

PEOPLE OF THE PHILIPPINES, APPELLEE, VS. JOSE TING LAN UY, JR. (ACQUITTED), ERNESTO GAMUS Y SOTELO, JAIME OCHOA, ALL OF THE NATIONAL POWER CORPORATION, AND RAUL GUTIERREZ ALIAS ...

G.R. No. 157399. November 17, 2005

Ponente: YNARES-SANTIAGO, J.

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YNARES-SANTIAGO, J.:

For allegedly diverting and collecting funds of the National Power Corporation (NPC) intended for the purchase of US Dollars from the United Coconut Planters Bank (UCPB), Jose Ting Lan Uy, Jr., Ernesto Gamus,[1] Jaime Ochoa and Raul Gutierrez were indicted before the Sandiganbayan for the complex crime of Malversation through Falsification of Commercial Documents defined and penalized under Articles 217 and 171 (8), in relation to Article 48 of the Revised Penal Code, in an amended Information,[2] docketed as Criminal Case No. 19558, which alleges –

That sometime in July 1990, or for sometime prior or subsequent thereto, in Quezon City, Philippines, and within the jurisdiction of this Honorable Court, accused Jose Ting Lan Uy, Jr., a public accountable officer, being the Treasurer of National Power Corporation (NAPOCOR), Ernesto Gamus and Jaime Ochoa, both public officers being the Manager of the Loan Management and Foreign Exchange Division (LOMAFED) and Foreign Trader Analyst, respectively, also of NAPOCOR, and accused Raul Gutierrez, alias Raul Nicolas, alias George Añonuevo, alias Mara Añonuevo, a private individual being a foreign exchange trader, said public officers taking advantage of their official positions, with grave abuse of authority and committing the offense in relation to their office, conspiring, confederating and mutually helping one another, with their private co-accused, did then and there willfully, unlawfully and feloniously falsify or cause to be falsified the NPC's application for managers checks with the Philippine National Bank (PNB), NPC Branch in the total amount of ONE HUNDRED EIGHTY THREE MILLION EIGHT HUNDRED FIVE THOUSAND TWO HUNDRED NINETY ONE PESOS and TWENTY FIVE CENTAVOS (P183,805,291.25), Philippine Currency, intended for the purchase of US dollars from the United Coconut Planters Bank (UCPB), by inserting the account number of Raul Gutierrez SA-111-121204-4, when in truth and in fact as the accused well knew that the Payment Instructions (PI) when signed by the NAPOCOR authorities did not indicate the account number of Raul Gutierrez, thereby making alteration or intercalation in a genuine document which changes its meaning, and with the use of the said falsified commercial documents, accused succeeded in diverting, collecting and receiving the total amount of ONE HUNDRED EIGHTY THREE MILLION EIGHT HUNDRED FIVE THOUSAND TWO HUNDRED NINETY ONE PESOS AND TWENTY FIVE CENTAVOS (P183,805,291.75), Philippine Currency from the National Power Corporation, which they thereafter malverse, embezzle, misappropriate and convert to their own personal use and benefit to the damage and prejudice of the National Power Corporation in the aforementioned sum.

CONTRARY TO LAW.

Upon arraignment, Gamus, Uy and Ochoa pleaded not guilty to the charge, while Gutierrez has remained at large.

On pre-trial, the prosecution and the defense stipulated –

- That accused Uy at the time stated in the information was a Treasurer at the NPC;
- That accused Ernesto Gamus was at the time mentioned in the information was (sic) the Manager of Loan Management and Foreign Exchange Division (LOMAFED);
- That accused Jaime Ochoa was the Senior Financial Analyst, LOMAFED, at the time mentioned in the information;
- That accused Gamus does not have any custody to (sic) public funds;
- That accused Ochoa's position as Sr. Financial Analyst did not require him to take custody or control of public funds;
- That the application forms for cashier's check or Manager's check are not accountable forms of the NAPOCOR.[3]

Trial on the merits thereafter ensued. On May 28, 2002, the Sandiganbayan rendered its Decision,[4] the dispositive portion of which reads:

WHEREFORE, premises considered, accused Jaime B. Ochoa is hereby found GUILTY beyond reasonable doubt of the crime of Malversation thru falsification of Commercial Document and is sentenced to suffer the penalty of reclusion perpetua and to pay a fine equal to the amount malversed which is ONE HUNDRED EIGHTY THREE MILLION EIGHT HUNDRED FIVE THOUSAND TWO HUNDRED NINETY ONE PESOS AND TWENTY FIVE CENTAVOS (P183,805,291.25) solidarily with accused Jose Ting Lan Uy, Jr. Accused Ochoa shall also suffer the penalty of perpetual disqualification. Costs against the accused.

