ARISTOTEL VALENZUELA Y NATIVIDAD, PETITIONER, VS. PEOPLE OF THE PHILIPPINES AND HON. COURT OF APPEALS, RESPONDENTS.

G.R. NO. 160188. June 21, 2007

Ponente: TINGA, J.

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TINGA, J.:

This case aims for prime space in the firmament of our criminal law jurisprudence. Petitioner effectively concedes having performed the felonious acts imputed against him, but instead insists that as a result, he should be adjudged guilty of frustrated theft only, not the felony in its consummated stage of which he was convicted. The proposition rests on a common theory expounded in two well-known decisions[1] rendered decades ago by the Court of Appeals, upholding the existence of frustrated theft of which the accused in both cases were found guilty. However, the rationale behind the rulings has never been affirmed by this Court.

As far as can be told,[2] the last time this Court extensively considered whether an accused was guilty of frustrated or consummated theft was in 1918, in People v. Adiao.[3] A more cursory treatment of the question was followed in 1929, in People v. Sobrevilla,[4] and in 1984, in Empelis v. IAC.[5] This petition now gives occasion for us to finally and fully measure if or how frustrated theft is susceptible to commission under the Revised Penal Code.

I.

The basic facts are no longer disputed before us. The case stems from an Information[6] charging petitioner Aristotel Valenzuela (petitioner) and Jovy Calderon (Calderon) with the crime of theft. On 19 May 1994, at around 4:30 p.m., petitioner and Calderon were sighted outside the Super Sale Club, a supermarket within the ShoeMart (SM) complex along North EDSA, by Lorenzo Lago (Lago), a security guard who was then manning his post at the open parking area of the supermarket. Lago saw petitioner, who was wearing an identification card with the mark "Receiving Dispatching Unit (RDU)," hauling a push cart with cases of detergent of the well-known "Tide" brand. Petitioner unloaded these cases in an open parking space, where Calderon was waiting. Petitioner then returned inside the supermarket, and after five (5) minutes, emerged with more cartons of Tide Ultramatic and again unloaded these boxes to the same area in the open parking space.[7]

Thereafter, petitioner left the parking area and haled a taxi. He boarded the cab and directed it towards the parking space where Calderon was waiting. Calderon loaded the cartons of Tide Ultramatic inside the taxi, then boarded the vehicle. All these acts were eyed by Lago, who proceeded to stop the taxi as it was leaving the open parking area. When Lago asked petitioner for a receipt of the merchandise, petitioner and Calderon reacted by fleeing on foot, but Lago fired a warning shot to alert his fellow security guards of the incident. Petitioner and Calderon were apprehended at the scene, and the stolen merchandise recovered.[8] The filched items seized from the duo were four (4) cases of Tide Ultramatic, one (1) case of Ultra 25 grams, and three (3) additional cases of detergent, the goods with an aggregate value of P12,090.00.[9]

Petitioner and Calderon were first brought to the SM security office before they were transferred on the same day to the Baler Station II of the Philippine National Police, Quezon City, for investigation. It appears from the police investigation records that apart from petitioner and Calderon, four (4) other persons were apprehended by the security guards at the scene and delivered to police custody at the Baler PNP Station in connection with the incident. However, after the matter was referred to the Office of the Quezon City Prosecutor, only petitioner and Calderon were charged with theft by the Assistant City Prosecutor, in Informations prepared on 20 May 1994, the day after the incident.[10]

After pleading not guilty on arraignment, at the trial, petitioner and Calderon both claimed having been innocent bystanders within the vicinity of the Super Sale Club on the afternoon of 19 May 1994 when they were haled by Lago and his fellow security guards after a commotion and brought to the Baler PNP Station. Calderon alleged that on the afternoon of the incident, he was at the Super Sale Club to withdraw from his ATM account, accompanied by his neighbor, Leoncio Rosulada.[11] As the queue for the ATM was long, Calderon and Rosulada decided to buy snacks inside the supermarket. It was while they were eating that they heard the gunshot fired by Lago, leading them to head out of the building to check what was transpiring. As they were outside, they were suddenly "grabbed" by a security guard, thus commencing their detention.[12] Meanwhile, petitioner testified during trial that he and his cousin, a Gregorio Valenzuela,[13] had been at the parking lot, walking beside the nearby BLISS complex and headed to ride a tricycle going to Pag-asa, when they saw the security guard Lago fire a shot. The gunshot caused him and the other people at the scene to start running, at which point he was apprehended by Lago and brought to the security office. Petitioner claimed he was detained at the security office until around 9:00 p.m., at which time he and the others were brought to the Baler Police Station. At the station, petitioner denied having stolen the cartons of detergent, but he was detained overnight, and eventually brought to the prosecutor's office where he was charged with theft.[14] During petitioner's cross-examination, he admitted that he had been employed as a "bundler" of GMS Marketing, "assigned at the supermarket" though not at SM.[15]

In a Decision[16] promulgated on 1 February 2000, the Regional Trial Court (RTC) of Quezon City, Branch 90, convicted both petitioner and Calderon of the crime of consummated theft. They were sentenced to an indeterminate prison term of two (2) years of prision correccional as minimum to seven (7) years of prision mayor as maximum.[17] The RTC found credible the testimonies of the prosecution witnesses and established the convictions on the positive identification of the accused as perpetrators of the crime.

Both accused filed their respective Notices of Appeal,[18] but only petitioner filed a brief[19] with the Court of Appeals, causing the appellate court to deem Calderon's appeal as abandoned and consequently dismissed. Before the Court of Appeals, petitioner argued that he should only be convicted of frustrated theft since at the time he was apprehended, he was never placed in a position to freely dispose of the articles stolen.[20] However, in its Decision dated 19 June 2003,[21] the Court of Appeals rejected this contention and affirmed petitioner's conviction.[22] Hence the present Petition for Review,[23] which expressly seeks that petitioner's conviction "be modified to only of Frustrated Theft."[24]

Even in his appeal before the Court of Appeals, petitioner effectively conceded both his felonious intent and his actual participation in the theft of several cases of detergent with a total value of P12,090.00 of which he was charged.[25] As such, there is no cause for the Court to consider a factual scenario other than that presented by the prosecution, as affirmed by the RTC and the Court of Appeals. The only question to consider is whether under the given facts, the theft should be deemed as consummated or merely frustrated.

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II.

In arguing that he should only be convicted of frustrated theft, petitioner cites[26] two decisions rendered many years ago by the Court of Appeals: People v. Diño[27] and People v. Flores.[28] Both decisions elicit the interest of this Court, as they modified trial court convictions from consummated to frustrated theft and involve a factual milieu that bears similarity to the present case. Petitioner invoked the same rulings in his appeal to the Court of Appeals, yet the appellate court did not expressly consider the import of the rulings when it affirmed the conviction.

