

**PABLO C. FRANCISCO, PETITIONER, VS. COURT OF APPEALS AND
THE HONORABLE MAXIMO C. CONTRERAS, RESPONDENTS.***G.R. No. 108747. April 06, 1995*

Ponente: BELLOSILLO, J.

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Probation is a special privilege granted by the state to a penitent qualified offender. It essentially rejects appeals and encourages an otherwise eligible convict to immediately admit his liability and save the state of time, effort and expenses to jettison an appeal. The law expressly requires that an accused must not have appealed his conviction before he can avail of probation. This outlaws the element of speculation, on the part of the accused - to wager on the result of his appeal - that when his conviction is finally affirmed on appeal, the moment of truth well-nigh at hand, and the service of his sentence inevitable, he now applies for probation as an "escape hatch" thus rendering nugatory the appellate court's affirmance of his conviction. Consequently, probation should be availed of at the first opportunity by convicts who are willing to be reformed and rehabilitated, who manifest spontaneity, contrition and remorse.

As conceptualized, is petitioner entitled to probation within the purview of P.D. 968, as amended by P.D. 1257 and P.D. 1990?

Petitioner's woes started when as President and General Manager of ASPAC Trans. Company he failed to control his outburst and blurted -

You employees in this office are all tanga, son of a bitches (sic), bullshit. Puro kayo walang utak . . . Mga anak ng puta . . . Magkano ba kayo . . . God damn you all.

Thus for humiliating his employees he was accused of multiple grave oral defamation in five (5) separate Informations instituted by five (5) of his employees, each Information charging him with gravely maligning them on four different days, i.e., from 9 to 12 April 1980.

On 2 January 1990, after nearly ten (10) years, the Metropolitan Trial Court of Makati, Br. 61, found petitioner guilty of grave oral defamation in four (4) of the five (5) cases filed against him, i.e., Crim. Cases Nos. 105206, 105207, 105209 and 105210, sentenced him to a prison term of one (1) year and one (1) day to one (1) year and eight (8) months of prision correccional "in each crime committed on each date of each case, as alleged in the information(s)," ordered him to indemnify each of the offended parties, Victoria Gatchalian, Rowena Ruiz, Linda Marie Ayala Pigar and Marie Solis, P10,000.00 as exemplary damages, and P5,000.00 for attorney's fees, plus costs of suit.[2] He was however acquitted in Crim. Case No. 105208 for persistent failure of the offended party, Edgar Colindres, to appear and testify.

Not satisfied with the Decision of the MeTC, and insisting on his innocence, petitioner elevated his case to the Regional Trial Court.

On 5 August 1991 the Regional Trial Court of Makati, Br. 59, affirmed his conviction but appreciated in his favor

a mitigating circumstance analogous to passion or obfuscation. Thus -

x x x (he) was angry and shouting when he uttered the defamatory words complained of x x x x he must have been angry and worried `about some missing documents x x x as well as the letter of the Department of Tourism advising ASPAC about its delinquent tax of P1.2 million x x x x' the said defamatory words must have been uttered in the heat of anger which is a mitigating circumstance analogous to passion or obfuscation.[3]

Accordingly, petitioner was sentenced "in each case to a STRAIGHT penalty of EIGHT (8) MONTHS imprisonment x x x x"[4] After he failed to interpose an appeal therefrom the decision of the RTC became final. The case was then set for execution of judgment by the MeTC which, as a consequence, issued a warrant of arrest. But before he could be arrested petitioner filed an application for probation which the MeTC denied "in the light of the ruling of the Supreme Court in Llamado v. Court of Appeals, G.R. No. 84850, 29 June 1989, 174 SCRA 566 x x x x"[5]

Forthwith he went to the Court of Appeals on certiorari which on 2 July 1992 dismissed his petition on the following grounds -

Initially, the Court notes that the petitioner has failed to comply with the provisions of Supreme Court Circular No. 28-91 of September 4, 1991. Violation of the circular is sufficient cause for dismissal of the petition.

Secondly, the petitioner does not allege anywhere in the petition that he had asked the respondent court to reconsider its above order; in fact, he had failed to give the court an opportunity to correct itself if it had, in fact, committed any error on the matter. He is, however, required to move for reconsideration of the questioned order before filing a petition for certiorari (Sy It v. Tiangco, 4 SCRA 436). This failure is fatal to his cause. It is a ground for dismissal of his petition (Santos v. Vda. de Cerdanola, 5 SCRA 823; Acquiao v. Estenso, 14 SCRA 18; Del Pilar Transit, Inc. v. Public Service Commission, 31 SCRA 372).