On the ground of reasonable doubt, accused JOSE TING LAN UY, Jr. is hereby ACQUITTED of Malversation of Public Funds thru Falsification of Commercial Document. However, because of preponderance of evidence, he is CIVILLY LIABLE for the damages suffered by the NPC in the amount of ONE HUNDRED EIGHTY THREE MILLION EIGHT HUNDRED FIVE THOUSAND TWO HUNDRED NINETY ONE PESOS AND TWENTY FIVE CENTAVOS (P183,805,291.25) solidarily with accused Jaime Ochoa. The Hold Departure Order against the accused embodied in this Court's Resolution dated April 18, 2002 is recalled.

Let an alias warrant of arrest be issued against Raul Gutierrez, alias Raul Nicolas, alias George Añonuevo, alias Mara Añonuevo with last known address at 1348 A. Mabini Street, Ermita, Manila or Suite 603 VIP Building, Roxas Boulevard, Manila.

SO ORDERED.[5]

Aggrieved, Ochoa interposed this appeal alleging that the Sandiganbayan erred in –

- convicting him based on the allegations in the information;
- admitting and considering his alleged sworn statements;
- considering the alleged transcripts of stenographic notes and the NBI Report.[6]

The factual antecedents of the case, as summed by the Sandiganbayan, are not disputed by the parties:

In July of 1990, the National Power Corporation ("NPC") became embroiled in a controversy involving the disappearance of P183,805,291.25 of its funds which were originally on deposit with the Philippine National Bank, NPC Branch ("PNB") but were subsequently used to purchase two (2) managers'/cashier's checks (the first check was in the amount of P70,000,000.00 while the second was for P113,805,291.25) in order to

comply with its loan obligations to the Asian Development Bank ("ADB"). As NPC's debt in favor of ADB was in yen, NPC was obligated to follow an intricate and circuitous procedure of buying US dollars from a local bank (in this case, United Coconut Planters Bank or UCPB T.M. Kalaw Branch), which local bank was supposed to remit the US dollars to an off-shore bank. This off-shore bank (in this case, the Credit Lyonnais, New York) was then supposed to remit the yen equivalent of the US dollars to a third bank (in this case, the Bank of Japan, Tokyo Branch) which would then credit the funds to the account of the ADB. The contracts of NPC with the concerned banks (embodied in three [3] "Payment Instructions") included a "value date" (which was July 13, 1990), the mere arrival of which would trigger the above-mentioned procedure, culminating in the payment to ADB of the NPC obligation in the foreign currency agreed upon.

On value date, per routing procedure, Credit Lyonnais (the second bank) remitted Japanese Yen 1,143,316,130.00 to the Bank of Japan, Tokyo Branch. Likewise, per routing procedure, UCPB T.M. Kalaw Branch was supposed to have remitted on said value date the amount of US\$7,740,799.80. UCPB T.M. Kalaw, however, despite the fact that the PNB had already issued two (2) manager's/cashier's checks ("Manager's check" for brevity) for such purpose, did not make the agreed remittance to Credit Lyonnais, so Credit Lyonnais received no payment for the funds it had remitted to the Bank of Japan, Tokyo. Both the State and the accused have offered explanations for the failure of UCPB, T.M. Kalaw Branch to remit the dollar equivalent of P183,805,291.25 to Credit Lyonnais. Both explanations, naturally, were diametrically opposed.[7]

The prosecution theorizes that the accused diverted the funds covered by the two PNB Manager's checks by falsifying a commercial document called an "Application for Cashier's Check" (ACC) by inserting an account number (A/C #111-1212-04) of a private individual after the name of the payee, UCPB, T.M. Kalaw Branch. It claims that NPC did not authorize the insertion considering that the Payment Instruction (PI) issued by NPC instructing PNB to prepare a Manager's check to be charged to NPC's savings account did not contain any account number. Through the insertion, the accused allegedly succeeded in diverting the funds from the UCPB, T.M. Kalaw Branch in favor of Raul Gutierrez @ Raul Nicolas @ George Añonuevo @ Mara Añonuevo, who is still at large.