It is not necessary to fault the Court of Appeals for giving short shrift to the Diño and Flores rulings since they have not yet been expressly adopted as precedents by this Court. For whatever reasons, the occasion to define or debunk the crime of frustrated theft has not come to pass before us. Yet despite the silence on our part, Diño and Flores have attained a level of renown reached by very few other appellate court rulings. They are comprehensively discussed in the most popular of our criminal law annotations,[29] and studied in criminal law classes as textbook examples of frustrated crimes or even as definitive of frustrated theft.

More critically, the factual milieu in those cases is hardly akin to the fanciful scenarios that populate criminal law exams more than they actually occur in real life. Indeed, if we finally say that Diño and Flores are doctrinal, such conclusion could profoundly influence a multitude of routine theft prosecutions, including commonplace shoplifting. Any scenario that involves the thief having to exit with the stolen property through a supervised egress, such as a supermarket checkout counter or a parking area pay booth, may easily call for the application of Diño and Flores. The fact that lower courts have not hesitated to lay down convictions for frustrated theft further validates that Diño and Flores and the theories offered therein on frustrated theft have borne some weight in our jurisprudential system. The time is thus ripe for us to examine whether those theories are correct and should continue to influence prosecutors and judges in the future.

III.

To delve into any extended analysis of Diño and Flores, as well as the specific issues relative to "frustrated theft," it is necessary to first refer to the basic rules on the three stages of crimes under our Revised Penal Code.[30]

Article 6 defines those three stages, namely the consummated, frustrated and attempted felonies. A felony is consummated "when all the elements necessary for its execution and accomplishment are present." It is frustrated "when the offender performs all the acts of execution which would produce the felony as a consequence but which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator." Finally, it is attempted "when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance."

Each felony under the Revised Penal Code has a "subjective phase," or that portion of the acts constituting the crime included between the act which begins the commission of the crime and the last act performed by the offender which, with prior acts, should result in the consummated crime.[31] After that point has been breached, the subjective phase ends and the objective phase begins.[32] It has been held that if the offender never passes the subjective phase of the offense, the crime is merely attempted.[33] On the other hand, the subjective phase is completely passed in case of frustrated crimes, for in such instances, "[s]ubjectively the crime is complete."[34]

Truly, an easy distinction lies between consummated and frustrated felonies on one hand, and attempted felonies on the other. So long as the offender fails to complete all the acts of execution despite commencing the commission of a felony, the crime is undoubtedly in the attempted stage. Since the specific acts of execution that

define each crime under the Revised Penal Code are generally enumerated in the code itself, the task of ascertaining whether a crime is attempted only would need to compare the acts actually performed by the accused as against the acts that constitute the felony under the Revised Penal Code.

In contrast, the determination of whether a crime is frustrated or consummated necessitates an initial concession that all of the acts of execution have been performed by the offender. The critical distinction instead is whether the felony itself was actually produced by the acts of execution. The determination of whether the felony was "produced" after all the acts of execution had been performed hinges on the particular statutory definition of the felony. It is the statutory definition that generally furnishes the elements of each crime under the Revised Penal Code, while the elements in turn unravel the particular requisite acts of execution and accompanying criminal intent.

The long-standing Latin maxim "actus non facit reum, nisi mens sit rea" supplies an important characteristic of a crime, that "ordinarily, evil intent must unite with an unlawful act for there to be a crime," and accordingly, there can be no crime when the criminal mind is wanting.[35] Accepted in this jurisdiction as material in crimes mala in se,[36] mens rea has been defined before as "a guilty mind, a guilty or wrongful purpose or criminal intent,"[37] and "essential for criminal liability."[38] It follows that the statutory definition of our mala in se crimes must be able to supply what the mens rea of the crime is, and indeed the U.S. Supreme Court has comfortably held that "a criminal law that contains no mens rea requirement infringes on constitutionally protected rights."[39] The criminal statute must also provide for the overt acts that constitute the crime. For a crime to exist in our legal law, it is not enough that mens rea be shown; there must also be an actus reus.[40]

It is from the actus reus and the mens rea, as they find expression in the criminal statute, that the felony is produced. As a postulate in the craftsmanship of constitutionally sound laws, it is extremely preferable that the language of the law expressly provide when the felony is produced. Without such provision, disputes would inevitably ensue on the elemental question whether or not a crime was committed, thereby presaging the undesirable and legally dubious set-up under which the judiciary is assigned the legislative role of defining crimes. Fortunately, our Revised Penal Code does not suffer from such infirmity. From the statutory definition of any felony, a decisive passage or term is embedded which attests when the felony is produced by the acts of execution. For example, the statutory definition of murder or homicide expressly uses the phrase "shall kill another," thus making it clear that the felony is produced by the death of the victim, and conversely, it is not produced if the victim survives.

We next turn to the statutory definition of theft. Under Article 308 of the Revised Penal Code, its elements are spelled out as follows:

> Art. 308. Who are liable for theft.–; Theft is committed by any person who, with intent to gain but without violence against or intimidation of persons nor force upon things, shall take personal property of another without the latter's consent.
>
> Theft is likewise committed by:
>
> - Any person who, having found lost property, shall fail to deliver the same to the local authorities or to its owner;
>
> - Any person who, after having maliciously damaged the property of another, shall remove or make use of the fruits or object of the damage caused by him; and
>
> - Any person who shall enter an inclosed estate or a field where trespass is forbidden or which belongs to another and without the consent of its owner, shall hunt or fish upon the same or shall gather cereals, or other forest or farm products.

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Article 308 provides for a general definition of theft, and three alternative and highly idiosyncratic means by which theft may be committed.[41] In the present discussion, we need to concern ourselves only with the general definition since it was under it that the prosecution of the accused was undertaken and sustained. On the face of the definition, there is only one operative act of execution by the actor involved in theft â”€ the taking of personal property of another. It is also clear from the provision that in order that such taking may be qualified as theft, there must further be present the descriptive circumstances that the taking was with intent to gain; without force upon things or violence against or intimidation of persons; and it was without the consent of the owner of the property.

