

## THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. BUENAVENTURA MARIANO Y TABAQUIN, DEFENDANT AND APPELLANT.

*G.R. No. L-19243. February 29, 1964*

Ponente: CONCEPCION, J.

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### CONCEPCION, J.:

From an order of the Court of First Instance of Manila defendant Buenaventura Mariano y Tabaquin has taken this appeal, which is before us only a question of law being raised therein.

Said defendant is charged in said court with having illegally engaged, in the City of Manila, and without the authority required therefor, in the business of carrying, conveying or transmitting letters or packages for monetary consideration in places where the government has provided means for the carriage of mails. Upon arraignment he pleaded not guilty of the charge. Thereafter the case was set for hearing, which was postponed several times on motion of the defendant. Eventually, it was set for trial on June 7, 1961, but, four (4) days prior thereto, defendant moved for the appointment of assessors. The lower court denied this motion upon the ground; (1) that the appointment of assessors is discretionary for the court which, under the circumstances, felt should be exercised adversely to the accused; and (2) that the motion had merely a dilatory purpose. Hence this appeal.

The Solicitor General assails defendant's right to appeal from the order complained of, the same being interlocutory (*People vs. Sampoli*, 51 Off, Gaz., 263). The objection is well taken. In view of the interlocutory nature of said order, the proper remedy against the same would have been for the defendant to apply for a writ of certiorari and mandamus. Nevertheless, we deem it fit to dispose of the issue raised by defendant herein in order that it could no longer be reiterated in the future, should the decision of the trial court on the merits of the case be unfavorable to him.

Defendant maintains that the lower court had the mandatory duty to appoint assessors upon the filing of his aforesaid motion. Upon the other hand, in overruling this contention, the lower court relied upon section 154 of the Code of Civil Procedure (Act No. 190) providing that "either party to an action may apply for assessors to sit at the trial" and section 49 of the Charter of the City of Manila (Republic Act No. 409), pursuant to which

"\* \* \* The aid of assessors in the trial of any civil or criminal action in the municipal court, or the Court of First Instance, within the city, may be invoked in the manner provided in the Code of Civil Procedure. \* \* \*."

and held that the verb "may" used in both provisions "does not in any way imply a duty on the part of the Court to grant the petition." It, likewise, cited, in support of this conclusion, a passage in our decision in *Primicias vs. Ocampo* (49 Off. Gaz., 2230) declaring that the respondent Judge therein had "acted with abuse of discretion in denying petitioner (therein) his right to the aid of assessor in the trial \* \* \*."

The view thus taken by His Honor, the trial judge, is incompatible with the rule laid down and consistently applied by this Court in several cases. In *Berbari vs. Concepcion* (40 Phil., 320, 322, and 324), this Court said:

"Said section 154 in its relation with section 2477 provides a specie of jury trial for the defendants in criminal and civil cases in the city of Manila, when a demand therefor is made by the defendant. By the terms of said section assessors are only appointed when one or both of the parties shall apply therefor in writing to the judge. The parties may therefore waive their right to assessors, and if they do not demand the appointment, they of course waive their right thereto. The necessity or advisability of having assessors is left to the discretion of the parties. Either or both may exercise the right to have assessors appointed. But when the demand is made, for the appointment of assessors in the form prescribed by the law, has the judge any discretion to deny it? Said section (154) provides that 'upon the filing of such application the judge shall direct that the assessors be provided.'

"It would be difficult to draw a law in which the terms could be made more mandatory. We are of the opinion that when the Legislature said that the court shall direct etc., it did not intend that the judge might, could or should appoint; that the Legislature, considering the purpose of the law, meant exactly what it said—that the judge upon proper application shall appoint.

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"\* \* \* From all of the foregoing our conclusions are:

"1. That the provisions of section 154 of Act No. 190 in relation with section 2477 of Act No. 2711 relating to the appointment of assessors is mandatory; \* \* \*."

