

OFFICE OF THE PROVINCIAL PROSECUTOR OF ZAMBOANGA DEL NORTE, PETITIONERS, VS. COURT OF APPEALS, ATICO ABORDO, JUDY CATUBIG, PETER MOLATO, AND FLORENCIO CANDIA, RESPONDENTS.

G.R. No. 125796. December 27, 2000

Ponente: MENDOZA, J.

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MENDOZA, J.:

The issue in this case is whether, even before the start of trial, the prosecution can be ordered to change the information which it had filed on the ground that the evidence presented at the preliminary investigation shows that the crime committed is not murder with multiple frustrated murder, but rebellion. The trial court ruled that the power to determine what crime to charge on the basis of the evidence gathered is the prerogative of the public prosecutor. The Court of Appeals, however, while agreeing with the trial court, nevertheless found the prosecutor to have gravely abused his discretion in charging murder with frustrated murder on the ground that the evidence adduced at the preliminary investigation shows that the crime committed was rebellion. Accordingly, it ordered the prosecutor to substitute the information filed by him. Hence, this petition brought by the provincial prosecutor of Zamboanga del Norte for a review of the decision of the Court of Appeals.

The facts are not in dispute. On August 3, 1993, the provincial prosecutor of Zamboanga del Norte^[1] filed with the Regional Trial Court, Branch 8, Dipolog City, an information (docketed as Criminal Case No. 6427) charging private respondents and 10 other individuals with murder and multiple frustrated murder. The information reads:

The undersigned, Provincial Prosecutor, accuses ATICO OBORDO alias "Dondoy," NACENCIANO PACALIUGA, JR., ELEAZAR FLORENDO, NESTOR BASES alias "Beses/Belly," FLORENCIO CANDIA alias "Bimbo," JUDY CATUBIG alias "Elboy/Al," PETER MOLATO alias "Joker," ALBERTO CATUBIG alias "Blacky", ALMARIO CATUBIG alias "Nixon," JIMMY DENGAL alias "Macboy," ENRICO SIMBULAN alias "Monstop," JIMMY GARIG alias "Nonoy," NILO CATUNGAN alias "Gino," and BERNIDO QUENECAS alias "Digoy" of the crime of MURDER WITH MULTIPLE FRUSTRATED MURDER, committed as follows:

That, in the morning, on or about the 1st day of May, 1988, in the municipality of Katipunan, Zamboanga del Norte, within the jurisdiction of this Honorable Court, the above-named accused armed with high caliber firearms, conspiring, confederating together and mutually helping one another and with intent to kill by means of treachery and evident premeditation did then and there wilfully, unlawfully, unlawfully and feloniously attack, assault and fire several shots to one Cpl. ALFREDO DELA CRUZ PA, which caused his instantaneous death and causing injuries to the following victims namely: SGT. RODRIGO ALVIAR PA, SGT. RODRIGO BARADI PA, SGT. LINOGAMAN PIATOS and SGT. BELLIZAR PA, which injuries would ordinarily cause their death; thus performing all the acts of execution which would have produced the crime of MURDER, as a consequence, but which nevertheless did not produce it for reason of causes independent of the will of the herein accused, that is the timely and able medical attendance rendered to the said victims which prevented their death; that as a result of the commission of the said crime the heirs of Cpl. Alfredo de la Cruz and the

herein victims suffered the following damages, vis:

On victim CPL ALFREDO DELA CRUZ:

a) Indemnity for victim's death . . P50,000.00

b) Loss of earning capacity 30,000.00

P80,000.00

SGT. RODRIGO ALVIAR:

a) Hospitalization P 10,000.00

b) Loss of earning capacity 10,000.00

P20,000.00

SGT. LINO GAMAN PIATOS:

a) Hospitalization P10,000.00

b) Loss of earning capacity. 10,000.00

P20,000.00

SGT. RODRIGO BARADI:

a) Hospitalization P10,000.00

b) Loss of earning capacity. 10,000.00

P20,000.00

SGT. BELLIZAR:

a) Hospitalization P10,000.00

b) Loss of earning capacity. 10,000.00

P20,000.00

CONTRARY TO LAW (Viol. of Art. 248, in relation to Art. 48 of the Revised Penal Code), with the aggravating circumstance of superior strength and with the qualifying circumstances of treachery and evident premeditation.[2]