Indeed, we have long recognized the following elements of theft as provided for in Article 308 of the Revised Penal Code, namely: (1) that there be taking of personal property; (2) that said property belongs to another; (3) that the taking be done with intent to gain; (4) that the taking be done without the consent of the owner; and (5) that the taking be accomplished without the use of violence against or intimidation of persons or force upon things.[42]

In his commentaries, Judge Guevarra traces the history of the definition of theft, which under early Roman law as defined by Gaius, was so broad enough as to encompass "any kind of physical handling of property belonging to another against the will of the owner,"[43] a definition similar to that by Paulus that a thief "handles (touches, moves) the property of another."[44] However, with the Institutes of Justinian, the idea had taken hold that more than mere physical handling, there must further be an intent of acquiring gain from the object, thus: "[f]urtum est contrectatio rei fraudulosa, lucri faciendi causa vel ipsius rei, vel etiam usus ejus possessinisve."[45] This requirement of animo lucrandi, or intent to gain, was maintained in both the Spanish and Filipino penal laws, even as it has since been abandoned in Great Britain.[46]

In Spanish law, animo lucrandi was compounded with apoderamiento, or "unlawful taking," to characterize theft. Justice Regalado notes that the concept of apoderamiento once had a controversial interpretation and application. Spanish law had already discounted the belief that mere physical taking was constitutive of apoderamiento, finding that it had to be coupled with "the intent to appropriate the object in order to constitute apoderamiento; and to appropriate means to deprive the lawful owner of the thing."[47] However, a conflicting line of cases decided by the Court of Appeals ruled, alternatively, that there must be permanency in the taking[48] or an intent to permanently deprive the owner of the stolen property;[49] or that there was no need for permanency in the taking or in its intent, as the mere temporary possession by the offender or disturbance of the proprietary rights of the owner already constituted apoderamiento.[50] Ultimately, as Justice Regalado notes, the Court adopted the latter thought that there was no need of an intent to permanently deprive the owner of his property to constitute an unlawful taking.[51]

So long as the "descriptive" circumstances that qualify the taking are present, including animo lucrandi and apoderamiento, the completion of the operative act that is the taking of personal property of another establishes, at least, that the transgression went beyond the attempted stage. As applied to the present case, the moment petitioner obtained physical possession of the cases of detergent and loaded them in the pushcart, such seizure motivated by intent to gain, completed without need to inflict violence or intimidation against persons nor force upon things, and accomplished without the consent of the SM Super Sales Club, petitioner forfeited the extenuating benefit a conviction for only attempted theft would have afforded him.

On the critical question of whether it was consummated or frustrated theft, we are obliged to apply Article 6 of the Revised Penal Code to ascertain the answer. Following that provision, the theft would have been frustrated only, once the acts committed by petitioner, if ordinarily sufficient to produce theft as a consequence, "do not produce [such theft] by reason of causes independent of the will of the perpetrator." There are clearly two determinative

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factors to consider: that the felony is not "produced," and that such failure is due to causes independent of the will of the perpetrator. The second factor ultimately depends on the evidence at hand in each particular case. The first, however, relies primarily on a doctrinal definition attaching to the individual felonies in the Revised Penal Code[52] as to when a particular felony is "not produced," despite the commission of all the acts of execution.

So, in order to ascertain whether the theft is consummated or frustrated, it is necessary to inquire as to how exactly is the felony of theft "produced." Parsing through the statutory definition of theft under Article 308, there is one apparent answer provided in the language of the law – that theft is already "produced" upon the "tak[ing of] personal property of another without the latter's consent."

U.S. v. Adiao[53] apparently supports that notion. Therein, a customs inspector was charged with theft after he abstracted a leather belt from the baggage of a foreign national and secreted the item in his desk at the Custom House. At no time was the accused able to "get the merchandise out of the Custom House," and it appears that he "was under observation during the entire transaction."[54] Based apparently on those two circumstances, the trial court had found him guilty, instead, of frustrated theft. The Court reversed, saying that neither circumstance was decisive, and holding instead that the accused was guilty of consummated theft, finding that "all the elements of the completed crime of theft are present."[55] In support of its conclusion that the theft was consummated, the Court cited three (3) decisions of the Supreme Court of Spain, the discussion of which we replicate below:

> The defendant was charged with the theft of some fruit from the land of another. As he was in the act of taking the fruit[,] he was seen by a policeman, yet it did not appear that he was at that moment caught by the policeman but sometime later. The court said: "[x x x] The trial court did not err [x x x] in considering the crime as that of consummated theft instead of frustrated theft inasmuch as nothing appears in the record showing that the policemen who saw the accused take the fruit from the adjoining land arrested him in the act and thus prevented him from taking full possession of the thing stolen and even its utilization by him for an interval of time." (Decision of the Supreme Court of Spain, October 14, 1898.)
>
> Defendant picked the pocket of the offended party while the latter was hearing mass in a church. The latter on account of the solemnity of the act, although noticing the theft, did not do anything to prevent it. Subsequently, however, while the defendant was still inside the church, the offended party got back the money from the defendant. The court said that the defendant had performed all the acts of execution and considered the theft as consummated. (Decision of the Supreme Court of Spain, December 1, 1897.)
>
> The defendant penetrated into a room of a certain house and by means of a key opened up a case, and from the case took a small box, which was also opened with a key, from which in turn he took a purse containing 461 reales and 20 centimos, and then he placed the money over the cover of the case; just at this moment he was caught by two guards who were stationed in another room near-by. The court considered this as consummated robbery, and said: "[x x x] The accused [x x x] having materially taken possession of the money from the moment he took it from the place where it had been, and having taken it with his hands with intent to appropriate the same, he executed all the acts necessary to constitute the crime which was thereby produced; only the act of making use of the thing having been frustrated, which, however, does not go to make the elements of the consummated crime." (Decision of the Supreme Court of Spain, June 13, 1882.)[56]

It is clear from the facts of Adiao itself, and the three (3) Spanish decisions cited therein, that the criminal actors in all these cases had been able to obtain full possession of the personal property prior to their apprehension. The interval between the commission of the acts of theft and the apprehension of the thieves did vary, from "sometime later" in the 1898 decision; to the very moment the thief had just extracted the money in a purse which had been stored as it was in the 1882 decision; and before the thief had been able to spirit the item stolen from the building where the theft took place, as had happened in Adiao and the 1897 decision. Still, such intervals proved of no consequence in those cases, as it was ruled that the thefts in each of those cases was consummated by the actual

possession of the property belonging to another.

In 1929, the Court was again confronted by a claim that an accused was guilty only of frustrated rather than consummated theft. The case is People v. Sobrevilla,[57] where the accused, while in the midst of a crowd in a public market, was already able to abstract a pocketbook from the trousers of the victim when the latter, perceiving the theft, "caught hold of the [accused]'s shirt-front, at the same time shouting for a policeman; after a struggle, he recovered his pocket-book and let go of the defendant, who was afterwards caught by a policeman."[58] In rejecting the contention that only frustrated theft was established, the Court simply said, without further comment or elaboration:

> We believe that such a contention is groundless. The [accused] succeeded in taking the pocket-book, and that determines the crime of theft. If the pocket-book was afterwards recovered, such recovery does not affect the [accused's] criminal liability, which arose from the [accused] having succeeded in taking the pocket-book.[59]

If anything, Sobrevilla is consistent with Adiao and the Spanish Supreme Court cases cited in the latter, in that the fact that the offender was able to succeed in obtaining physical possession of the stolen item, no matter how momentary, was able to consummate the theft.