In his defense, appellant asserts that there was no evidence that he committed any of the acts alleged in the information, particularly the intercalation on the ACC; that he deposited the checks subsequently issued or that he received the proceeds thereof; or that he conspired with any of his co-accused. He claims that his conviction was based on the alleged sworn statement and the transcript of stenographic notes of a supposed interview with appellant by the NPC personnel and the report of the National Bureau of Investigation (NBI). Appellant maintains that he signed the sworn statement while confined at the Philippine Heart Center and upon assurance that it would not be used against him. He was not assisted by counsel nor was he apprised of his constitutional rights when he executed the affidavit.

To be found guilty of malversation, the prosecution must prove the following essential elements:

a.]

The offender is a public officer;

b.]

He has the custody or control of funds or property by reason of the duties of his office;

c.]

The funds or property involved are public funds or property for which he is accountable; and

d.]

He has appropriated, taken or misappropriated, or has consented to, or through abandonment or negligence, permitted the taking by another person of, such funds or property.[8]

Appellant insists that he could not be convicted under the allegations in the information without violating his constitutional right to due process and to be informed of the accusation against him. He points out that the information alleges willful and intentional commission of the acts complained of while the judgment found him guilty of inexcusable negligence amounting to malice.

Appellant's contention lacks merit. Malversation may be committed either through a positive act of misappropriation of public funds or property or passively through negligence by allowing another to commit such misappropriation.[9] To sustain a charge of malversation, there must either be criminal intent or criminal negligence[10] and while the prevailing facts of a case may not show that deceit attended the commission of the offense, it will not preclude the reception of evidence to prove the existence of negligence because both are equally punishable in Article 217 of the Revised Penal Code.

More pointedly, the felony involves breach of public trust, and whether it is committed through deceit or negligence, the law makes it punishable and prescribes a uniform penalty therefor. Even when the information charges willful malversation, conviction for malversation through negligence may still be adjudged if the evidence ultimately proves that mode of commission of the offense.[11] Explicitly stated –

Even on the putative assumption that the evidence against petitioner yielded a case of malversation by negligence but the information was for intentional malversation, under the circumstances of this case his conviction under the first mode of misappropriation would still be in order. Malversation is committed either intentionally or by negligence. The *dolo* or the *culpa* present in the offense is only a modality in the perpetration of the felony. Even if the mode charged differs from mode proved, the same offense of malversation is involved and conviction thereof is proper.[12]

The question of whether or not an information charging the commission of the crime by means of deceit will preclude a conviction on the basis of negligence is neither novel nor of first impression. In *Samson v. Court of Appeals, et al.*,[13] we ruled that an accused charged with willful or intentional falsification can validly be convicted of falsification through negligence, thus:

While a criminal negligent act is not a simple modality of a willful crime, as we held in *Quizon vs. Justice of the Peace of Bacolor, ...* but a distinct crime in itself, designated as a quasi offense in our Penal Code, it may however be said that a conviction for the former can be had under an information exclusively charging the commission of a willful offense, upon the theory that the greater includes the lesser offense. This is the situation that obtains in the present case. Appellant was charged with willful falsification but from the evidence submitted by the parties, the Court of Appeals found that in effecting the falsification which made possible the cashing of the checks in question, appellant did not act with criminal intent but merely failed to take proper and adequate means to assure himself of the identity of the real claimants as an ordinary prudent man would do. In other words, the information alleges acts which charge willful falsification but which turned out to be not willful but negligent. This is a case covered by the rule when there is a variance between the allegation and proof, and is similar to some of the cases decided by this Tribunal.

....

The fact that the information does not allege that the falsification was committed with imprudence is of no

moment for here this deficiency appears supplied by the evidence submitted by appellant himself and the result has proven beneficial to him. Certainly, having alleged that the falsification has been willful, it would be incongruous to allege at the same time that it was committed with imprudence for a charge of criminal intent is incompatible with the concept of negligence.