The foregoing information is based on a joint affidavit executed on June 1, 1993 by five individuals, who claimed to be former members of the New People's Army (NPA), before the Municipal Trial Court of Katipunan, Zamboanga del Norte. The affiants stated that on May 1, 1988, their group, which included private respondents, figured in an armed encounter with elements of the Philippine Army in Campo Uno, Femagas, Katipunan, Zamboanga del Norte, as a result of which one soldier, Cpl. Alfredo de la Cruz, was killed while four others, Sgts. Rodrigo Alviar, Linomagan Piatos, Rodrigo Baradi, and a certain Bellizar, were seriously wounded. Although private respondents did not appear nor submit affidavits in the preliminary investigation, they appealed the resolution of the provincial prosecutor to the Secretary of Justice on the ground that, in accusing them of murder and multiple frustrated murder, the provincial prosecutor disregarded the political motivation which made the crime committed rebellion. When the case was filed in court, private respondents reiterated their contention and prayed that the provincial prosecutor be ordered to change the charge from murder with multiple frustrated

murder to rebellion.

On September 29, 1995, the trial court issued an order denying private respondents' motion for the correction or amendment of the information. The trial court said:[3]

Be it recalled, that as pointed out by the Asst. Provincial Prosecutor, the same movant counsel sometime on July 22, 1993 filed a notice of appeal assailing the resolution of the provincial prosecutor dated July 16, 1993 finding probable cause against all the above-named accused for the crime of Murder and Multiple frustrated Murder, to the Honorable Secretary of Justice, by raising the same issue that "instead of recommending the filing of a political crime such as subversion or rebellion, the investigating prosecutor is recommending the filing of the common crime of murder to cover-up the apparent political color of the alleged crime committed." Until the appeal by the movant therefore is resolved by the Secretary of Justice, this court will have no basis to order the public prosecutor to amend or change the crime charged in the information. Besides, this Court recognizes and respects the prerogative of the fiscal to determine whether or not a prima facie case exists in a given case against the accused. This power vested in the fiscal cannot be interfered with even by the courts.

But since the case has already been filed with this Court, jurisdiction thereover now lies with the court. It may not even be bound by the ruling of the Secretary of Justice. . . .

Private respondents twice moved for a reconsideration and twice were rebuffed. They then filed a petition for certiorari with this Court to set aside the orders dated September 29, October 24, and November 3, 1995 of the trial court. They impleaded the provincial prosecutor of Zamboanga del Norte as co-respondent of Judge Pacifico Garcia of the Regional Trial Court, Branch 8, Dipolog City.

Without ruling on the petition, this Court referred the case to the Court of Appeals which, in a decision[4] dated July 24, 1996, the subject of this review, found the provincial prosecutor guilty of grave abuse of discretion in charging private respondents with murder with multiple frustrated murder. The Court of Appeals held:

The New People's Army (NPA) is the armed component of the Communist Party in this country called the National Democratic Front (NDF). The ultimate objective of the NPA/NDF is to overthrow the constitutional democratic Philippine Government and supplant it with a government anchored on the communist ideology.

It is common practice of the military and police to charge captured or arrested members of the NPA with capital offenses like murder, robbery with homicide, illegal possession of firearms used in the commission of homicide or murder, arson resulting in death rather than on simple rebellion.

If an NPA fighter (terrorist, according to the military lexicon) commits homicide, murder, arson, robbery, illegal possession of firearms and ammunition in furtherance or on the occasion of his revolutionary pursuit, the only crime he has committed is rebellion because all those common crimes are absorbed in the latter one pursuant to the ruling in *People v. Hernandez*, 99 Phil. 515 and several subsequent cases.

The reason why instead of charging the NPA fighter with capital offenses mentioned supra and not the proper offense of rebellion is obvious. Rebellion is aailable offense and given the resources of the NPA, it is the easiest thing for it to bail out its members facing rebellion charges in court. Once out, the NPA fighter goes back to his mountain lair and continues the fight against the government. If he is accused of a capital offense where the granting of bail is a matter of discretion, his chances of securing provisional liberty during the pendency of the trial are very much lessened.