Adiao, Sobrevilla and the Spanish Supreme Court decisions cited therein contradict the position of petitioner in this case. Yet to simply affirm without further comment would be disingenuous, as there is another school of thought on when theft is consummated, as reflected in the Diño and Flores decisions.

Diño was decided by the Court of Appeals in 1949, some 31 years after Adiao and 15 years before Flores. The accused therein, a driver employed by the United States Army, had driven his truck into the port area of the South Harbor, to unload a truckload of materials to waiting U.S. Army personnel. After he had finished unloading, accused drove away his truck from the Port, but as he was approaching a checkpoint of the Military Police, he was stopped by an M.P. who inspected the truck and found therein three boxes of army rifles. The accused later contended that he had been stopped by four men who had loaded the boxes with the agreement that they were to meet him and retrieve the rifles after he had passed the checkpoint. The trial court convicted accused of consummated theft, but the Court of Appeals modified the conviction, holding instead that only frustrated theft had been committed.

In doing so, the appellate court pointed out that the evident intent of the accused was to let the boxes of rifles "pass through the checkpoint, perhaps in the belief that as the truck had already unloaded its cargo inside the depot, it would be allowed to pass through the check point without further investigation or checking."[60] This point was deemed material and indicative that the theft had not been fully produced, for the Court of Appeals pronounced that "the fact determinative of consummation is the ability of the thief to dispose freely of the articles stolen, even if it were more or less momentary."[61] Support for this proposition was drawn from a decision of the Supreme Court of Spain dated 24 January 1888 (1888 decision), which was quoted as follows:

> Considerando que para que el apoderamiento de la cosa sustraida sea determinate de la consumacion del delito de hurto es preciso que so haga en circunstancias tales que permitan al sustractor la libre disposicion de aquella, siquiera sea mas o menos momentaneamente, pues de otra suerte, dado el concepto del delito de hurto, no puede decirse en realidad que se haya producido en toda su extension, sin materializar demasiado el acto de tomar la cosa ajena.[62]

Integrating these considerations, the Court of Appeals then concluded:

> This court is of the opinion that in the case at bar, in order to make the booty subject to the control and disposal of the culprits, the articles stolen must first be passed through the M.P. check point, but since the offense was opportunely discovered and the articles seized after all the acts of execution had been performed, but before the

> loot came under the final control and disposal of the looters, the offense can not be said to have been fully consummated, as it was frustrated by the timely intervention of the guard. The offense committed, therefore, is that of frustrated theft.[63]

Diño thus laid down the theory that the ability of the actor to freely dispose of the items stolen at the time of apprehension is determinative as to whether the theft is consummated or frustrated. This theory was applied again by the Court of Appeals some 15 years later, in Flores, a case which according to the division of the court that decided it, bore "no substantial variance between the circumstances [herein] and in [Diño]."[64] Such conclusion is borne out by the facts in Flores. The accused therein, a checker employed by the Luzon Stevedoring Company, issued a delivery receipt for one empty sea van to the truck driver who had loaded the purportedly empty sea van onto his truck at the terminal of the stevedoring company. The truck driver proceeded to show the delivery receipt to the guard on duty at the gate of the terminal. However, the guards insisted on inspecting the van, and discovered that the "empty" sea van had actually contained other merchandise as well.[65] The accused was prosecuted for theft qualified by abuse of confidence, and found himself convicted of the consummated crime. Before the Court of Appeals, accused argued in the alternative that he was guilty only of attempted theft, but the appellate court pointed out that there was no intervening act of spontaneous desistance on the part of the accused that "literally frustrated the theft." However, the Court of Appeals, explicitly relying on Diño, did find that the accused was guilty only of frustrated, and not consummated, theft.

As noted earlier, the appellate court admitted it found "no substantial variance" between Diño and Flores then before it. The prosecution in Flores had sought to distinguish that case from Diño, citing a "traditional ruling" which unfortunately was not identified in the decision itself. However, the Court of Appeals pointed out that the said "traditional ruling" was qualified by the words "is placed in a situation where [the actor] could dispose of its contents at once."[66] Pouncing on this qualification, the appellate court noted that "[o]bviously, while the truck and the van were still within the compound, the petitioner could not have disposed of the goods "at once." At the same time, the Court of Appeals conceded that "[t]his is entirely different from the case where a much less bulk and more common thing as money was the object of the crime, where freedom to dispose of or make use of it is palpably less restricted,"[67] though no further qualification was offered what the effect would have been had that alternative circumstance been present instead.

Synthesis of the Diño and Flores rulings is in order. The determinative characteristic as to whether the crime of theft was produced is the ability of the actor "to freely dispose of the articles stolen, even if it were only momentary." Such conclusion was drawn from an 1888 decision of the Supreme Court of Spain which had pronounced that in determining whether theft had been consummated, "es preciso que so haga en circunstancias tales que permitan al sustractor de aquella, siquiera sea mas o menos momentaneamente." The qualifier "siquiera sea mas o menos momentaneamente" proves another important consideration, as it implies that if the actor was in a capacity to freely dispose of the stolen items before apprehension, then the theft could be deemed consummated. Such circumstance was not present in either Diño or Flores, as the stolen items in both cases were retrieved from the actor before they could be physically extracted from the guarded compounds from which the items were filched. However, as implied in Flores, the character of the item stolen could lead to a different conclusion as to whether there could have been "free disposition," as in the case where the chattel involved was of "much less bulk and more common x x x, [such] as money x x x."[68]

In his commentaries, Chief Justice Aquino makes the following pointed observation on the import of the Diño ruling:

> There is a ruling of the Court of Appeals that theft is consummated when the thief is able to freely dispose of the stolen articles even if it were more or less momentary. Or as stated in another case[[69]], theft is

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> consummated upon the voluntary and malicious taking of property belonging to another which is realized by the material occupation of the thing whereby the thief places it under his control and in such a situation that he could dispose of it at once. This ruling seems to have been based on Viada's opinion that in order the theft may be consummated, "es preciso que se haga en circumstancias x x x [[70]]"[71]

In the same commentaries, Chief Justice Aquino, concluding from Adiao and other cases, also states that "[i]n theft or robbery the crime is consummated after the accused had material possession of the thing with intent to appropriate the same, although his act of making use of the thing was frustrated."[72]

