

**FRANCO GORION, PETITIONER, VS. REGIONAL TRIAL COURT OF CEBU, BRANCH 17, PRESIDED BY HON. JOSE BURGOS, PEOPLE OF THE PHILIPPINES, REPRESENTED BY CITY PROSECUTOR RODOLFO PEREZ AN...**

*G.R. No. 102131. August 31, 1992*

Ponente: DAVIDE, JR., J.

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**DAVIDE, JR., J.:**

May an order dismissing a criminal case after the accused had been arraigned, issued in open court through inadvertence or mistake during a hearing that had already been cancelled, be set aside by the court and the case tried without placing the accused in double jeopardy?

This is the issue in this case.

On 17 October 1989, after conducting the appropriate preliminary investigation pursuant to a complaint filed by one Bonifacio Bacaltos, the Office of the City Prosecutor of Cebu City filed with the Regional Trial Court of Cebu an information charging the petitioner with the crime of Estafa involving the amount of P50,000.00. The case was docketed as Criminal Case No. CBU-16726[1] and was raffled to Branch 17 of said court.

Upon his arraignment on 12 March 1990, the petitioner entered a plea of not guilty and the court set the pre-trial and trial of the case for 17 April 1990.[2]

The pleadings of the parties do not reveal what transpired on 17 April 1990. It appears, however, that hearing was again scheduled for 27 and 28 September 1990.

When the case was called for hearing on 27 September 1990, neither the petitioner nor the accused was present. Not wanting to take advantage of their absence, and considering that there were other cases to be heard, the prosecutor moved for the cancellation of the hearing on that date as well as the hearing to be held the following day, which the court granted. The hearing was reset to 4 October 1990. The pertinent portions of the transcript of stenographic notes of the proceedings on 27 September 1990 read:

"ATTY. GAMELO FAJARDO:

I appear as private prosecutor in this case, Your Honor.

FISCAL RODOLFO PEREZ:

For the Prosecution, Your Honor.

COURT:

Where is (sic) the accused and the defense counsel?

ATTY. FAJARDO:

I have not seen them in the courtroom, Your Honor.

FISCAL PEREZ:

The private complainant is coming, Your Honor, but we do not want to take advantage of the absence of the accused and his defense counsel. We are willing to give them opportunity (sic) to present their evidence.

ATTY. FAJARDO:

Inasmuch as there are other cases to be heard by the Court this morning, we might as well reset the hearing.

FISCAL PEREZ:

I suggest that we cancel the hearing scheduled for today and also for tomorrow, September 28, 1990.

COURT:

What is your available calendar date?

(NOTE)

(The Fiscal, private prosecutor and the Court, after going over their available calendar dates, finally agreed to call this case again on October 4, 1990 at 11:00 A.M.)

COURT:

Upon suggestion of the prosecution, cancel the hearing scheduled for today and tomorrow, September 28, 1990, and reset the same to October 4, 1990, at 11:00 A.M. in order to give the prosecution the last opportunity to present its evidence. Fiscal Rodolfo Perez, and private prosecutor Atty. Gamelo Fajardo are notified in open court. Furnish Atty. Eutiquiano Bilocura, defense counsel, with a copy of this order. Notify the accused and the private complainant."<sup>[3]</sup>

Unfortunately, however, the case was still included in the trial calendar of the court for 28 September 1990. When the case was called for hearing on that date, only the Fiscal appeared for the prosecution. The court then issued the following order dismissing the case:

### **"ORDER**

When this case was called for hearing today for the presentation of evidence for the prosecution, only the Fiscal appeared without his witnesses.

In view thereof, this case is hereby ordered DISMISSED for failure to prosecute with costs de officio.

Furnish the private complainant, the private prosecutor, defense counsel and the accused each with a copy of this Order.