In *People v. Consigna, et al.*,^[14] we ruled that the afore-stated rationale also applies to the felony of malversation, that is, that an accused charged with willful malversation, in an information containing allegations similar to the present case, can be validly convicted of the same offense of malversation through negligence where the evidence sustains the latter mode of perpetrating the offense.

Appellant next claims that he should be acquitted since his conviction was based on his sworn statement, transcript of stenographic notes from which the sworn statement was taken and the NBI Report, which are incompetent evidence. He contends that his sworn statement was taken without the benefit of counsel, in violation of his constitutional right under Section 12, Article III of the 1987 Constitution.

Paragraph 1, Section 12, Article III of the 1987 Constitution states that –

Section 12. (1). Any person under investigation for the commission of an offense shall have the right to be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel.

The "investigation" under the above-quoted provision refers to a "custodial" investigation where a suspect has already been taken into police custody^[15] and the investigating officers begin to ask questions to elicit information and confessions or admissions from the suspect.^[16] More specifically –

Custodial investigation involves any questioning initiated by law enforcement authorities after a person is taken into custody or otherwise deprived of his freedom of action in any significant manner. And, the rule begins to operate at once as soon as the investigation ceases to be a general inquiry into an unsolved crime and direction is then aimed upon a particular suspect who has been taken into custody and to whom the police would then direct interrogatory question which tend to elicit incriminating statements.^[17]

Succinctly stated, custodial investigation refers to the critical pre-trial stage when the investigation ceases to be a general inquiry into an unsolved crime but has begun to focus on a particular person as a suspect.^[18] Such a situation contemplated has been more precisely described thus where –

After a person is arrested and his custodial investigation begins a confrontation arises which at best may be termed unequal. The detainee is brought to an army camp or police headquarters and there questioned and cross-examined not only by one but as many investigators as may be necessary to break down his morale. He finds himself in a strange and unfamiliar surrounding, and every person he meets he considers hostile to him. The investigators are well-trained and seasoned in their work. They employ all the methods and means that experience and study has taught them to extract the truth, or what may pass for it, out of the detainee. Most detainees are unlettered and are not aware of their constitutional rights. And even if they were, the intimidating and coercive presence of the officers of the law in such an atmosphere overwhelms them into silence....^[19]

Clearly, therefore, the rights enumerated by the constitutional provision invoked by accused-appellant are not available before government investigators enter the picture.^[20] Thus we held in one case^[21] that admissions made during the course of an administrative investigation by Philippine Airlines do not come within the purview of Section 12. The protective mantle of the constitutional provision also does not extend to admissions or confessions made to a private individual,^[22] or to a verbal admission made to a radio announcer who was not part of the investigation,^[23] or even to a mayor approached as a personal confidante and not in his official capacity.^[24]

Along the same vein, we held that a videotaped interview showing the accused unburdening his guilt willingly, openly and publicly in the presence of newsmen is not covered by the provision although in so ruling, we warned trial courts to take extreme caution in further admitting similar confessions because we recognized the distinct possibility that the police, with the connivance of unscrupulous media practitioners, may attempt to legitimize coerced extrajudicial confessions and place them beyond the exclusionary rule by having an accused admit an offense on television.[25]

Neither does the constitutional provision on custodial investigation extends to a spontaneous statement, not elicited through questioning by the authorities, but given in an ordinary manner whereby the accused orally admits having committed the crime,[26] nor to a person undergoing an audit examination because an audit examiner is not a law enforcement officer.[27]

Thus, the flaw in appellant's argument in this regard becomes immediately apparent vis-à-vis the foregoing legal yardsticks, considering that his statement was taken during the administrative investigation of NPC's audit team[28] and before he was taken into custody. As such, the inquest was still a general inquiry into an unsolved offense at the time and there was, as yet, no specific suspect.

Much less can appellant claim that he was in police custody because he was confined at the time at the Philippine Heart Center and he gave this statement to NPC personnel, not to police authorities.[29] Appellant can hardly claim that, under the prevailing circumstances at the time, whatever degree of compulsion may have existed went beyond the borders of the unobjectionable where impermissible levels of duress would force him into making false and incriminating declarations against his interest. While he may have been persuaded into doing so, he cannot feign that he was intimidated in such a way as to bring his statements within the ambit of the exclusionary constitutional provision.