In *Colegio de San Jose vs. Sison* (56 Phil., 344, 349) it was held:

"\* \* \* The respondents could not be deprived of a substantial right granted them by law. According to section 62 of the Code of Civil Procedure, the assessors thus appointed shall after qualifying sit at the hearing and advise the justice of the peace in the determination of all questions of facts as well as of law, and in case of their dissent as to the merits of the action, they are required by law to certify in writing their dissent, giving the reasons therefor, and such dissent shall be taken into account by the Court of First Instance in case of appeal. All these provisions necessarily lead to the conclusion that the intervention of the assessors is not an empty formality which may be disregarded without violating either the letter or the spirit of the law. It is another security given by the law to the litigants, and as such, it is a substantial right of which they cannot be deprived without vitiating all the proceedings. \* \* \*."

And in *Primicias vs. Ocampo* (93 Phil., 446; 49 Off. Gaz. 2230), the language used was:

"\* \* \* we hold that the provisions on assessors embodied in the Code of Civil Procedure are still in force and that the same may still be invoked in the light of the provisions of section 49 of Republic Act No. 409. It is therefore our opinion that the respondent Judge acted with abuse of discretion in denying petitioner his right to the aid of assessors in the trial of the two criminal cases now pending in the Court of First Instance of Manila."

It is thus clear that, whereas the party in a criminal case in the City of Manila may, in his discretion, move or not for the appointment of assessors, once the motion to this effect has been filed, "the appointment of assessors is mandatory."

This notwithstanding, the order appealed from should not be disturbed, insofar as it denies defendant's motion, for, as stated in said order:

"On the other hand, the Court feels that the Insistence of the defense to have assessors appointed is merely part of the dilatory tactics employed by the defense. This case was filed on August 11, 1960. When the case was called for the arraignment of the defendant, the defense sought and obtained a postponement on the ground that it had sought the reinvestigation of the case. Finally, the defendant was arraigned on September 26, 1960. On November 14, 1960, the date set for trial, the defendant moved for a postponement on the ground that his

original counsel had withdrawn and that he needed time to secure the services of another counsel. This was granted in an order dated November 18, 1960. The hearing was set for January 4, 1961. On January 3, 1961, the defense filed a motion for permission to withdraw his original plea of not guilty to enable him to file a motion to quash. The Court granted the defense permission to file the said motion which was in fact filed on January 9, 1961. On the same date, the Court denied the motion to quash and the case was set for hearing on March 6, 1961. On March 3, 1961, the defense, alleging that they had to file several briefs and memoranda, moved for the postponement of the hearing. The defense counsel, however, taking for granted, perhaps, that the Court would grant their motion to postpone, failed to appear on March 6, 1961, whereupon the Court ordered them to show cause why they should not be held in contempt. On March 16, 1961, the Court excused counsel for his non-appearance. The trial was set for June 7, 1961. On June 3, 1961, the defense filed his original motion for the appointment of assessors."

We are fully in accord with this view. Indeed, defendant has not even tried to explain why it took him over eight (8) months since his arraignment, on September 26, 1960, and almost seven (7) months since the case was first set for trial (on November 14, 1960), to ask for the appointment of assessors. It is, also, noteworthy that the issues of fact, under the information filed against the defendant, are limited to: (1) whether he had engaged in activities analogous to the carriage of mail, as alleged in said information; and (2) whether he had the requisite authority therefor. Obviously, the determination of these issues does not depend materially upon the appreciation or credibility of testimonial evidence, for which the services of assessors may be of substantial assistance in the administration of justice. This circumstance and the delay in moving for the appointment of assessors, after several postponements of the hearing upon defendant's request, indicates clearly that his purpose in filing the motion was purely dilatory. Its denial by the lower court did not amount, therefore, to an abuse of discretion warranting our intervention for, "the request for the appointment of assessors should be made at the earliest convenient time so as not to hinder or delay the trial or to unnecessarily inconvenience the progress of the work of the court" (*Berbari vs. Concepcion*, 40 Phil., 320, 323), which would have been the necessary effect of said motion, had it been granted.

Wherefore, the order appealed from is affirmed, with costs against the defendant. It is so ordered.

Bengzon, C. J., Padilla, Bautista Angelo, Labrador, Reyes, J. B. L., Barrera, Parades, Dizon, Regala and Makalintal, JJ., concur.

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