Thirdly, it is obvious that respondent court did not commit any capricious, arbitrary, despotic or whimsical exercise of power in denying the petitioner's application for probation x x x x

Fourthly, the petition for probation was filed by the petitioner out of time x x x x

Fifthly, the Court notes that Section 4 of PD 968 allows the trial court to grant probation after conviction, upon an application by the defendant within the period of appeal, upon terms and conditions and period appropriate to each case, but expressly rules out probation where an appeal has been taken x x x x [6]

The motion for reconsideration was likewise denied.

In the present recourse, petitioner squirms out of each ground and seeks this Court's compassion in dispensing with the minor technicalities which may militate against his petition as he now argues before us that he has not yet lost his right to avail of probation notwithstanding his appeal from the MeTC to the RTC since "[t]he reason for his appeal was precisely to enable him to avail himself of the benefits of the Probation Law because the original Decision of the (Metropolitan) Trial Court was such that he would not then be entitled to probation." [7] He contends that "he appealed from the judgment of the trial court precisely for the purpose of reducing the penalties imposed upon him by the said court to enable him to qualify for probation." [8]

The central issue therefore is whether petitioner is still qualified to avail of probation even after appealing his conviction to the RTC which affirmed the MeTC except with regard to the duration of the penalties imposed.

Petitioner is no longer eligible for probation.

First. Probation is a mere privilege, not a right.[9] Its benefits cannot extend to those not expressly included.

Probation is not a right of an accused, but rather an act of grace and clemency or immunity conferred by the state which may be granted by the court to a seemingly deserving defendant who thereby escapes the extreme rigors of the penalty imposed by law for the offense of which he stands convicted.[10] It is a special prerogative granted by law to a person or group of persons not enjoyed by others or by all. Accordingly, the grant of probation rests solely upon the discretion of the court which is to be exercised primarily for the benefit of organized society, and only incidentally for the benefit of the accused.[11] The Probation Law should not therefore be permitted to divest the state or its government of any of the latter's prerogatives, rights or remedies, unless the intention of the legislature to this end is clearly expressed, and no person should benefit from the terms of the law who is not clearly within them.

Neither Sec. 4 of the Probation Law, as amended, which clearly mandates that "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction," nor *Llamado v. Court of Appeals*[12] which interprets the quoted provision, offers any ambiguity or qualification. As such, the application of the law should not be subjected to any to suit the case of petitioner. While the proposition that an appeal should not bar the accused from applying for probation if the appeal is solely to reduce the penalty to within the probationable limit may be equitable, we are not yet prepared to accept this interpretation under existing law and jurisprudence. Accordingly, we quote Mr. Justice Feliciano speaking for the Court en banc in *Llamado v. Court of Appeals* -

x x x we note at the outset that Probation Law is not a penal statute. We, however, understand petitioner's argument to be really that any statutory language that appears to favor the accused in a criminal case should be given a 'liberal interpretation.' Courts x x x have no authority to invoke 'liberal interpretation' or 'the spirit of the law' where the words of the statute themselves, and as illuminated by the history of that statute, leave no room for doubt or interpretation. We do not believe that 'the spirit of the law' may legitimately be invoked to set at naught words which have a clear and definite meaning imparted to them by our procedural law. The 'true legislative intent' must obviously be given effect by judges and all others who are charged with the application and implementation of a statute. It is absolutely essential to bear in mind, however, that the spirit of the law and the intent that is to be given effect are derived from the words actually used by the law-maker, and not from some external, mystical or metajuridical source independent of and transcending the words of the legislature.

The Court is not here to be understood as giving a 'strict interpretation' rather than a 'liberal' one to Section 4 of the Probation Law of 1976 as amended by P.D. No. 1990. 'Strict' and 'liberal' are adjectives which too frequently impede a disciplined and principled search for the meaning which the law-making authority projected when it promulgated the language which we must apply. That meaning is clearly visible in the text of Section 4, as plain and unmistakable as the nose on a man's face. The Court is simply reading Section 4 as it is in fact written. There is no need for the involved process of construction that petitioner invites us to engage in, a process made necessary only because petitioner rejects the conclusion or meaning which shines through the words of the statute. The first duty of the judge is to take and apply a statute as he finds it, not as he would like it to be. Otherwise, as this Court in *Yangco v. Court of First Instance* warned, confusion and uncertainty will surely follow, making, we might add, stability and continuity in the law much more difficult to achieve:

'x x x [w]here language is plain, subtle refinements which tinge words as to give them the color of a particular judicial theory are not only unnecessary but decidedly harmful. That which has caused so much confusion in the law, which has made it so difficult for the public to understand and know what the law is with respect to a given matter, is in considerable measure the unwarranted interference by judicial tribunals with the English language as found in statutes and contracts, cutting the words here and inserting them there, making them fit personal ideas of what the legislature ought to have done or what parties should have agreed upon, giving them meanings which they do not ordinarily have cutting, trimming, fitting, changing and coloring until lawyers

themselves are unable to advise their clients as to the meaning of a given statute or contract until it has been submitted to some court for its interpretation and construction.'