There are at least two other Court of Appeals rulings that are at seeming variance with the Diño and Flores rulings. People v. Batoon[73] involved an accused who filled a container with gasoline from a petrol pump within view of a police detective, who followed the accused onto a passenger truck where the arrest was made. While the trial court found the accused guilty of frustrated qualified theft, the Court of Appeals held that the accused was guilty of consummated qualified theft, finding that "[t]he facts of the cases of U.S. [v.] Adiao x x x and U.S. v. Sobrevilla x x x indicate that actual taking with intent to gain is enough to consummate the crime of theft."[74]

In People v. Espiritu,[75] the accused had removed nine pieces of hospital linen from a supply depot and loaded them onto a truck. However, as the truck passed through the checkpoint, the stolen items were discovered by the Military Police running the checkpoint. Even though those facts clearly admit to similarity with those in Diño, the Court of Appeals held that the accused were guilty of consummated theft, as the accused "were able to take or get hold of the hospital linen and that the only thing that was frustrated, which does not constitute any element of theft, is the use or benefit that the thieves expected from the commission of the offense."[76]

In pointing out the distinction between Diño and Espiritu, Reyes wryly observes that "[w]hen the meaning of an element of a felony is controversial, there is bound to arise different rulings as to the stage of execution of that felony."[77] Indeed, we can discern from this survey of jurisprudence that the state of the law insofar as frustrated theft is concerned is muddled. It fact, given the disputed foundational basis of the concept of frustrated theft itself, the question can even be asked whether there is really such a crime in the first place.

IV.

The Court in 1984 did finally rule directly that an accused was guilty of frustrated, and not consummated, theft. As we undertake this inquiry, we have to reckon with the import of this Court's 1984 decision in Empelis v. IAC.[78]

As narrated in Empelis, the owner of a coconut plantation had espied four (4) persons in the premises of his plantation, in the act of gathering and tying some coconuts. The accused were surprised by the owner within the plantation as they were carrying with them the coconuts they had gathered. The accused fled the scene, dropping the coconuts they had seized, and were subsequently arrested after the owner reported the incident to the police. After trial, the accused were convicted of qualified theft, and the issue they raised on appeal was that they were guilty only of simple theft. The Court affirmed that the theft was qualified, following Article 310 of the Revised Penal Code,[79] but further held that the accused were guilty only of frustrated qualified theft.

It does not appear from the Empelis decision that the issue of whether the theft was consummated or frustrated was raised by any of the parties. What does appear, though, is that the disposition of that issue was contained in only two sentences, which we reproduce in full:

> However, the crime committed is only frustrated qualified theft because petitioners were not able to perform all the acts of execution which should have produced the felony as a consequence. They were not able to carry the coconuts away from the plantation due to the timely arrival of the owner.[80]

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No legal reference or citation was offered for this averment, whether Diño, Flores or the Spanish authorities who may have bolstered the conclusion. There are indeed evident problems with this formulation in Empelis.
Empelis held that the crime was only frustrated because the actors "were not able to perform all the acts of execution which should have produced the felon as a consequence."[81] However, per Article 6 of the Revised Penal Code, the crime is frustrated "when the offender performs all the acts of execution," though not producing the felony as a result. If the offender was not able to perform all the acts of execution, the crime is attempted, provided that the non-performance was by reason of some cause or accident other than spontaneous desistance. Empelis concludes that the crime was frustrated because not all of the acts of execution were performed due to the timely arrival of the owner. However, following Article 6 of the Revised Penal Code, these facts should elicit the conclusion that the crime was only attempted, especially given that the acts were not performed because of the timely arrival of the owner, and not because of spontaneous desistance by the offenders.

For these reasons, we cannot attribute weight to Empelis as we consider the present petition. Even if the two sentences we had cited actually aligned with the definitions provided in Article 6 of the Revised Penal Code, such passage bears no reflection that it is the product of the considered evaluation of the relevant legal or jurisprudential thought. Instead, the passage is offered as if it were sourced from an indubitable legal premise so settled it required no further explication.

Notably, Empelis has not since been reaffirmed by the Court, or even cited as authority on theft. Indeed, we cannot see how Empelis can contribute to our present debate, except for the bare fact that it proves that the Court had once deliberately found an accused guilty of frustrated theft. Even if Empelis were considered as a precedent for frustrated theft, its doctrinal value is extremely compromised by the erroneous legal premises that inform it, and also by the fact that it has not been entrenched by subsequent reliance.

Thus, Empelis does not compel us that it is an insurmountable given that frustrated theft is viable in this jurisdiction. Considering the flawed reasoning behind its conclusion of frustrated theft, it cannot present any efficacious argument to persuade us in this case. Insofar as Empelis may imply that convictions for frustrated theft are beyond cavil in this jurisdiction, that decision is subject to reassessment.

V.

At the time our Revised Penal Code was enacted in 1930, the 1870 Codigo Penal de España was then in place. The definition of the crime of theft, as provided then, read as follows:

> Son reos de hurto:
>
> - Los que con ánimo de lucrarse, y sin volencia o intimidación en las personas ni fuerza en las cosas, toman las cosas muebles ajenas sin la voluntad de su dueño.
>
> - Los que encontrándose una cosa perdida y sabiendo quién es su dueño se la apropriaren co intención de lucro.
>
> - Los dañadores que sustrajeren o utilizaren los frutos u objeto del daño causado, salvo los casos previstos en los artículos 606, núm. 1.0; 607, núms, 1.0, 2.0 y 3.0; 608, núm. 1.0; 611; 613; Segundo párrafo del 617 y 618.

It was under the ambit of the 1870 Codigo Penal that the aforecited Spanish Supreme Court decisions were handed down. However, the said code would be revised again in 1932, and several times thereafter. In fact, under Codigo Penal Español de 1995, the the crime of theft is now simply defined as '[e]l que, con ánimo de lucro, Codigo Penal Español de 1995,tomare las cosas muebles ajenas sin la voluntad de su dueño será castigado"[82]

Notice that in the 1870 and 1995 definition of theft in the penal code of Spain, "la libre disposicion" of the

property is not an element or a statutory characteristic of the crime. It does appear that the principle originated and perhaps was fostered in the realm of Spanish jurisprudence.

The oft-cited Salvador Viada adopted a question-answer form in his 1926 commentaries on the 1870 Codigo Penal de España. Therein, he raised at least three questions for the reader whether the crime of frustrated or consummated theft had occurred. The passage cited in Diño was actually utilized by Viada to answer the question whether frustrated or consummated theft was committed "[e]l que en el momento mismo de apoderarse de la cosa ajena, viéndose sorprendido, la arroja al suelo."[83] Even as the answer was as stated in Diño, and was indeed derived from the 1888 decision of the Supreme Court of Spain, that decision's factual predicate occasioning the statement was apparently very different from Diño, for it appears that the 1888 decision involved an accused who was surprised by the employees of a haberdashery as he was abstracting a layer of clothing off a mannequin, and who then proceeded to throw away the garment as he fled.[84]

Nonetheless, Viada does not contest the notion of frustrated theft, and willingly recites decisions of the Supreme Court of Spain that have held to that effect.[85] A few decades later, the esteemed Eugenio Cuello Calén pointed out the inconsistent application by the Spanish Supreme Court with respect to frustrated theft.