### **SO ORDERED."**<sup>[4]</sup>

Counsel for the petitioner, Atty. Eutiquiano Bilocura, received a copy of this order on 4 October 1990. However, he received a copy of the 27 September 1990 Order only on 15 June 1992.<sup>[5]</sup>

The pleadings of the parties do not reveal what actually transpired on 4 October 1990. In any event, the case was called again on 31 May 1991, but the Court reset the hearing to 18, 22, 23 and 25 July 1991 on the ground that it had not yet received from the Chief Justice of this Court a reply to the Presiding Judge's request for an extension of the trial dates.<sup>[6]</sup>

On 2 July 1991, petitioner filed a Motion to Dismiss<sup>[7]</sup> alleging therein that the dismissal of the case by the court on 28 September 1990 without his consent amounted to his acquittal; hence, he would be placed in double jeopardy, prohibited under Section 21, Article III of the New Constitution in relation to Section 3(h), Rule 117 of the 1985 Rules of Criminal Procedure, if the case were to be "reopened or continued."

The trial court set aside the dismissal order of 28 September 1990 in its Order of 9 August 1991 on the ground that the court was only misled in issuing the same due to the stenographer's failure to transcribe the order given in open court issued the previous day; hence, it was issued without due process.

Also on 9 August 1991, the court denied the petitioner's motion to dismiss on the ground that the order of dismissal of 28 September 1990 was set aside in the aforesaid order of 9 August 1991.<sup>[8]</sup>

On 16 September 1991, petitioner filed a motion to reconsider the order denying his motion to dismiss; he alleges therein that he cannot be blamed or faulted for (a) any error in the dismissal of the case, (b) the failure of the stenographer to type the order, and (c) the inclusion of the case in the calendar of 28 September 1990. And even assuming arguendo that the court erroneously dismissed the information, he asserts that in accordance with this Court's ruling in *People vs. Hernandez*,<sup>[9]</sup> *People vs. Ferrer*,<sup>[10]</sup> *People vs. Borja*<sup>[11]</sup> and *People vs. Gil*,<sup>[12]</sup> the reopening, continuation thereof or appeal therefrom by the State will place him in double jeopardy.

In its Order of 18 September 1991, the court denied the aforesaid motion for reconsideration by reiterating the reasons upon which it anchored its denial order of 9 August 1991, and holding that the cases abovesited are not applicable since they involve dismissals grounded on lack of jurisdiction.<sup>[13]</sup>

Hence this petition, filed on 2 October 1991, wherein petitioner reiterates the issues raised and the arguments adduced before the trial court and asks this Court to set aside the Orders of 9 August 1991 denying the motion to dismiss, and 18 September 1991 denying the motion for reconsideration, for having been rendered without or in excess of jurisdiction or with grave abuse of discretion amounting to lack of jurisdiction.<sup>[14]</sup>

On 10 March 1992, after extensions of time were granted them, public respondents, through the Office of the Solicitor General, filed their Comment to the petition in compliance with the Resolution of 6 November 1991.<sup>[15]</sup> They assert therein that the order of dismissal of 28 September 1990 was a mistake and was thus issued without due process as there was in fact no hearing on that date; hence, the dismissal was null and void and of no effect. Besides, petitioner did not object to the dismissal; thus, he cannot invoke double jeopardy.

Petitioner filed, on 24 February 1992,<sup>[16]</sup> a Reply to the Comment. In refutation of the public respondents' assertion that he did not object to the dismissal, petitioner maintains that his silence or failure to object is not the express consent contemplated by Section 7, Rule 117 of the Rules of Court that would bar him from pleading double jeopardy.

We resolved to give due course to the petition, consider the Comment as the Answer and decide this case on the merits.

The petition must fail.

It is obvious to this Court that the trial court was, on 28 September 1990, divested of jurisdiction, *pro hac vice*, to issue any order, much less one of dismissal, in Criminal Case No. CBU-16727 for the simple reason that said case was already effectively removed from its trial calendar for that date in view of the previous day's order cancelling the hearing of the case on 27 and 28 September 1990. Plainly, the court should not have included the case for hearing in the 28 September 1990 trial calendar. The respondent Court attributed the mistake to the stenographer's failure to immediately transcribe the order. This, of course, is passing the buck too far.