Since, the military and the police carry the brunt of fighting the NPAs and in so doing they put their limbs and lives on the line, it is easy for Us to understand why they usually charge the captured or arrested NPAs with capital offenses instead of the proper offense which is rebellion. The police or military practice is of course wrong, but it is not much of a problem because it is at most recommendatory in nature. It is the prosecutory service that ultimately decides the offense to be charged.

....

No one disputes the well-entrenched principle in criminal procedure that the public prosecutor has the discretion to determine the crime to be charged in a criminal action. But like all discretions, his must be exercised soundly, meaning, reasonably, responsibly, and fairly. As stated by the Supreme Court in *Misola v. Panga* cited in respondents' Comment (p. 61, Rollo); "The question of instituting a criminal charge is one addressed to the sound discretion of the investigating Fiscal. The information must be supported by the facts brought about by an inquiry made by him." (underscoring supplied).

If then, a public prosecutor deliberately ignores or suppresses an evidence in his hands which palpably indicates the chargeable offense and files an information charging a more serious one, he departs from the precinct of discretion and treads on the forbidden fi[el]d or arbitrary action.

This was what happened in the case at bench. The evidentiary bases of the criminal action against petitioners are the Joint Affidavit and the recorded testimony earlier adverted to. It is not at all disputed that based upon these two documents, the proper offense to charge petitioners with is rebellion. No amount of legalistic sophistry can make those documents support murder with multiple frustrated murder for these offenses in the factual milieu in this case were all absorbed by rebellion.

We vehemently reject respondents' contention that the petitioners do not suffer any prejudice because they can use their theory that the chargeable offense is only rebellion as a defense in the trial on the merits and if the trial court finds that the evidence establishes only rebellion, then, it can convict them under the Information for just that lesser crime. This argument is not only wrong but betrays an insensitivity to violation of human rights. If prosecutory discretion is twisted to charge a person of an unbailable offense and, therefore, keeps him under detention when the truly chargeable offense is a bailable one, the prosecutor transgresses upon the human rights of the accused.[5]

The appeals court was more kindly disposed toward the trial court. It said:

Respecting the respondent court, the situation is different. . . .

...

[T]he Joint Affidavit and the recorded testimony mentioned earlier are not part of the records. The trial has not yet been started and, therefore, no evidence has yet been adduced. There is no basis then for the trial court even to call the attention of the prosecutor to a mistake in the crime charged.

We hold that respondent court did not commit an error in issuing the assailed orders, mu[ch] less gravely abuse[d] its discretion in issuing them.[6]

Accordingly, the Court of Appeals ordered:

WHEREFORE, with the foregoing premises, We a) dismiss the petition as against respondent court for lack of merit; and b) order the respondent office of Provincial Prosecutor to file a substitute Information in Criminal Case No. 6427 charging the petitioners with rebellion only.[7]

Petitioner contends that the Court of Appeals erred -

- IN MAKING DISPARATE AND IRRECONCILABLE RULINGS CONCERNING THE CORRECTNESS OF THE ACTION OF PETITIONER AND THE LOWER COURT.

- IN HOLDING THAT PETITIONER GRAVELY ABUSE[D] ITS DISCRETION IN CHARGING PRIVATE RESPONDENTS WITH MURDER AND MULTIPLE FRUSTRATED MURDER.[8]

We find the contentions to be well taken.

First. It was improper for the Court of Appeals to consider the record of the preliminary investigation as basis for finding petitioner provincial prosecutor guilty of grave abuse of discretion when such record was not presented before the trial court and, therefore, was not part of the record of the case. Rule 112, §8 of the Revised Rules of Criminal Procedure provides:

SEC. 8. Record of preliminary investigation. - The record of the preliminary investigation whether conducted by a judge or a fiscal, shall not form part of the record of the case in the Regional Trial Court. However, the said court, on its own initiative or that of any party, may order the production of the record of any part thereof whenever the same shall be necessary in the resolution of the case or any incident therein, or shall be introduced as evidence by the party requesting for its production.

The certiorari proceedings in the Court of Appeals was limited to the record of the trial court and indeed the Court of Appeals recognized this by absolving the trial court of any liability for abuse of its discretion. It is petitioner provincial prosecutor which it found guilty of grave abuse of discretion in filing a case for murder with multiple frustrated murder against private respondents because, in its view, the crime committed is rebellion. The Court of Appeals based its ruling on the joint affidavit of five prosecution witnesses and their testimonies relating to such affidavit before the Municipal Trial Court of Katipunan, Zamboanga del Norte, which had conducted the preliminary investigation. But this could not be done because the petition before it was a petition for certiorari to set aside orders of the Regional Trial Court denying private respondents' motion to compel petitioner to change the charge against them from murder with frustrated murder to rebellion.