> Hay frustración cuando los reos fueron sorprendidos por las guardias cuando llevaban los sacos de harino del carro que los conducia a otro que tenían preparado, 22 febrero 1913; cuando el resultado no tuvo efecto por la intervención de la policia situada en el local donde se realizó la sustracción que impidió pudieran los reos disponer de lo sustraído, 30 de octubre 1950. Hay "por lo menos" frustración, si existe apoderamiento, pero el culpale no llega a disponer de la cosa, 12 abril 1930; hay frustración "muy próxima" cuando el culpable es detenido por el perjudicado acto seguido de cometer la sustracción, 28 febrero 1931. Algunos fallos han considerado la existencia de frustración cuando, perseguido el culpable o sorprendido en el momento de llevar los efectos hurtados, los abandona, 29 mayo 1889, 22 febrero 1913, 11 marzo 1921; esta doctrina no es admissible, éstos, conforme a lo antes expuesto, son hurtos consumados.[86]

Ultimately, Cuello Calón attacked the very idea that frustrated theft is actually possible:

> La doctrina hoy generalmente sustentada considera que el hurto se consuma cuando la cosa queda de hecho a la disposición del agente. Con este criterio coincide la doctrina sentada últimamente porla jurisprudencia española que generalmente considera consumado el hurto cuando el culpable coge o aprehende la cosa y ésta quede por tiempo más o menos duradero bajo su poder. El hecho de que éste pueda aprovecharse o no de lo hurtado es indiferente. El delito no pierde su carácter de consumado aunque la cosa hurtada sea devuelta por el culpable o fuere recuperada. No se concibe la frustración, pues es muy dificil que el que hace cuanto es necesario para la consumación del hurto no lo consume efectivamente, los raros casos que nuestra jurisprudencia, muy vacilante, declara hurtos frustrados son verdaderos delitos consumados.[87] (Emphasis supplied)

Cuello Calón's submissions cannot be lightly ignored. Unlike Viada, who was content with replicating the Spanish Supreme Court decisions on the matter, Cuello Calón actually set forth his own thought that questioned whether theft could truly be frustrated, since "pues es muy dificil que el que hace cuanto es necesario para la consumación del hurto no lo consume efectivamente." Otherwise put, it would be difficult to foresee how the execution of all the acts necessary for the completion of the crime would not produce the effect of theft.

This divergence of opinion convinces us, at least, that there is no weighted force in scholarly thought that obliges us to accept frustrated theft, as proposed in Diño and Flores. A final ruling by the Court that there is no crime of frustrated theft in this jurisdiction will not lead to scholastic pariah, for such a submission is hardly heretical in light of Cuello Calón's position.

Accordingly, it would not be intellectually disingenuous for the Court to look at the question from a fresh

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perspective, as we are not bound by the opinions of the respected Spanish commentators, conflicting as they are, to accept that theft is capable of commission in its frustrated stage. Further, if we ask the question whether there is a mandate of statute or precedent that must compel us to adopt the Diño and Flores doctrines, the answer has to be in the negative. If we did so, it would arise not out of obeisance to an inexorably higher command, but from the exercise of the function of statutory interpretation that comes as part and parcel of judicial review, and a function that allows breathing room for a variety of theorems in competition until one is ultimately adopted by this Court.

V.

The foremost predicate that guides us as we explore the matter is that it lies in the province of the legislature, through statute, to define what constitutes a particular crime in this jurisdiction. It is the legislature, as representatives of the sovereign people, which determines which acts or combination of acts are criminal in nature. Judicial interpretation of penal laws should be aligned with what was the evident legislative intent, as expressed primarily in the language of the law as it defines the crime. It is Congress, not the courts, which is to define a crime, and ordain its punishment.[88] The courts cannot arrogate the power to introduce a new element of a crime which was unintended by the legislature, or redefine a crime in a manner that does not hew to the statutory language. Due respect for the prerogative of Congress in defining crimes/felonies constrains the Court to refrain from a broad interpretation of penal laws where a "narrow interpretation" is appropriate. "The Court must take heed of language, legislative history and purpose, in order to strictly determine the wrath and breath of the conduct the law forbids."[89]

With that in mind, a problem clearly emerges with the Diño/Flores dictum. The ability of the offender to freely dispose of the property stolen is not a constitutive element of the crime of theft. It finds no support or extension in Article 308, whether as a descriptive or operative element of theft or as the mens rea or actus reus of the felony. To restate what this Court has repeatedly held: the elements of the crime of theft as provided for in Article 308 of the Revised Penal Code are: (1) that there be taking of personal property; (2) that said property belongs to another; (3) that the taking be done with intent to gain; (4) that the taking be done without the consent of the owner; and (5) that the taking be accomplished without the use of violence against or intimidation of persons or force upon things.[90]

Such factor runs immaterial to the statutory definition of theft, which is the taking, with intent to gain, of personal property of another without the latter's consent. While the Diño/Flores dictum is considerate to the mindset of the offender, the statutory definition of theft considers only the perspective of intent to gain on the part of the offender, compounded by the deprivation of property on the part of the victim.

For the purpose of ascertaining whether theft is susceptible of commission in the frustrated stage, the question is again, when is the crime of theft produced? There would be all but certain unanimity in the position that theft is produced when there is deprivation of personal property due to its taking by one with intent to gain. Viewed from that perspective, it is immaterial to the product of the felony that the offender, once having committed all the acts of execution for theft, is able or unable to freely dispose of the property stolen since the deprivation from the owner alone has already ensued from such acts of execution. This conclusion is reflected in Chief Justice Aquino's commentaries, as earlier cited, that "[i]n theft or robbery the crime is consummated after the accused had material possession of the thing with intent to appropriate the same, although his act of making use of the thing was frustrated."[91]

It might be argued, that the ability of the offender to freely dispose of the property stolen delves into the concept of "taking" itself, in that there could be no true taking until the actor obtains such degree of control over the stolen item. But even if this were correct, the effect would be to downgrade the crime to its attempted, and not frustrated

stage, for it would mean that not all the acts of execution have not been completed, the "taking not having been accomplished." Perhaps this point could serve as fertile ground for future discussion, but our concern now is whether there is indeed a crime of frustrated theft, and such consideration proves ultimately immaterial to that question. Moreover, such issue will not apply to the facts of this particular case. We are satisfied beyond reasonable doubt that the taking by the petitioner was completed in this case. With intent to gain, he acquired physical possession of the stolen cases of detergent for a considerable period of time that he was able to drop these off at a spot in the parking lot, and long enough to load these onto a taxicab.