The point in this warning may be expected to become sharper as our people's grasp of English is steadily attenuated.[13]

Therefore, that an appeal should not bar the accused from applying for probation if the appeal is taken solely to reduce the penalty is simply contrary to the clear and express mandate of Sec. 4 of the Probation Law, as amended, which opens with a negative clause, "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction." In *Bersabal v. Salvador*,[14] we said -

By its very language, the Rule is mandatory. Under the rule of statutory construction, negative words and phrases are to be regarded as mandatory while those in the affirmative are merely directory x x x x the use of the term 'shall' further emphasizes its mandatory character and means that it is imperative, operating to impose a duty which may be enforced.

And where the law does not distinguish the courts should not distinguish; where the law does not make exception the court should not except.

Second. At the outset, the penalties imposed by the MeTC were already probationable. Hence, there was no need to appeal if only to reduce the penalties to within the probationable period. Multiple prison terms imposed against an accused found guilty of several offenses in one decision are not, and should not be, added up. And, the sum of the multiple prison terms imposed against an applicant should not be determinative of his eligibility for, nay his disqualification from, probation. The multiple prison terms are distinct from each other, and if none of the terms exceeds the limit set out in the Probation Law, i.e., not more than six (6) years, then he is entitled to probation, unless he is otherwise specifically disqualified. The number of offenses is immaterial as long as all the penalties imposed, taken separately, are within the probationable period. For, Sec. 9, par. (a), P.D. 968, as amended, uses the word maximum, not total, when it says that "[t]he benefits of this Decree shall not be extended to those x x x x sentenced to serve a maximum term of imprisonment of more than six years." Evidently, the law does not intend to sum up the penalties imposed but to take each penalty separately and distinctly with the others. Consequently, even if petitioner was supposed to have served his prison term of one (1) year and one (1) day to one (1) year and eight (8) months of prison correccional sixteen (16) times as he was sentenced to serve the prison term for "each crime committed on each date of each case, as alleged in the information (s)," and in each of the four (4) informations, he was charged with having defamed the four (4) private complainants on four (4) different, separate days, he was still eligible for probation, as each prison term imposed on petitioner was probationable.

Fixing the cut-off point at a maximum term of six (6) years imprisonment for probation is based on the assumption that those sentenced to higher penalties pose too great a risk to society, not just because of their demonstrated capability for serious wrongdoing but because of the gravity and serious consequences of the offense they might further commit.[15] The Probation Law, as amended, disqualifies only those who have been convicted of grave felonies as defined in Art. 9 in relation to Art. 25 of The Revised Penal Code,[16] and not necessarily those who have been convicted of multiple offenses in a single proceeding who are deemed to be less perverse. Hence, the basis of the disqualification is principally the gravity of the offense committed and the concomitant degree of penalty imposed. Those sentenced to a maximum term not exceeding six (6) years are not generally considered callous, hard core criminals, and thus may avail of probation.

To demonstrate the point, let us take for instance one who is convicted in a single decision of, say, thirteen (13) counts of grave oral defamation (for having defamed thirteen [13] individuals in one outburst) and sentenced to a total prison term of thirteen (13) years, and another who has been found guilty of mutilation and sentenced to six

(6) years and one (1) day of prison mayor minimum as minimum to twelve (12) years and one (1) day of reclusion temporal minimum as maximum. Obviously, the latter offender is more perverse and is disqualified from availing of probation.

Petitioner thus proceeds on an erroneous assumption that under the MeTC Decision he could not have availed of the benefits of probation. Since he could have, although he did not, his appeal now precludes him from applying for probation.

And, even if we go along with the premise of petitioner, however erroneous it may be, that the penalties imposed against him should be summed up, still he would not have qualified under the Decision rendered by the RTC since if the "STRAIGHT penalty of EIGHT (8) MONTHS imprisonment" imposed by the RTC is multiplied sixteen (16) times, the total imposable penalty would be ten (10) years and eight (8) months, which is still way beyond the limit of not more than six (6) years provided for in the Probation Law, as amended. To illustrate: 8 months multiplied by 16 cases = 128 months; 128 months divided by 12 months (in a year) = 10 years and 8 months, hence, following his argument, petitioner cannot still be eligible for probation as the total of his penalties exceeds six (6) years.