To sustain the procedure followed by the Court of Appeals of considering evidence dehors the record of the trial court would be to set a bad precedent whereby the accused in any case can demand, upon the filing of the information, a review of the evidence presented during the preliminary investigation for the purpose of compelling the trial court to change the charge to a lesser offense. Such a ruling would undermine the authority of the prosecutor and impose an intolerable burden on the trial court. As held in *Depamaylo v. Brotarlo*:^[9]

. . . The Court in a number of cases has declared that a municipal judge has no legal authority to determine the character of the crime but only to determine whether or not the evidence presented supported prima facie the allegation of facts contained in the complaint. He has no legal authority to determine the character of the crime and his declaration upon that point can only be regarded as an expression of opinion in no wise binding on the court (*People vs. Gorospe*, 53 Phil. 960; *de Guzman vs. Escalona*, 97 SCRA 619). This power belongs to the fiscal (*Bais vs. Tugaoen*, 89 SCRA 101).

It is to be noted that private respondents did not even attend the preliminary investigation during which they could have shown that the crime committed was rebellion because the killing and wounding of the government troopers was made in furtherance of rebellion and not for some private motive.

Second. Indeed, it is not at all clear that the crime as made out by the facts alleged in the Joint Affidavit of witnesses is rebellion and not murder with multiple murder. The affidavit reads:

REPUBLIC OF THE PHILIPPINES)
PROVINCE OF ZAMBOANGA DEL NORTE) S.S.
Municipality of Jose Dalman)

x ----- x

JOINT AFFIDAVIT

I, Teofilo D. Sarigan, 31 years old, Manuel A. Cuenca, 28 yrs. old, Romulo A. Pacaldo, 25 years old, Carmelito Carpe, 36 yrs. old, all married and Pablo D. Maladia, 20 yrs. old and with postal address of Brgy. Loper, Brgy. Lumaping, of Jose Dalman, Brgy. Villahermosa, Roxas, all of ZDN, Brgy. Sigamok, Dumingag,

ZDS and Brgy. Lipay, Jose Dalman, ZDN after having been duly sworn to an oath in accordance to law do hereby depose and answer questions propounded:

QUESTIONS AND ANSWERS:

01. Q -

Why are you here now in this office?

A -

To render statement regarding the alleged incident wherein we were previously involved when we were still with the underground movement of CPP/NPA that transpired on or about 011000H May 1988 at vicinity Campo Uno, Femagas, Katipunan, ZDN against the government troops of 321B.

02. Q -

Since when the five (5) of you entered the underground movement of CPP/NPA?

A -

Since May 16, 1980, August 12, 1980, March 12, 1981, May 7, 1983 and August 27, 1987, sir.

03. Q -

What is your previous position?

A -

CO, FCOM (Front Command) and second deputy secretary of FC-1 "BBC, the Vice CO, FCOM, the CO, FCOM after @ Bebeth surrendered, a Yunit Militia (YM) member, GYP element under squad Lion all of FC-1 "BBC" in which we are operating within the Province of ZDN.

04. Q -

Will you narrate to me what and how the incident you are referring to all about?

A -

Actually sir, last 30 April 1988 our main force of FGU, FC-1 "BBC" had a meeting at vicinity basketball court of vicinity Campo Uno, Femagas, Katipunan, ZDN. While on that status our security group left at the highground portion of the place [and] engage[d] the advancing government troops of 321B afterwhich we then decided to postpone the meeting hence, the government troops presence. However, on the following day of 01 May 1988 at about 10:00 o'clock in the morning when we assembled again at the aforesaid place, firefight occurred between us and the government troops of 321B which resulted to inflict casualties to the 321B troopers, KIA one (1) Cpl. Alfredo Dela Cruz and wounding four (4) others, Sgt. Rodrigo Alviar, Sgt. Linogaman Piatos, Sgt. Rodrigo Baradi and Sgt. Bellizar while on our side with one wounded @ TOY.

