point, objecting to the taking of the depositions. When all these intervals or periods of time are added up, it would appear that the defendant and his counsel had ample time, practically one hour, not only to appear in Court for they were already there but even to prepare for the taking of the depositions, and if counsel needed a few more minutes and had asked the Court for a little more time, there is no reason to believe that the Court would not have granted the same.

But more important than this is the fact that in the opinion of the Court, the one hour notice mentioned in section 7, Rule 115 of the Rules of Court was intended by law mainly to give the defendant time to attend the taking of a deposition and not to prepare for the taking thereof because in reality there is no need for preparation. If is not a trial where the defendant has to introduce his evidence. It is only taking down the statements of the witnesses for the prosecution with opportunity on the part of the defendant to cross-examine them. That portion of section 7, Rule 115 which we have underlined, conveys the idea that once the defendant is in court, the one hour notice is unnecessary.

On this point of the time given the defendant to attend the taking of the deposition, Professor Wigmore has the following to say:

"The opportunity of cross-examination involves two elements:

"(1) Notice to the opponent that the deposition is to be taken at the time and place specified, and

"(2) A sufficient interval of time to prepare for examination and to reach the place.

x x x

"(2) The requirements as to the interval of time are now everywhere regulated by statute xxx; the rulings in regard to the sufficiency of time are thus so dependent on the interpretation of the detailed prescriptions of the local statutes that it would be impracticable to examine them here. But whether or not the time allowed was supposedly insufficient or was precisely the time required by statute, the actual attendance of the party obviate any objection upon the ground of insufficiency, because then the party has actually had that opportunity of cross-examination xxx for the sole sake of which the notice was required." Wigmore on Evidence, 3rd Ed. Vol. V. pp. 60-61.

Bearing in mind that the defendant and his counsel were actually present in court and were given the opportunity to attend the taking of the deposition and cross-examine the deponents and furthermore, were given practically one hour within which to decide whether or not to attend the taking of the deposition, we hold that the taking of the depositions of Col. McDade and Maj. O'Brien was proper and valid and that the Court of Appeals committed no error in so finding.

As regards the second assignment of error, we disagree with the Court of Appeals in its holding that the depositions of the two American officers were admissible in evidence despite the fact that they were present in court. The provision of law on this point is quite clear and explicit. Rule 111 paragraph (e) of the Rules of Court reads thus:

"To be confronted at the trial by, and cross-examine the witness against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the defendant or

his attorney, the defense having had an opportunity to cross-examine the witness, the testimony or deposition of the latter maybe read, upon satisfactory proof to the court that he is dead or incapacitated to, testify, or can no twith due diligence be found in the Philippines;" (Italics is ours)

It is clear from the Rule above-quoted, particularly the underlined portion, that the testimony or deposition of a witness may be read or submitted in evidence only when the deponent is dead or incapacitated to testify or cannot be found in the Philippines. If he was present in court, there is no need for introducing his deposition in evidence because his testimony is the best evidence, especially in a case like the present where the deponent in giving his deposition had not been cross-examined by the defendant, although of course, said failure to cross-examine may not be laid at the door of the prosecution.

As early as 1903 the Supreme Court in the case of U. S. vs. Castillo, 2 Phil. 19 cited and applied section 15 of General Orders No. 58, from which the Rule of Court above reproduced was taken. It held that in no other cases than those specified in this section can the testimony introduced at the preliminary investigation be received in the trial. The issue involved in that case of Castillo was whether the testimony of a witness given at the preliminary hearing could be received against the defendant during the trial when said witness was actually present in court. The Supreme Court held that in admitting said previous testimony of the witness, Castillo was denied the right granted to him by law to be con-fronted at the trial and to cross-examine the witnesses against him.

Examining other judicial authorities on this point, we find that the great weight thereof is against the admission of a deposition or previous testimony by a witness when said witness is present in court or is available. We again cite Professor Wigmore on this point:

"SEC. 1415. If Witness is Available for Testifying, Deposition is not Usable.-No one has ever doubtedthat the former testimony of a witness cannot be used if the witness is still available for the purpose of testifying at the present trial.