The assertion that the Decision of the RTC should be multiplied only four (4) times since there are only four (4) Informations thereby allowing petitioner to qualify for probation, instead of sixteen (16) times, is quite difficult to understand. The penalties imposed by the MeTC cannot be any clearer - "one (1) year and one (1) day to one (1) year and eight (8) months of prison correccional, in each crime committed on each date of each case, as alleged in the information(s)." Hence, petitioner should suffer the imposed penalties sixteen (16) times. On the other hand, the RTC affirmed the judgment of conviction and merely reduced the duration of each penalty imposed by the MeTC "in each case to a STRAIGHT penalty of EIGHT (8) MONTHS imprisonment" on account of a mitigating circumstance for each case, count or incident of grave oral defamation. There is no valid reason therefore why the penalties imposed by the RTC should be multiplied only four (4) times, and not sixteen (16) times, considering that the RTC merely affirmed the MeTC as regards the culpability of petitioner in each of the sixteen (16) cases and reducing only the duration of the penalties imposed therein. Thus -

Premises considered, the judgment of conviction rendered by the trial court is **AFFIRMED** with modification, as follows:

WHEREFORE, the Court hereby finds the accused Pablo C. Francisco **GUILTY** beyond reasonable doubt in each of the above entitled cases and appreciating in his favor the mitigating circumstance which is analogous to passion or obfuscation, the Court hereby sentences the said accused in each case to a straight penalty of **EIGHT (8) MONTHS** imprisonment, with the accessory penalties prescribed by law; and to pay the costs.[17]

Nowhere in the RTC Decision is it stated or even hinted at that the accused was acquitted or absolved in any of the four (4) counts under each of the four (4) Informations, or that any part of the judgment of conviction was reversed, or that any of the cases, counts or incidents was dismissed. Otherwise, we will have to account for the twelve (12) other penalties imposed by the MeTC. Can we? What is clear is that the judgment of conviction rendered by the MeTC was affirmed with the sole modification on the duration of the penalties.

In fine, considering that the multiple prison terms should not be summed up but taken separately as the totality of all the penalties is not the test, petitioner should have immediately filed an application for probation as he was already qualified after being convicted by the MeTC, if indeed thereafter he felt humbled, was ready to unconditionally accept the verdict of the court and admit his liability. Consequently, in appealing the Decision of the MeTC to the RTC, petitioner lost his right to probation. For, plainly, the law considers appeal and probation mutually exclusive remedies.[18]

Third. Petitioner appealed to the RTC not to reduce or even correct the penalties imposed by the MeTC, but to assert his innocence. Nothing more. The cold fact is that petitioner appealed his conviction to the RTC not for the sole purpose of reducing his penalties to make him eligible for probation - since he was already qualified under the MeTC Decision - but rather to insist on his innocence. The appeal record is wanting of any other purpose. Thus, in his Memorandum before the RTC, he raised only three (3) statements of error purportedly committed by the MeTC all aimed at his acquittal: (a) in finding that the guilt of the accused has been established because of his positive identification by the witness for the prosecution; (b) in giving full faith and credence to the bare statements of the private complainants despite the absence of corroborating testimonies; and, (c) in not acquitting him in all the cases." [19] Consequently, petitioner insisted that the trial court committed an error in relying on his positive identification considering that private complainants could not have missed identifying him who was their President and General Manager with whom they worked for a good number of years. Petitioner further argued that although the alleged defamatory words were uttered in the presence of other persons, mostly private complainants' co-employees and clients, not one of them was presented as a witness. Hence, according to petitioner, the trial court could not have convicted him on the basis of the uncorroborative testimony of private complainants. [20]

Certainly, the protestations of petitioner connote profession of guiltlessness, if not complete innocence, and do not simply put in issue the propriety of the penalties imposed. For sure, the accused never manifested that he was appealing only for the purpose of correcting a wrong penalty - to reduce it to within the probationable range. Hence, upon interposing an appeal, more so after asserting his innocence therein, petitioner should be precluded from seeking probation. By perfecting his appeal, petitioner ipso facto relinquished his alternative remedy of availing of the Probation Law the purpose of which is simply to prevent speculation or opportunism on the part of an accused who although already eligible does not at once apply for probation, but doing so only after failing in his appeal.

The fact that petitioner did not elevate the affirmance of his conviction by the RTC to the Court of Appeals does not necessarily mean that his appeal to the RTC was solely to reduce his penalties. Conversely, he was afraid that the Court of Appeals would increase his penalties, which could be worse for him. Besides, the RTC Decision had already become final and executory because of the negligence, according to him, of his former counsel who failed to seek possible remedies within the period allowed by law.

Perhaps it should be mentioned that at the outset petitioner, in accordance with Sec 3, par. (e), Rule 117 of the Rules of Court, [21] should have moved to quash as each of the four (4) Informations filed against him charged four (4) separate crimes of grave oral defamation, committed on four (4) separate days. His failure to do so however may now be deemed a waiver under Sec. 8 of the same Rule [22] and he can be validly convicted, as in the instant case, of as many crimes charged in the Information.

