

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLANT, VS. ASTURO TOGLE, VICTOR TOGLE, DEFENDANT AND APPELLEE.*G. R. No. 13709. January 30, 1959*

Ponente: BAUTISTA ANGELO, J.

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On May 8, 1957, the accused was charged with qualified theft before the Court of First Instance of Negros Occidental where, upon arraignment, he pleaded not guilty. The case was set for hearing but it was postponed several times, once *motu proprio* by the court due to lack of material time, once at the instance of the prosecution, and several times at the instance of the defense. At the hearing held on December 27, 1957, the fiscal for the second time asked for the postponement of the trial for took the present appeal. Under Section 9 of Rule 113 of the Rules of Court, the reason that he had only one witness available. Counsel for the accused objected to a further postponement of the trial invoking the right of the accused to a speedy trial, but in the latter part of his objection he stated: "And as the prosecution does not have witnesses or evidence against the accused, I would like to ask that this case be dismissed provisionally until the fiscal will be ready to enter into trial, Your Honor." And it appearing that this case had been postponed several times and the prosecution could not go to trial because its most important witness failed to appear, the court denied the motion and dismissed the case provisionally with costs de oficio.

On January 20, 1958, the city fiscal of Bacolod again charged the accused with the same offense of qualified theft reproducing practically the same information that was previously filed against him. On February 19, 1958, counsel for the accused filed a motion to quash on the ground that to proceed with the prosecution of the accused would place the latter in double jeopardy. This motion was objected to by the city fiscal contending that there is no double jeopardy because the first case was dismissed precisely upon the express petition of the accused, but the court sustained the motion and dismissed the case, with costs de oficio, whereupon the Government took the present appeal.

Under Section 9 of Rule 113 of the Rules of Court, if the case against the accused is dismissed by the court without his consent, the dismissal is a bar to another prosecution for the same offense; but if the case is dismissed upon his request or with his express consent, the dismissal is not a bar to another prosecution for the same offense because his act constitutes a waiver of his defense of double jeopardy. in the present case, it is contended, the accused must be deemed to have waived such a defense when, considering that the prosecution cannot go to trial because of the inability of its important witness to appear, he expressly asked the court to dismiss the case provisionally "until the fiscal will be ready to enter into trial." For this reason, the trial court dismissed the case provisionally.

Counsel for the accused, on the other hand, has filed a written statement wherein he made manifest his conformity to the views expressed by the Solicitor General and joins him in asking for the setting aside of the order subject of the present appeal.

It appearing that the dismissal of the previous case was made provisionally and upon the express request of counsel for the accused, we hold that the prosecution of the second case, even if it covers the same crime, does not give rise to double jeopardy,

The order appealed from is set aside. This case is remanded to the lower court for further proceedings. No costs.

Paras, C.J., Bengzon, Padilla, Montemayor, Labrador, Reyes, J.B.L., and Endencia, JJ., concur.

CONCURRING

CONCEPCION, J.,

The first case having been dismissed after jeopardy had attached, the present case places the accused twice in jeopardy of punishment for the same offense. This notwithstanding, appellee cannot avail himself of the constitutional guarantee against double jeopardy, the same having been impliedly waived by him when he moved for the provisional dismissal of the first case "until the fiscal will be ready to enter into trial." Hence, I concur in the reversal of the order appealed from.

[1] *Candicela vs. Lutero*, 88 Phil., 299; *People vs. Romero*, 89 Phil 672; 93 Phil., 128 *Co Te Hua vs. Hon. Demetrio B. Encarnacion*, 94 Phil., 258.

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