The fact that an NBI investigation was being contemporaneously conducted at the time the sworn statement was taken will not extricate appellant from his predicament. The essence of the constitutional safeguard is protection from coercion. The interview where the sworn statement is based was conducted by NPC personnel for the NPC's administrative investigation. Any investigation conducted by the NBI is a proceeding separate, distinct and independent from the NPC inquiry and should not be confused or lumped together with the latter.

Appellant invokes *Galman v. Pamaran*[30] in insisting that the constitutional safeguard should have been applied notwithstanding that he was not yet arrested or under detention at the time. He also invites our attention to the pronouncements of Fr. Joaquin G. Bernas[31] that "the right to counsel is available if a person is in custody, even if he is not a suspect; or even if not yet in custody but he is a suspect."

The contention is tenuous. Although we held in *Galman* that the constitutional protection covers not only confessions but admissions as well, we qualified the ruling with the statement that what is being eschewed is the evil of "extorting" a confession from the mouth of the person being interrogated. As defined, "extortion" is an act or practice of taking or obtaining anything from a person by illegal use of fear, whether by force, threats or any undue exercise of power.[32] In the context of obtaining an admission, "extorting" means "compelling or coercing a confession or information by any means serving to overcome his power of resistance, or making the confession or admission involuntary." [33] In this case, we find nothing on record to support appellant's claim that his statements were extorted from him.

Furthermore, while indeed *Galman* taken together with the 1986 deliberations on what was later to become Section 12 (1) of the 1987 Constitution may lead to the conclusion that the rights are available when the person is already in custody as a suspect, or if the person is a suspect even if he is not yet deprived in any significant way of his liberty, Fr. Bernas[34] qualified this statement by saying that "[J]urisprudence under the 1987 Constitution,

however, has consistently held, following Escobedo, the stricter view, that the rights begin to be available only when the person is already in custody." [35]

Appellant next advances the argument that even if his sworn statement were admissible in evidence, the contents thereof may not be sufficient to sustain a conviction. He contends that although his statement was supposedly gathered from the transcript of stenographic notes of the conversation between him and Atty. Bagcal, neither Atty. Bagcal nor the person who actually prepared the sworn statement was presented. Therefore, the sworn statement is hearsay.

The argument is puerile. It bears stressing that the prosecution presented as witness Atty. Lamberto P. Melencio who saw appellant at the hospital to show him the prepared statement and to verify from him the truth of its contents. [36] Atty. Melencio testified that he asked appellant to go over the document before affixing his signature thereto. [37] He also inquired whether or not appellant was coerced or intimidated by anybody when the statement was taken. [38] Appellant denied that he was coerced or intimidated, [39] affirmed the contents of the document as a true reflection of his statements, [40] and signed the same. [41] It need not be overemphasized that the sworn statement is a duly notarized document which has in its favor the presumption of regularity and, thus, it can be contradicted only by clear and convincing evidence. Without that sort of evidence, the presumption of regularity, the evidentiary weight conferred upon such public document with respect to its execution, as well as the statements and the authenticity of the signatures thereon, stand. [42]

In disclaiming the authenticity of his sworn statement, appellant insists that at the time he signed the document, he was confined in the hospital and therefore not physically and mentally fit to assess the significance of his signature. This pretext however collides with the testimony of his own witness, Dr. Teresita Sadava, who stated that appellant was confined for three days and, who, when queried whether "ischemic heart disease" had any emotional or psychological effect, gave the inconclusive reply that it "may or may not." Moreover, as aptly observed by the Sandiganbayan, although supposedly violated and repulsed as he was by the alleged falsity of the affidavit, it is strange that appellant, who is supposedly astute in business matters as he then occupied the position of Foreign Trader Analyst of the NPC, nevertheless felt it unnecessary to execute another affidavit retracting the same after his recovery from illness. Verily, evidence to be believed must not only proceed from the mouth of a credible witness, but must be credible in itself – such as the common experience and observation of mankind can approve as probable under the circumstances. [43]

Appellant finally contends that both the NBI Investigation Report and the transcript of stenographic notes are hearsay for having been made extra-judicially. The record, however, shows that the prosecution presented the team leader of the NBI investigators who conducted the investigation, although his testimony was dispensed with as the parties stipulated on the existence and due execution of the NBI Investigation report albeit without admitting the truth of its contents. If at all, the admission of the report's existence is an acknowledgment that it is neither spurious nor counterfeit.