Fourth. The application for probation was filed way beyond the period allowed by law. This is vital and crucial. From the records it is clear that the application for probation was filed "only after a warrant for the arrest of petitioner had been issued x x x (and) almost two months after (his) receipt of the Decision" [23] of the RTC. This is a significant fact which militates against the instant petition. We quote with affirmance the well-written, albeit assailed, ponencia of now Presiding Justice of the Court of Appeals Nathanael P. De Pano, Jr., on the specific issue -

x x x the petition for probation was filed by the petitioner out of time. The law in point, Section 4 of P.D. 968, as amended, provides thus:

'SEC. 4. Grant of Probation. -- Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal x x x place the defendant on probation x x x'

Going to the extreme, and assuming that an application for probation from one who had appealed the trial court's judgment is allowed by law, the petitioner's plea for probation was filed out of time. In the petition is a clear statement that the petitioner was up for execution of judgment before he filed his application for probation. P.D. No. 968 says that the application for probation must be filed "within the period for perfecting an appeal;" but in this case, such period for appeal had passed, meaning to say that the Regional Trial Court's decision had attained finality, and no appeal therefrom was possible under the law. Even granting that an appeal from the appellate court's judgment is contemplated by P.D. 968, in addition to the judgment rendered by the trial court, that appellate judgment had become final and was, in fact, up for actual execution before the application for probation was attempted by the petitioner. The petitioner did not file his application for probation before the finality of the said judgment; therefore, the petitioner's attempt at probation was filed too late.

Our minds cannot simply rest easy on the proposition that an application for probation may yet be granted even if it was filed only after judgment has become final, the conviction already set for execution and a warrant of arrest issued for service of sentence.

The argument that petitioner had to await the remand of the case to the MeTC, which necessarily must be after the decision of the RTC had become final, for him to file the application for probation with the trial court, is to stretch the law beyond comprehension. The law, simply, does not allow probation after an appeal has been perfected.

ACCORDINGLY, considering that prevailing jurisprudence treats appeal and probation as mutually exclusive remedies, and petitioner appealed from his conviction by the MeTC although the imposed penalties were already probationable, and in his appeal, he asserted only his innocence and did not even raise the issue of the propriety of the penalties imposed on him, and finally, he filed an application for probation outside the period for perfecting an appeal granting he was otherwise eligible for probation, the instant petition for review should be as it is hereby DENIED.

SO ORDERED.

Narvasa, C.J., Feliciano, Padilla, Bidin, Regalado, Davide, Jr., and Quiazon, JJ., concur.
Romero, Melo, Puno, Kapunan, and Francisco, JJ., joins J. Mendoza in his dissenting opinion.
Vitug, J., separate opinion.

[1] Originally a dissenting view.

[2] Decision penned by Judge Andres B. Reyes, Jr., pp. 13-14; Rollo, pp. 46-47.

[3] Decision penned by Judge Lucia V. Isnani, pp. 12-13; Rollo, pp. 59-60.

[4] Ibid.

[5] Order of Judge Maximo C. Contreras, Metropolitan Trial Court of Makati, Br. 61, Rollo, p. 67.

[6] Decision of the Special Eleventh Division penned by then Associate Justice Nathaniel P. De Pano, Jr. (now Presiding Justice), concurred in by Associate Justices Jesus M. Elbinias and Consuelo Y. Santiago.

[7] Urgent Petition for Review, p. 15; Rollo, p. 16.

[8] Id., p. 10; Rollo, p. 11.

[9] *Baclayon v. Mutia*, G.R. No. 59298, 30 April 1984, 129 SCRA 149; *Amandy v. People*, G.R. No. 76258, 23 May 1988, 161 SCRA 436.

[10] 34 Words and Phrases 111.

[11] Bala v. Martinez, G.R. No. 67301, 29 January 1990, 181 SCRA 459.

[12] G.R. No. 84850, 29 June 1989, 174 SCRA 566.

[13] See Note 11, pp. 577-578.

[14] No. L- 35910, 21 July 1978, 84 SCRA 176, citing McGee v. Republic, 94 Phil. 820 (1954).

[15] Bautista, E., Statutory Concept and Objectives, Coverage and Selection Criteria for Probation. Lecture delivered during the 1977 Regional Seminar on Probation, Philippine International Convention Center.

[16] Art. 9 defines grave felonies as those to which the law attaches the capital punishment or penalties which in any of their periods are afflictive, in accordance with Art. 25. Art. 25 on the other hand lists death as capital punishment, and reclusion perpetua, reclusion temporal, perpetual or temporary absolute disqualification, perpetual or temporary special disqualification, and prision mayor as afflictive penalties.