05. Q -

Can you still recall the names of those other NPA's that participated in that encounter against the government

troops?

A - Yes, sir. ATICO OBORDO @ DONDOY, NACENCIANO PACALIUGA JR. @ ALFIE/IGI, ELEAZAR FLORENDO, NESTOR BASES @ BELOY/BELLY, FLORENCIO CANDIA @ BIMBO, JUDY CATUBIG @ ELBOY/AL, PETER MOLATO @ JOKER, BIENVENIDO CATUBIG @ RASTY, ALBERTO CATUBIG @ BLACKY/RENATO, ALMARIO CATUBIG @ NOEL, ROGER CATUBIG @ JAMES, JOEL CATUBIG @ NIXON, JIMMY DINGAL @ MACBOY, ENRICO SIMBULAN @ NONSTOP, @ DANDY, @ WAWAY, @ ALBA/JONAS, JIMMY GARIG @ NONOY, NILO CATUNGAN @ GINO, BERNIDO QUENECAS @ DIGOY, @ CRISTINE/LFA @ MARILOU @ ELNA, @ BENIGNO, PAULINO CORPUZ @ JR/PAWA, BENJAMIN SANDANTER @ JAKE, @ NESTOR, @ JAY, @ ISAGANI, @ RONIE, ESMAEL OBORDO @ ANICIO, @ FREDO, @ RUEL, @ DODONG, JULITA ADJANAN @ GENIE, @ TONY, @ RJ, @ LANNIE @ DEMET, @ RENDON, @ JESS, @ SAMSON AND many others, sir.

Q -

Then what transpired next?

A -

Right after the encounter, we withdraw our troops towards vicinity SVR, complex, Sergio Osmena, Sr., ZDN.

Q -

Do you have something more to say?

A -

Nothing more, sir.

Q -

Are you willing to sign your statement without being forced, coerced or intimidated?

A -

Yes, sir.

IN WITNESS WHEREOF, WE hereunto affix our signature this 1st day of June 1993 at Katipunan, ZN, Philippines.

(SGD.) TEOFILO D. SARIGAN (SGD.) MANUEL A. CUENCA
Affiant Affiant

(SGD.) ROMULO A. PACALDO
Affiant

(SGD.) CARMELITO L. CARPE (SGD.) PABLO G. MALABIA
Affiant Affiant

SUBSCRIBED and SWORN to before me this 1st day of June 1993 at Katipunan, ZN, Philippines.

(SGD.) ADELA S. GANDOLA

Municipal Trial Judge

Nowhere is the political motivation for the commission of the crime indicated in the foregoing affidavit. Merely because it is alleged that private respondents were members of the CPP/NPA who engaged government troops in a firefight resulting in the death of a government trooper and the wounding of four others does not necessarily mean that the killing and wounding of the victims was made in furtherance of a rebellion. The political motivation for the crime must be shown in order to justify finding the crime committed to be rebellion. Otherwise, as in *People v. Ompad*,^[10] although it was shown that the accused was an NPA commander, he was nonetheless convicted of murder for the killing of a person suspected of being a government informer. At all events, as this Court said in *Baylosis v. Chavez*:^[11]

. . . . Certainly, the public prosecutors should have the option to ascertain which prosecutions should be initiated on the basis of the evidence at hand. That a criminal act may have elements common to more than one offense does not rob the prosecutor of that option (or discretion) and mandatorily require him to charge the lesser offense although the evidence before him may warrant prosecution of the more serious one.^[12]

In *Baylosis v. Chavez*, the accused, who were NPA members, assailed the constitutionality of P.D. No. 1866 under which they were charged with illegal possession of firearm and ammunition on the ground that it gave prosecutors the discretion to charge an accused either with rebellion or with other crimes committed in furtherance thereof. In rejecting their contention, this Court said:

. . . . The argument is not tenable. The fact is that the Revised Penal Code treats rebellion or insurrection as a crime distinct from murder, homicide, arson, or other felonies that might conceivably be committed in the course of rebellion. It is the Code, therefore, in relation to the evidence in the hands of the public prosecutor, and not the latter's whim or caprice, which gives the choice. The Code allows, for example, separate prosecutions for either murder or rebellion, although not for both where the indictment alleges that the former has been committed in furtherance of or in connection with the latter.^[13]

The burden of proving that the motivation for the crime is political and not private is on the defense. This is the teaching of another case,^[14] in which it was held:

. . . . In deciding if the crime is rebellion, not murder, it becomes imperative for our courts to ascertain whether or not the act was done in furtherance of a political end. The political motive of the act should be conclusively demonstrated.