The Judge, Clerk of Court and the prosecution should shoulder the blame because unless amnesia suddenly struck all of them simultaneously, it cannot be imagined that in a brief span of about twenty-four (24) hours, they had all forgotten about the order dictated in open court cancelling the hearing for 27 and 28 September 1990. For the prosecutor who orally moved for such cancellation and the Judge himself who dictated the said order, no plausible explanation may be offered for such lapse. Apparently, the latter did not read the calendar before the start of the session that day, and the branch clerk of court who probably prepared the same one or two days earlier, did not bother to review it anymore. And in the event that said clerk of court failed to attend the session, he or she did not read the minutes of the case as prepared by a subordinate. Upon the other hand, the prosecutor literally slept on his duty when he failed to immediately inform the court of the previous day's order of cancellation of hearing which obviously accounted for the absence of both the witness and the private prosecutor, and kept his unusual silence in the face of the open court dictation of the order of dismissal. This ineptitude cannot be condoned. Prosecutors should always be mindful of the heavy burden of responsibility which they bear in prosecuting criminal cases because they represent no less than the People of the Philippines and the State.

The erroneous dismissal order of 28 September 1990 was then issued capriciously and arbitrarily; it unquestionably deprived the State of a fair opportunity to present and prove its case. Thus, its right to due process was violated. The said order is null and void and hence, cannot be pleaded by the petitioner to bar the subsequent annulment of the dismissal order or a re-opening of the case on the ground of double jeopardy. This is the rule obtaining in this jurisdiction.

In *People vs. Balisacan*,<sup>[17]</sup> the accused at his arraignment pleaded not guilty and was allowed to present mitigating circumstances; he thus testified that he stabbed the deceased in self-defense. The trial court thereafter, without receiving the evidence for the prosecution, promulgated a decision acquitting the accused; the prosecution appealed therefrom. We then rejected the plea of double jeopardy therein not only because of the fatal procedural flaw of failure to re-arraign the accused after he, in effect, vacated his plea of guilty thus resulting in the absence of a plea which is an essential element of double jeopardy, but also because:

"x x x the court a quo decided the case upon the merits without giving the prosecution an opportunity to present its evidence or even to rebut the testimony of the defendant. In doing so, it clearly acted without due process of law. And for lack of this fundamental prerequisite, its action is perforce null and void. The acquittal, therefore, being a nullity for want of due process, is no acquittal at all, and thus can not constitute a proper basis for a claim of former jeopardy. (*People vs. Cabero*, 61 Phil. 121; 21 Am. Jur. 2d. 235; *McCleary vs. Hudspeth*, 124 Fed. 2d. 445)."

In *People vs. Gomez*,<sup>[18]</sup> where the motion of the Assistant City Fiscal to postpone the hearing of a criminal case -? because the Special Prosecutor actively handling the case was not served with a notice of the said hearing and the former was not ready because the records were with the latter -- was denied by the respondent judge in open court, resulting in the eventual dismissal of the case, this Court ruled that such dismissal was capricious and rendered with grave abuse of discretion amounting to an excess of jurisdiction, thus depriving the state of a fair opportunity to prosecute and convict. Such a dismissal order, made sua sponte, for no proper reason at all, is void for being issued without authority.

In *Serino vs. Zosa*,<sup>[19]</sup> where both the Assistant Provincial Fiscal and private prosecutor were readily available, having merely stepped out of the courtroom when the Judge announced that he would first finish the trial of another case, but after said trial was completed and the criminal case was called again, both were not yet around, thus prompting the court to issue an order dismissing the case for failure to prosecute, which it nevertheless set aside on a motion for reconsideration, this Court rejected the plea of double jeopardy on the ground that the order of dismissal was null and void for lack of due process, and hence was correctly set aside by the Judge himself.

In *People vs. Navarro*,<sup>[20]</sup> this Court nullified a judgment of acquittal in a criminal case for light threats which was erroneously decided together with a case for frustrated theft against the same accused in a joint decision, despite the fact that there was no joint trial in said cases and no hearing had as yet been conducted in the light threats case, because in rendering the judgment in the latter, the Judge acted with abuse of discretion amounting to excess or lack of jurisdiction. It is therefore null and void ab initio. Having been rendered by a court which had no power to do so, it is as though there had been no judgment; it is *coram non iudice*.