Indeed, we have, after all, held that unlawful taking, or apoderamiento, is deemed complete from the moment the offender gains possession of the thing, even if he has no opportunity to dispose of the same.[92] And long ago, we asserted in People v. Avila:[93]

> x x x [T]he most fundamental notion in the crime of theft is the taking of the thing to be appropriated into the physical power of the thief, which idea is qualified by other conditions, such as that the taking must be effected animo lucrandi and without the consent of the owner; and it will be here noted that the definition does not require that the taking should be effected against the will of the owner but merely that it should be without his consent, a distinction of no slight importance.[94]

Insofar as we consider the present question, "unlawful taking" is most material in this respect. Unlawful taking, which is the deprivation of one's personal property, is the element which produces the felony in its consummated stage. At the same time, without unlawful taking as an act of execution, the offense could only be attempted theft, if at all.

With these considerations, we can only conclude that under Article 308 of the Revised Penal Code, theft cannot have a frustrated stage. Theft can only be attempted or consummated.

Neither Diño nor Flores can convince us otherwise. Both fail to consider that once the offenders therein obtained possession over the stolen items, the effect of the felony has been produced as there has been deprivation of property. The presumed inability of the offenders to freely dispose of the stolen property does not negate the fact that the owners have already been deprived of their right to possession upon the completion of the taking.

Moreover, as is evident in this case, the adoption of the rule "that the inability of the offender to freely dispose of the stolen property frustrates the theft – would introduce a convenient defense for the accused which does not reflect any legislated intent,[95] since the Court would have carved a viable means for offenders to seek a mitigated penalty under applied circumstances that do not admit of easy classification. It is difficult to formulate definite standards as to when a stolen item is susceptible to free disposal by the thief. Would this depend on the psychological belief of the offender at the time of the commission of the crime, as implied in Diño?

Or, more likely, the appreciation of several classes of factual circumstances such as the size and weight of the property, the location of the property, the number and identity of people present at the scene of the crime, the number and identity of people whom the offender is expected to encounter upon fleeing with the stolen property, the manner in which the stolen item had been housed or stored; and quite frankly, a whole lot more. Even the fungibility or edibility of the stolen item would come into account, relevant as that would be on whether such property is capable of free disposal at any stage, even after the taking has been consummated.

All these complications will make us lose sight of the fact that beneath all the colorful detail, the owner was indeed deprived of property by one who intended to produce such deprivation for reasons of gain. For such will remain the presumed fact if frustrated theft were recognized, for therein, all of the acts of execution, including the taking, have been completed. If the facts establish the non-completion of the taking due to these peculiar circumstances, the effect could be to downgrade the crime to the attempted stage, as not all of the acts of

execution have been performed. But once all these acts have been executed, the taking has been completed, causing the unlawful deprivation of property, and ultimately the consummation of the theft.

Maybe the Diño/Flores rulings are, in some degree, grounded in common sense. Yet they do not align with the legislated framework of the crime of theft. The Revised Penal Code provisions on theft have not been designed in such fashion as to accommodate said rulings. Again, there is no language in Article 308 that expressly or impliedly allows that the "free disposition of the items stolen" is in any way determinative of whether the crime of theft has been produced. Diño itself did not rely on Philippine laws or jurisprudence to bolster its conclusion, and the later Flores was ultimately content in relying on Diño alone for legal support. These cases do not enjoy the weight of stare decisis, and even if they did, their erroneous appreciation of our law on theft leave them susceptible to reversal. The same holds true of Empilis, a regrettably stray decision which has not since found favor from this Court.

We thus conclude that under the Revised Penal Code, there is no crime of frustrated theft. As petitioner has latched the success of his appeal on our acceptance of the Diño and Flores rulings, his petition must be denied, for we decline to adopt said rulings in our jurisdiction. That it has taken all these years for us to recognize that there can be no frustrated theft under the Revised Penal Code does not detract from the correctness of this conclusion. It will take considerable amendments to our Revised Penal Code in order that frustrated theft may be recognized. Our deference to Viada yields to the higher reverence for legislative intent.

WHEREFORE, the petition is DENIED. Costs against petitioner.

SO ORDERED.

Puno, C.J., Ynares-Santiago, Sandoval-Gutierrez, Carpio, Austria-Martinez, Corona, Carpio-Morales, Azcuna, Chico-Nazario, Garcia, Velasco, Jr., and Nachura, JJ., concur.
Quisumbing, J., on official leave.

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[1] See infra, People v. Diño and People v. Flores.

[2] Not accounting for those unpublished or unreported decisions, in the one hundred year history of this Court, which could no longer be retrieved from the Philippine Reports or other secondary sources, due to their wholesale destruction during the Second World War or for other reasons.

[3] See People v. Adiao, infra. There have been a few cases wherein the Court let stand a conviction for frustrated theft, yet in none of those cases was the issue squarely presented that theft could be committed at its frustrated stage. See People v. Abuyen, 52 Phil. 722 (1929); People v. Flores, 63 Phil. 443 (1936); and People v. Tapang, 88 Phil. 721 (1951). In People v. Argel G.R. No. L-45975, 25 May 1981, 192 SCRA 21, the Court did tacitly accept the viability of a conviction for frustrated theft, though the issue expounded on by the Court pertained to the proper appellate jurisdiction over such conviction.

It would indeed be error to perceive that convictions for frustrated theft are traditionally unconventional in this jurisdiction, as such have routinely been handed down by lower courts, as a survey of jurisprudence would reveal. Still, the plain fact remains that this Court , since Adiao in 1918, has yet to directly rule on the legal foundation of frustrated theft, or even discuss such scenario by way of dicta.

In passing, we take note of a recent decision of the Court of Appeals in People v. Concepcion, C.A. G.R. CR No. 28280, 11 July 2005 (See at http://ca.supremecourt.gov.ph/cardis/CR28280.pdf), where the appellate court affirmed a conviction for frustrated theft, the accused therein having been caught inside Meralco property before

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he could flee with some copper electrical wire. However, in the said decision, the accused was charged at the onset with frustrated theft, and the Court of Appeals did not inquire why the crime committed was only frustrated theft. Moreover, the charge for theft was not under the Revised Penal Code, but under Rep. Act No. 7832, a special law.

[4] 53 Phil. 226 (1929).

[5] 217 Phil. 377 (1984).

[6] Records, pp. 1-2.

[7] Rollo, pp. 21-22.

[8] Id. at 22.

[9] See id. at 472.