All told, given the paucity of substance in the arguments advanced by appellant to prop up his cause, his appeal must fall.

WHEREFORE, the May 28, 2002 Decision of the Sandiganbayan is hereby AFFIRMED in all respects.

SO ORDERED.

Davide, Jr., C.J. Quisumbing, Carpio, and Azcuna, JJ., concur.

- [1] Who passed away during the pendency of the proceedings below.
- [2] Rollo, pp. 12-13.
- [3] Id. at 38.
- [4] Id. at 37-97. Penned by then Associate Justice Minita V. Chico-Nazario, who is now a member of the Supreme Court, and concurred in by Associate Justices Ma. Cristina G. Cortez-Estrada and Francisco H. Villaruz, Jr.
- [5] Id. at 96-97.
- [6] Id. at 108-109.
- [7] Id. at 39-40.
- [8] *Barriga v. Sandiganbayan*, G.R. Nos. 161784-86, April 26, 2005, 457 SCRA 301, 313.
- [9] *Cabello v. Sandiganbayan*, G.R. No. 93885, May 14, 1991, 197 SCRA 94, 99.
- [10] *Deloso v. Hon. Desierto*, 372 Phil. 805, 813 [1999].
- [11] *Diaz v. Sandiganbayan*, 361 Phil. 789, 802-803 [1999].
- [12] *Cabello v. Sandiganbayan*, *supra* at 103.
- [13] 103 Phil. 277, 285-286 [1958].
- [14] 122 Phil. 293, 296 [1965].
- [15] Bernas, J.G., *The 1987 Constitution of the Republic of the Philippines: A Commentary*, 2003 ed., p. 453.
- [16] *People v. Figueroa*, 390 Phil. 561, 575 [2000].
- [17] *People v. De la Cruz*, 344 Phil. 653, 660-661 [1997].
- [18] *People v. Dueñas, Jr.*, G.R. No. 151286, March 31, 2004, 426 SCRA 666, 679.
- [19] *Morales, Jr. v. Minister Enrile, et al.*, 206 Phil. 466, 488 [1983].
- [20] Bernas, J.G., *supra* at 454.
- [21] *People v. Ayson*, G.R. No. 85215, July 7, 1989, 175 SCRA 216,
- [22] *Kimpo v. Court of Appeals*, G.R. No. 95604, April 29, 1994, 232 SCRA 53.
- [23] *People v. Ordoño*, 390 Phil. 649 [2000].
- [24] *People v. Zuela*, 380 Phil. 568 [2000].
- [25] *People v. Endino*, G.R. No. 133026, February 20, 2001, 352 SCRA 307.
- [26] *People v. Baloloy*, G.R. No. 140740, April 12, 2002, 381 SCRA 31.
- [27] *Navallo v. Sandiganbayan*, G.R. No. 97214, July 18, 1994, 234 SCRA 175.
- [28] TSN, January 22, 1996, p. 17.
- [29] Id.
- [30] Nos. L-71208-09 & Nos. L-71212-13, August 30, 1985, 138 SCRA 294.

[31] Bernas, J.G., *supra* at 453, citing the Session of November 25, 1972 of the Constitutional Convention.

[32] Words And Phrases, Vol. 15A, p. 649, citing U.S. v. Sutter, C.C.A. Ill. 160 F 2d 754, 756.

[33] *Id.* at 654, citing Sutton v. Commonwealth, 269 S. W. 754, 757. 207 Ky 597.

[34] Bernas, J.G., *supra* at 456.

[35] *Id.*

[36] TSN, October 8, 1996, p. 8.

[37] *Id.* at 13.

[38] *Id.*

[39] *Id.* at 14.

[40] *Id.* at 16.

[41] *Id.* at 17.

[42] Barcenas v. Tomas, G.R. No. 150321, March 31, 2005, 454 SCRA 593, 609.

[43] People v. Calumpang, G.R. No.158203, March 31, 2005, 454 SCRA 719, 735.

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