"But, in the case of a deposition, authorized as it is by statute to be taken for subsequent use in the trial, a notion has sometimes been formed that the authorized taking involves an absolute authority to use the deposition, unconditionally and without showing the witness' in availability at the trial. Such a notion is entirely opposite to the orthodox principle of the common law. A deposition was taken 'de bene esse' i.e. conditionally. The fundamental notion was that it was taken as a provision against the loss of the evidence at the trial, so that if the witness was after all at the time of the trial available for testifying, the deposition was not needed and was not admissible. Had this not been the principle, all the inquiries' above examined, as to the sufficiency of death, illness, insanity and the like, would have been meaningless." Wigmore on Evidence, 3rd Ed., Vol. V. p. 191."

"It is clear, therefore, that if the witness is present in the court room at the time when his deposition is offered, the deposition is inadmissible, because there is no necessity for resorting to it.

"So also if the witness is within reach of the court-process and is not shown to be unavailable by reason of illness or the like, the deposition is inadmissible." Wigmore on Evidence. 3rd Ed., Vol. V. pp. 192-193.

Other authorities on this point may be cited with profits:

"x x x But plainly the testimony of a party or other witness at a former trial may not be read in evidence when he is in the presence of the court and able to testify." Jones' Commentaries on Evidence. Vol. 1. p. 2176.

"x x x Though the authorities sustain the rule by which in civil suits the testimony of an absent witness is received not only in case of death, but where he is incompetent by insanity or illness, or mere absence, the criminal courts always hesitate in the absence of a permissive or mandatory statute, to admit such evidence where it is not shown that he witness is dead, incapacitated or cannot be found. The mere fact that the witness

is sick, or out of the jurisdiction, or that his whereabouts are unknown so that he cannot be reached by a subpoena, is not enough. A temporary absence from the state does not render such testimony admissible. Only when it is necessary to prevent the miscarriage of justice is the former testimony of a witness admissible in a subsequent criminal trial, x x x." Underhill's Criminal Evidence, 4th Ed., pp. 958-959.

From the foregoing it is evident that the prosecuting attorney and the trial court made a mistake, the first, in presenting in evidence the depositions of Col. McDade and Maj. O'Brien when said two witnesses were actually present in court, and the second, in admitting them, and the Court of Appeals committed reversible error in validating said admission of the depositions, and in considering the same in deciding whether or not the petitioner herein was guilty of the crime charged against him.

As to the third assignment of error, we cannot safely say by reading the decision of the Court of Appeals that it actually drew a conclusion unfavorable to the petitioner from the fact that he chose not to take the witness stand and deny the incriminatory statements contained in the evidence introduced against him. Besides, if the incriminatory evidence referred to was that contained in the two depositions of McDade and O'Brien which we now hold were erroneously admitted, and then even assuming that the Court of Appeals had unjustly considered the failure of the defendant to deny them against him, and then no damage shall have been caused. Anyway, the law and the authorities on this point are clear, including those cited by the Solicitor-General on pages 22-23 of his brief, and we are confident that the Court of Appeals is not unaware of them.

Excluding the deposition of Col. McDade and Maj. O'Brien from the evidence submitted by the prosecution, is the remaining evidence sufficient to establish the guilt of the appellant? While the Government maintains the affirmative the defense counsel equally claims that it is insufficient. This Court is not in a position to decide this point unless it reviews said remaining evidence, particularly the testimony of Col. Tuason and Sgt. McGovern and the unsigned statement of the appellant (Exhibit "F"), which we may not do, first, because said evidence is not before us, and second, because the determination of questions of fact pertains to the Court of Appeals.

In view of the foregoing, the Court holds that although the depositions of the two American officers were properly and validly taken, nevertheless they are inadmissible in evidence and were improperly introduced with and admitted by the trial court, and the Court of Appeals erred in considering said evidence, because at the time the depositions were introduced in evidence during the trial, the deponents were actually present in Court.

Reversing the decision of the Court of Appeals, this case is hereby returned to that Court for the consideration of the remaining evidence and for decision on the basis thereof. No pronouncement as to costs.

Moran, C.J., Ozaeta, Paras, Feria, Bengzon, Padilla, Tuason, Reyes, and Torres, JJ., concur.

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