

FERNANDO FORALAN, PETITIONER, VS. THE HONORABLE COURT OF APPEALS, FORMER SEVENTH (7TH) DIVISION AND THE PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 109832. February 07, 1995

Ponente: ROMERO, J.

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ROMERO, J.:

The sole issue for resolution in this case is whether or not the dismissal, upon respondent court's own motion, of petitioner's appeal, on the ground that the appellant's brief was filed out of time was in accord with the provisions of Section 8, Rule 124 of the 1985 Rules on Criminal Procedure, as amended.

On August 14, 1990, petitioner was charged with qualified theft in an information filed before the Regional Trial Court, Branch 19, Catarman, Northern Samar. Petitioner assisted by counsel de officio, Atty. Jose Falcatelo, entered a plea of not guilty. As the trial ensued, Atty. Falcatelo was substituted by Atty. Arturo S. Daiz of the Public Attorney's Office of Northern Samar.

On September 29, 1990, petitioner was convicted by the trial court. Maintaining his innocence, petitioner, by himself, without assistance of counsel filed his notice of appeal before the Court of Appeals. Though the notice of appeal was signed by petitioner alone, the Special and Appealed Cases Division (SAC Division) of the Public Attorney's Office in Padre Faura, Manila nevertheless, received a Notice to File Brief from respondent court dated August 31, 1992, requiring it to file the appellant's brief within 30 days from receipt of said notice or until October 3, 1992. However, it was only on October 5, 1992 that the SAC Division received from Atty. Daiz the complete records of the case. On October 6, 1992, therefore, the SAC Division filed before respondent court a Notice of Appearance with Motion for a Fresh Period of thirty days within which to file appellant's brief.

Said motion was, however, dismissed by respondent court in a resolution dated October 15, 1992 for failure to file appellant's brief within the reglementary period. The SAC Division, consequently, moved for reconsideration of the resolution of October 15, 1992 arguing that respondent court, in issuing the same failed to take into consideration the provisions of Section 8, Rule 124 of the 1985 Rules on Criminal Procedure as amended:

"SEC. 8. Dismissal of appeal for abandonment or failure to prosecute. - The appellate court may, upon motion of the appellee or on its own motion and notice to the appellant, dismiss the appeal if the appellant fails to file his brief within the time prescribed by this Rule, except in case the appellant is represented by a counsel de officio.

The court may also, upon motion of the appellee or on its own motion, dismiss the appeal if the appellant escapes from prison or confinement or jumps bail or flees to a foreign country during the pendency of the appeal."

According to petitioner, the aforequoted, provision states that the dismissal of an appeal due to late filing of the appellant's brief is not mandatory upon the respondent court as it uses the permissive word "may;" that however, where the dismissal is desired, respondent court cannot ipso facto order the same without prior notice to the

appellant; that the abovementioned rule admits of an exception, that is, when the appellant, as in the case at bench, is represented by a counsel de officio.

The Office of the Solicitor General, by way of comment, did not interpose any objection to the motion for reconsideration of petitioner and further recommended the reinstatement of the appeal.

On March 24, 1993, respondent court issued a resolution denying for lack of merit petitioner's motion for reconsideration. It ruled:

"The absence of a prior notice to accused-appellant is cured by his filing of the instant motion for reconsideration.

'In a case in which the Court of Appeals failed to give notice to the appellant before dismissing his appeal, the Supreme Court held that 'as petitioner has filed a motion for reconsideration of, or to set aside, the order dismissing his appeal, in which he stated the reasons why he failed to file his brief on time, and the Court of Appeals denied the motion considering said reasons not satisfactory, the filing of such a motion has cured any defect or failure to comply, if any, with the notice required by section 8, Rule 124, because if the notice had been given the same reasons would have been alleged by the appellant.'" (Francisco, *The Revised Rules of Court of the Philippines, Criminal Procedure, Second Edition*, p. 981, citing *Baradi versus People*, 46 O.G. 1576)

Counsel for accused-appellant is not counsel de officio as they are not court-appointed. They are de parte counsel."

Hence, the present petition for certiorari with prayer for temporary restraining order. On May 3, 1993, the Supreme Court issued a temporary restraining order enjoining respondent court from proceeding with the issuance of an entry of judgment in the appealed case of petitioner.

Petitioner's arguments before this court are substantially a reiteration of its contentions raised before the respondent court. Any further discussion of the same would be superfluous.

Consequently, we proceed to rule on the lone issue earlier stated. We find that the motu proprio dismissal by respondent court of petitioner's appeal is not proper. It is clear that under Sec. 8, Rule 124 of the 1985 Rules on Criminal Procedure as amended, the failure to file the appellant's brief on time may cause the dismissal of the appeal, upon either the motion of the appellee or on the own motion of the appellate court, provided that notice must be furnished to the appellant to show cause why his appeal should not be dismissed.

But the exception to this rule has been clearly stated — -i.e. when the appellant is represented by a counsel de officio which, beyond doubt, is the case herein. Respondent court in dismissing the appeal insisted that petitioner was represented by a de parte counsel, but the facts strongly indicate otherwise. It should be emphasized that petitioner, at the very inception of the trial before the lower court, was already represented by a counsel de officio, Atty. Jose Falcatelo, later on substituted by Atty. Daiz of the Public Attorney's Office in Catarman, Samar. On appeal before respondent court, petitioner was represented by the Public Attorney's Office in Padre Faura, Manila, but not at his instance but upon that of respondent court itself, having required said office to file the appellant's brief. Since the notice of appeal was filed and signed by petitioner alone, without assistance of counsel, the act of respondent court in requiring the Public Attorney's Office in Padre Faura to file the appellant's brief amounts to an appointment by the court itself of a counsel de officio to represent petitioner.

WHEREFORE, the petition is hereby GRANTED, respondent Court of Appeals is ordered to REINSTATE petitioner's appeal in CA-G.R. CR No. 11466, entitled "*People of the Philippines v. Fernando Foralan*", and the temporary restraining order issued on May 3, 1993 is made permanent.

SO ORDERED.

Feliciano, (Chairman), Melo, Vitug, and Francisco, JJ., concur.

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