In such cases the burden of demonstrating political motive falls on the defense, motive, being a state of mind which the accused, better than any individual, knows. . . .

. . . .

[I]t is not enough that the overt acts of rebellion are duly proven. Both purpose and overt acts are essential components of the crime. With either of these elements wanting, the crime of rebellion legally does not exist. .

. .

The proceedings in the case at bar is still in the pre-arraignment stage. The parties have yet to present their respective evidence. If, during the trial, private respondents are able to show proof which would support their present contention, then they can avail of the remedy provided under the second paragraph of Rule 110, §14^[15] which provides:

If it appears at any time before judgment that a mistake has been made in charging the proper offense, the court shall dismiss the original complaint or information upon the filing of a new one charging the proper offense in accordance with Rule 119, Section 11, provided the accused would not be placed thereby in double jeopardy . .

..

Until then, however, petitioner provincial prosecutor is under no obligation to change the charge against private respondents.

Third. The Court of Appeals says it is a common practice of the military and the police to charge captured members of the NPA with capital offenses like murder, robbery with homicide, or illegal possession of firearms rather than rebellion. The alleged purpose is to deny them bail since murder is a capital offense and private respondents will have a right to bail only if it can be shown that the evidence against them is not strong, whereas if the charge is rebellion, private respondents would have an absolute right to bail.

As already stated, however, given the Joint Affidavit of the prosecution witnesses alone, it is not possible to determine at this stage of the criminal proceeding that in engaging the government troops in a "firefight," private respondents were acting in pursuance of rebellion. It could be that the "firefight" was more of an ambush staged by the NPA, as shown by the fact that while the government troop suffered one dead and four wounded, the CPP/NPA suffered only one wounded.

The charge that it is "common practice" for the military and the police to charge suspected rebels with murder in order to prevent them from going out on bail can be laid equally at the door of the accused. As noted in *Enrile v. Salazar*:^[16]

It may be that in the light of contemporary events, the act of rebellion has lost that quintessentially quixotic quality that justifies the relative leniency with which it is regarded and punished by law, that present-day rebels are less impelled by love of country than by lust for power and have become no better than mere terrorists to whom nothing, not even the sanctity of human life, is allowed to stand in the way of their ambitions. Nothing so underscores this aberration as the rash of seemingly senseless killings, bombings, kidnappings and assorted mayhem so much in the news these days, as often perpetrated against innocent civilians as against the military, but by and large attributable to, or even claimed by so-called rebels to be part of, an ongoing rebellion.^[17]

What the real crime is must await the presentation of evidence at the trial or at the hearing on the application for bail. Those accused of common crimes can then show proof that the crime with which they were charged is really rebellion. They are thus not without any remedy.

WHEREFORE, the decision of the Court of Appeals, dated July 24, 1996, is REVERSED insofar as it orders petitioner to file a substitute information for rebellion in Criminal Case No. 6427. In other respects, it is AFFIRMED.

SO ORDERED.

Bellosillo, (Chairman), Quisumbing, Buena, and De Leon, Jr., JJ., concur.

[1]Rodolfo T. Mata.

[2]Rollo, pp. 44-46.

[3]Id., pp. 50-51.

[4]Per Justice Hilarion L. Aquino and concurred in by Justices Jainal D. Rasul and Hector Hofileña.

[5]CA Decision, pp. 4-6; Rollo, pp. 43-45.

[6]Id., p. 6; id., p. 45.

[7]Id., p. 7; id., p. 46

[8]Rollo, p. 19.

[9]265 SCRA 151, 157 (1996).

[10]233 SCRA 62 (1994).

[11]202 SCRA 405, 420 (1991).

[12]Supra at 419-420 (1991).

[13]Id. at 415 (emphasis added).

[14]People v. Lovedioro, 250 SCRA 389, 395 (1995) (emphasis added).

[15]Now Rule 110, §14, par. 3 of the Revised Rules of Criminal Procedure (2000).

[16]186 SCRA 217 (1990).

[17]Supra at 233.

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