In *People vs. Pablo*,<sup>[21]</sup> this Court struck down as having been issued with grave abuse of discretion amounting to lack of jurisdiction an order of the court acquitting the accused, later on amended to be merely one of dismissal of the case, issued when the prosecution asked for a postponement upon its inability to produce its last but vital and indispensable witness who would have testified on the cause of death of the victim, the subpoena for whom was received by his secretary, despite the fact that five (5) witnesses for the prosecution had already testified. Said order could not be used to invoke double jeopardy.

In *People vs. Bocar*,<sup>[22]</sup> where after the accused entered their plea of not guilty, the Judge, instead of receiving the evidence for the prosecution, conducted a summary investigation by directing questions to both the complainant and the accused and at the end thereof, issued an order dismissing the case on the ground that it is more civil than criminal, this Court ruled that since no evidence in law had as yet been entered into the records of the case, the dismissal order was arbitrary, whimsical and capricious -- a veritable abuse of discretion which this Court cannot permit.

In *Saldana vs. Court of Appeals*,<sup>[23]</sup> where the trial judge had earlier issued an order sustaining the objection of the defense to the presentation of one Linel Garcia Cuevas on the ground that being a mere member of the complaining Valle Verde Bagong Lipunan Community Association, Inc., he cannot be considered as the complainant, and thereafter not only denied a motion to reconsider the said order but also barred the prosecution from presenting other members of the association from testifying and thereupon terminated the presentation of the prosecution, and, acting on a motion to dismiss the case for insufficiency of evidence, dismissed the case on said ground, this Court sustained the decision of the Court of Appeals annulling the said order and reinstating the criminal case in a petition for certiorari brought before the latter.

Coming back to the instant case, the dismissal order of 28 September 1990 being null and void because the trial court lost its jurisdiction to issue the same and violated the right of the prosecution to due process, it follows that Criminal Case No. CBU-16726 continues to remain at that stage before the said order was issued. Consequently, the first jeopardy was not terminated and no second jeopardy threatened the accused.

The three (3) requisites of double jeopardy are: (1) a first jeopardy must have attached prior to the second, (2) the first jeopardy must have been validly terminated, and (3) a second jeopardy must be for the same offense as that in the first. Legal jeopardy attaches only (a) upon a valid indictment, (b) before a competent court, (c) after arraignment, (d) when a valid plea has been entered, and (e) when the case was dismissed or otherwise terminated without the express consent of the accused.<sup>[24]</sup>

It having been shown that in this case, the requisites of a valid termination of the first jeopardy are not present, the petitioner cannot hide behind the protective mantle of double jeopardy.

WHEREFORE, the petition is DISMISSED for lack of merit. The respondent Court is hereby directed to immediately place in its trial calendar Criminal Case No. CBU-16726 for the reception of the evidence of the parties and thereafter to decide the same.

Costs against petitioner.

**SO ORDERED.**

Gutierrez, Jr., (Chairman), Bidin, and Romero, JJ., concur.  
Feliciano, J., on official leave.

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- [1] Annex "A" of Petition; Rollo, 9-10.  
[2] Annex "B", Id.; Id., 11.  
[3] Rollo, 57-59.  
[4] Annex "C" of Petition; Rollo, 13.  
[5] Certification of the Branch Clerk of Court, Elsie C.B. Quijano, dated 15 June 1992; Id., 68.  
[6] Order of 31 May 1991, Annex "D", Petition, op. cit.; Id., 14.  
[7] Annex "E" of Petition; Rollo, 15-17.  
[8] Annex "F", Id.; Id., 19.  
[9] 49 O.G. No. 12, 5342.  
[10] 100 Phil. 124, [1956].  
[11] 43 Phil. 618, [1922].  
[12] 7 SCRA 888, [1968]; Annex "G" of Petition; Rollo, 20-21.  
[13] Annex "H", Id.; Id., 22.  
[14] Id., 3.  
[15] Id., 39-48.  
[16] Rollo, 51-52.

**[17] 17 SCRA 1119, 1122-1123 [1966].**

**[18] 20 SCRA 293 [1967].**

**[19] 40 SCRA 433 [1971].**

**[20] 63 SCRA 264 [1975].**

**[21] 98 SCRA 289 [1980].**

**[22] 138 SCRA 166 [1985].**

**[23] 190 SCRA 396 [1990].**

[24] People vs. Bocar, supra.; Saldana vs. Court of Appeals, supra.

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