[17] Decision of the RTC, p. 13; Rollo, p. 60.

[18] Bernardo v. Balagot, G.R. No. 86561, 10 November 1992, 215 SCRA 526.

[19] Decision of the RTC, p. 2; Rollo, p. 49.

[20] Ibid.

[21] Section 3, par. (e), Rule 117, Rules of Court, provides: "The accused may move to quash the complaint or information on any of the following grounds: x x x that more than one offense is charged x x x x

[22] Section 8, Rule 117, Rules of Court, provides: "The failure of the accused to assert any ground of a motion to quash before he pleads to the complaint or information, either because he did not file a motion to quash or failed to alleged the same in the said motion shall be deemed a waiver of the grounds of a motion to quash x x x x

[23] Urgent Petition for Review, p. 5; Rollo, p. 6.

DISSENTING OPINION

MENDOZA, J.:

I vote to reverse the judgment of the Court of Appeals in this case.

I.

The principal basis for the affirmance of the decision of the Court of Appeals denying probation is the fact that petitioner had appealed his sentence before filing his application for probation. Reliance is placed on the literal application of § 4 of the Probation Law of 1976, as amended, which provides as follows:

SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, That no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for

probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.

An order granting or denying probation shall not be appealable.

Thus, under § 4 the accused is given the choice of appealing his sentence or applying for probation. If he appeals, he cannot later apply for probation. If he opts for probation, he can not appeal. Implicit in the choice, however, is that the accused is not disqualified for probation under any of the cases mentioned in § 9, to wit:

SEC. 9. Disqualified Offenders. - The benefits of this Decree shall not be extended to those:

- (a) sentenced to serve a maximum term of imprisonment of more than six years;
- (b) convicted of subversion or any crime against the national security or the public order;
- (c) who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos.
- (d) who have been once on probation under the provisions of this Decree; and
- (e) who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof.

Consequently, if under the sentence given to him an accused is not qualified for probation, as when the penalty imposed on him by the court singly or in their totality exceeds six (6) years but on appeal the sentence is modified so that he becomes qualified, I believe that the accused should not be denied the benefit of probation.

Before its amendment by P.D. No. 1990, the law allowed -- even encouraged -- speculation on the outcome of appeals by permitting the accused to apply for probation after he had appealed and failed to obtain an acquittal.[1] It was to change this that §4 was amended by P.D. No. 1990 by expressly providing that "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction." For an accused, despite the fact that he is eligible for probation, may be tempted to appeal in the hope of obtaining an acquittal if he knows he can any way apply for probation in the event his conviction is affirmed. [2]

There is, however, nothing in the amendatory Decree to suggest that in limiting the accused to the choice of either appealing from the decision of the trial court or applying for probation, the purpose is to deny him the right to probation in cases like the one at bar where he becomes eligible for probation only because on appeal his sentence is reduced. The purpose of the amendment, it bears repeating, is simply to prevent speculation or opportunism on the part of an accused who, although eligible for probation, does not at once apply for probation, doing so only after failing in his appeal.

In the case at bar, it cannot be said that in appealing the decision of the MeTC petitioner was principally motivated by a desire to be acquitted. While acquittal might have been an alluring prospect for him, what is clear is that he had a reason for appealing because under the sentence given to him he was disqualified to apply for probation. The MeTC had originally sentenced him to 1 year and 1 day to 1 year and 8 months of prison correccional for "each crime committed on each date of each case, as alleged in the information[s]." This meant, as the majority opinion points out, that petitioner had to suffer the prison term of 1 year and 1 day to 1 year and 8 months sixteen times, since he was found guilty of four crimes of grave oral defamation in each of four cases. The totality of the penalties imposed on petitioner (26 years and 8 months) thus exceeded the limit of six (6) years of imprisonment allowed by § 9(a) and disqualified him for probation. It was only after this penalty was reduced on appeal to a straight penalty of eight months imprisonment in each case or to a total term of 2 years and 8 months

in the four cases that petitioner became eligible for probation. Then he did not appeal further although he could have done so.

The Court of Appeals, while acknowledging that "there may be some space not covered by the present law on probation . . . where in its original state, the petitioner was disqualified from applying for probation under Sec. 9 of the Decree, becoming eligible for probation only under the terms of the judgment on appeal," nevertheless felt bound by the letter of § 4: "No application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction." The majority opinion, affirming the ruling, states that to allow probation in this case would be to go against the "clear and express mandate of sec. 4 of the Probation Law, as amended." (p. 9)

To regard probation, however, as a mere privilege, to be given to the accused only where it clearly appears he comes within its letter is to disregard the teaching in many cases that the Probation Law should be applied in favor of the accused not because it is a criminal law -- it is not -- but to achieve its beneficent purpose. (*Santos To v. Paño*, 120 SCRA 8, 14 (1983)). The niggardly application of the law would defeat its purpose to "help the probationer develop into a law-abiding and self-respecting individual" (*Baclayon v. Mutia*, 129 SCRA 148, 149 (1984), per Teehankee, J.) or "afford [him] a chance to reform and rehabilitate himself without the stigma of a prison record, to save government funds that may otherwise be spent for his food and maintenance while incarcerated, and to decongest the jails of the country." (*Del Rosario v. Rosero*, 126 SCRA 228, 232 (1983), per Makasiar, J.)

The approach followed by the Court in *Atienza v. Court of Appeals*, 140 SCRA 391, 395 (1985) instead commends itself to me:

Regarding this, it suffices to state that the Probation Law was never intended to limit the right of an accused person to present all relevant evidence he can avail of in order to secure a verdict of acquittal or a reduction of the penalty. Neither does the law require a plea of guilty on the part of the accused to enable him to avail of the benefits of probation. A contrary view would certainly negate the constitutional right of an accused to be presumed innocent until the contrary is proved.

As already stated, petitioner did not appeal primarily to seek acquittal. Proof of this is that after the penalty imposed on him by the MeTC had been reduced by the RTC so that he thereby became qualified for probation, he did not appeal further. The majority says that this was because he was afraid that if he did the penalty could be increased. That possibility, however, was also there when he appealed from the MeTC to the RTC. For by appealing the sentence of the MeTC, petitioner took as much risk that the penalty would be raised as the chance that he would be acquitted.

It is true that in appealing the sentence of the MeTC petitioner professed his innocence and not simply questioned the propriety of his sentence, but no more so does an accused who, upon being arraigned, pleads "Not Guilty." And yet the latter cannot be denied probation if he is otherwise eligible for probation.

It is argued that there is a difference because an accused who pleads "not guilty" in the beginning, later acknowledges his guilt and shows contrition after he is found guilty. So does an accused who appeals a sentence because under it he is not qualified for probation, but after the penalty is reduced, instead of appealing further, accepts the new sentence and applies for probation.

This case is thus distinguishable from *Llamado v. Court of Appeals*, 174 SCRA 566 (1989), in which it was held that because the petitioner had appealed his sentence, he could not subsequently apply for probation. For, unlike petitioner in the case at bar, the accused in that case could have applied for probation as his original sentence of

one year of prision correccional did not disqualify him for probation. That case fell squarely within the ambit of the prohibition in § 4 that one who applies for probation must not "have perfected an appeal from the judgment of conviction."

II.

It is contended that petitioner did not have to appeal because under the original sentence meted out to him he was not disqualified for probation. The issue here is whether the multiple prison terms imposed on petitioner are to be considered singly or in their totality for the purpose of § 9(a) which disqualifies from probation those "sentenced to serve a maximum term of imprisonment of more than six years."

I submit that they should be taken in their totality. As the sentence originally imposed on petitioner was for "one (1) year and one (1) day to one (1) year and eight (8) months of prision correccional in each crime committed on each date of each case" and as there are four offenses of grave oral defamation against petitioner in each of the four cases, the total prison term which he would have to serve was 26 years and 8 months. This is clearly beyond the probationable maximum allowed by law.

It is said, however, that even if the totality of the prison terms is the test, the modified sentence imposed by the RTC would not qualify the petitioner for probation because he has to suffer imprisonment of eight months sixteen times. That is not so. The RTC only "sentence[d] the said accused in each case to a STRAIGHT penalty of EIGHT (8) MONTHS imprisonment." This means eight (8) months times four (4), since there are four cases, or 32 months or 2 years and 8 months.

The policy of the law indeed appears to be to treat as only one multiple sentences imposed in cases which are jointly tried and decided. For example, § 9(c) disqualifies from probation persons "who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos." It was held in *Rura v. Lopena*, 137 SCRA 121 (1985) that the accused, who had been found guilty of estafa in five criminal cases, was qualified for probation because although the crimes had been committed on different dates he was found guilty of each crime on the same day. As this Court noted, "Rura was sentenced to a total prison term of seventeen (17) months and twenty-five (25) days. In each criminal case the sentence was three (3) months and fifteen (15) days."

That the duration of a convict's sentence is determined by considering the totality of several penalties for different offenses committed is also implicit in the provisions of the Revised Penal Code on the accumulation of penalties. (See, e.g., arts. 48 and 70)

It is said that the basis of disqualification under § 9 is the gravity of the offense committed and the penalty imposed. I agree. That is why I contend that a person who is convicted of multiple grave oral defamation for which the total prison term is, say, 6 years and 8 months, is guilty of a graver offense than another who is guilty of only offense of grave oral defamation and sentenced to a single penalty of 1 year and 8 months. The relevant comparison is between an accused convicted of one offense of grave oral defamation and another one convicted of the same offense, say four or more times. The relevant comparison is not, as the majority says, between an accused found guilty of grave oral defamation four or more times and another one found guilty of mutilation and sentenced to an indeterminate term of 6 years and 1 day of prision mayor to 12 years and 1 day of reclusion temporal.

III.

Finally, it is said that there is a more fundamental reason for denying probation in this case and that is that petitioner applied for probation only after his case had been remanded to the MeTC for the execution of its decision as modified. But that is because § 4 provides that "an application for probation shall be filed with the trial court." In the circumstances of this case, petitioner had to await the remand of the case to the MeTC, which necessarily must be after the decision of the RTC had become final.

The decision of the Court of Appeals should be REVERSED and respondent judge of the Metropolitan Trial Court of Makati, Metro Manila should be ORDERED to GRANT petitioner's application for probation.

[1] As originally promulgated on July 24, 1976, P.D. No. 968, § 4 provided:

SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant and upon application at any time of said defendant, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal.

An order granting or denying probation shall not be appealable. (Emphasis added)

Thus, under the law as originally promulgated, any time after the trial court had convicted and sentenced the accused and even if he had taken an appeal, the trial court could grant him probation in the event he is convicted.

On December 1, 1977, § 4 of the law was again amended by P. D. No. 1257 so as to read as follows:

SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant but before he begins to serve his sentence and upon his application, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

The prosecuting officer concerned shall be notified by the court of the filing of the application for probation and he may submit his comment on such application within ten days from receipt of the notification.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine with subsidiary imprisonment in case of insolvency. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. In the latter case, however, if the application is filed on or after the date of the judgment of the appellate court, said application shall be acted upon by the trial court on the basis of the judgment of the appellate court.

An order granting or denying probation shall not be appealable. (Emphasis added)

This amendment limited the period for applying for probation to the point just "before he begins to serve his sentence." This meant not only after an appeal had been taken but even after a judgment had been rendered by the appellate court and after the latter's judgment had become final. Hence the proviso that "the application [for probation] shall be acted upon by the trial court on the basis of the judgment of the appellate court."

On October 5, 1985, § 4 of the Probation Law was again amended to further limit the period for applying for

probation to the "period for perfecting an appeal." The purpose was to confine the accused to the choice of either applying for probation or appealing. While heretofore an accused could appeal and, after his appeal had failed, apply for probation, under the amendatory Decree, this is no longer possible. If he appeals he cannot later apply for probation. If he applies for probation he cannot later appeal. As amended by P.D. No. 1990, § 4 reads:

SEC. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, That no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.

An order granting or denying probation shall not be appealable. (Emphasis added)

[2] The preamble of P.D. No. 1990 states:

WHEREAS, it has been the sad experience that persons who are convicted of offenses and who may be entitled to probation still appeal the judgment of conviction even up to the Supreme Court, only to pursue their application for probation when their appeal is eventually dismissed;

WHEREAS, the process of criminal investigation, prosecution, conviction and appeal entails too much time and effort, not to mention the huge expenses of litigation, on the part of the State;

WHEREAS, the time, effort and expenses of the Government in investigating and prosecuting accused persons from the lower courts up to the Supreme Court, are oftentimes rendered nugatory when, after the appellate court finally affirms the judgment of conviction, the defendant applies for and is granted probation;

WHEREAS, probation was not intended as an escape hatch and should not be used to obstruct and delay the administration of justice, but should be availed of at the first opportunity by offenders who are willing to be reformed and rehabilitated; (Emphasis added)

SEPARATE OPINION

VITUG, J.:

While I subscribe to the observation made by Mr. Justice Vicente V. Mendoza in his dissenting opinion that an accused, who originally is not qualified for probation because the penalty imposed on him by a court *a quo* exceeds six (6) years, should not be denied that benefit of probation if on appeal the sentence is ultimately reduced to within the prescribed limit, I am unable, however, to second the other proposition that multiple prison terms imposed by a court should be taken in their totality for purposes of Section 9 (a), P.D. No. 968. In this respect, I concur with Mr. Justice Josue N. Bellosillo in his ponencia that in determining the eligibility or disqualification of an applicant for probation charged with, and sentenced to serve multiple prison terms for, several offenses, "the number of offenses is immaterial as long as all the penalties imposed, taken separately, are within the probationable period." The use of the word maximum instead of the word total in Section 9, paragraph (a) of P.D. 968, as amended, should be enough to reveal that such has been the legislative intent.

Thus, I still must vote for the denial of the petition.

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