[10] See Records, pp. 7-14. A brief comment is warranted regarding these four (4) other apparent suspects. The affidavits and sworn statements that were executed during the police investigation by security guards Lago and Vivencio Yanson, by SM employee Adelio Nakar, and by the taxi driver whose cab had been hailed to transport the accused, commonly point to all six as co-participants in the theft of the detergents. It is not explained in the record why no charges were brought against the four (4) other suspects, and the prosecution's case before the trial court did not attempt to draw in any other suspects other than petitioner and Calderon. On the other hand, both petitioner and Calderon claimed during trial that they were innocent bystanders who happened to be in the vicinity of the Super Sale Club at the time of the incident when they were haled in, along with the four (4) other suspects by the security guards in the resulting confusion. See infra. However, both petitioner and Calderon made no move to demonstrate that the non-filing of the charges against the four (4) other suspects somehow bolstered their plea of innocence.

In any event, from the time this case had been elevated on appeal to the Court of Appeals, no question was anymore raised on the version of facts presented by the prosecution. Thus, any issue relative to these four (4) other suspects should bear no effect in the present consideration of the case.

[11] Also identified in the case record as "Rosalada" or "Rosullado." He happened to be among the four (4) other suspects also apprehended at the scene and brought for investigation to the Baler PNP Station. See id. Rosulada also testified in court in behalf of Calderon. See Records, pp. 357-390.

[12] Records, pp. 330-337.

[13] A person who was neither among the four (4) other suspects (see note 6) nor a witness for the defense.

[14] Rollo, p. 25.

[15] Records, pp. 424-425.

[16] Id. at 472-474; Penned by Judge Reynaldo B. Daway.

[17] Id. at 474.

[18] Id. at 484.

[19] CA rollo, pp. 54-62.

[20] Rollo, p. 25.

[21] Id. at 20-27. Penned by Associate Justice Eubolo G. Verzola of the Court of Appeals Third Division, concurred in by Associate Justices Martin S. Villarama, Jr. and Mario L. Guariña.

[22] A motion for reconsideration filed by petitioner was denied by the Court of Appeals in a Resolution dated 1 October 2003.

[23] Rollo, pp. 8-15.

[24] Id. at 12.

[25] Id. at 9.

[26] Id. at at 13-14.

[27] No. 924-R, 18 February 1948, 45 O.G. 3446.

[28] 6 C.A. Rep. 2d 835 (1964).

[29] See e.g., L.B. REYES, I THE REVISED PENAL CODE: CRIMINAL LAW (13th ed., 2001), at 112-113 and R. AQUINO, I THE REVISED PENAL CODE (1997 ed.), at 122.

[30] Act No. 3185, as amended.

[31] See People v. Caballero, 448 Phil. 514, 534 (2003). Reyes defines the final point of the subjective phase as "that point where [the offender] still has control over his acts, including their (acts') natural course." See L.B. REYES, I THE REVISED PENAL CODE: CRIMINAL LAW (13th Ed., 2001), at 101.

[32] People v. Caballero, 448 Phil. 514, 534 (2003).

[33] See e.g., U.S. v. Eduave, 36 Phil. 209, 212 (1917); People v. Caballero, id.

[34] U.S. v. Eduave, 36 Phil. 209, 212 (1917).

[35] People v. Pacana, 47 Phil. 48 (1925); cited in AQUINO, supra note 29, at 39. See also Lecaroz v. Sandiganbayan, 364 Phil. 890, 905 (1999).

[36] See Padilla v. Dizon, A.C. No. 3086, 23 February 1988, 158 SCRA 127, 135.

[37] People v. Moreno, 356 Phil. 231, 248 (1998) citing BLACK'S LAW DICTIONARY, 5th ed., p. 889.

[38] Jariol, Jr. v. Sandiganbayan, Nos. L-52095-52116, 13 August 1990, 188 SCRA 475, 490.

[39] City of Chicago v. Morales, 527 U.S. 41 (1999) cited in Separate Opinion, J.Tinga, Romualdez v. Sandiganbayan, G.R. No. 152259, 29 July 2004, 435 SCRA 371, 400.

[40] J. Feliciano, Concurring and Dissenting, Umil v. Ramos, G.R. No. 81567, 3 October 1991, 202 SCRA 251, 288.

[41]See also REVISED PENAL CODE, Art. 310, which qualifies theft with a penalty two degrees higher "if committed by a domestic servant, or with grave abuse of confidence, or if the property stolen is motor vehicle, mail matter or large cattle or consists of coconuts taken from the premises of the plantation or fish taken from a fishpond or fishery, or if property is taken on the occasion of fire, earthquake, typhoon, volcanic eruption, or any other calamity, vehicular accident or civil disturbance."

[42] See People v. Bustinera, G.R. No. 148233, 8 June 2004, 431 SCRA 284, 291, citing People v. Sison, 322 SCRA 345, 363-364 (2000).

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[43] S. GUEVARRA, COMMENTARIES ON THE REVISED PENAL CODE (4th ed., 1946), at 614.

[44] Id. at 615.

[45] Id. citing Inst. 4, 1, 1.

[46] Section 1(2) of the Theft Act of 1968 states: "It is immaterial whether the appropriation is made with a view to gain, or is made for the thief's own benefit." Sir John Smith provides a sensible rationalization for this doctrine: "Thus, to take examples from the old law, if D takes P's letters and puts them down on a lavatory or backs P's horse down a mine shaft, he is guilty of theft notwithstanding the fact that he intends only loss to P and no gain to himself or anyone else. It might be thought that these instances could safely and more appropriately have been left to other branches of the criminal law–that of criminal damage to property for instance. But there are cases where there is no such damage or destruction of the thing as would found a charge under another Act. For example, D takes P's diamond and flings it into a deep pond. The diamond lies unharmed in the pond and a prosecution for criminal damage would fail. It seems clearly right that D should be guilty of theft." J. SMITH, SMITH & HOGAN CRIMINAL LAW (9th ed., 1999), at 534.

[47] F. REGALADO, CRIMINAL LAW CONSPECTUS (1st ed., 2000), at 520.

[48] People v. Kho Choc, 50 O.G. 1667, cited in Regalado, id. at 521.

[49] People v. Galang, CA, 43 O.G. 577; People v. Rico, CA, 50 O.G. 3103; cf. People v. Roxas, CA-G.R. No. 14953, 31 October 1956, all cited in REGALADO, supra note 47 at 521.

[50] People v. Fernandez, CA, 38 O.G. 985; People v. Martisano, CA, 48 O.G. 4417, cited in REGALADO, supra note 47 at 521.

[51]REGALADO, supra note 47 at 521 citing Villacorta v. Insurance Commission, G.R. No. 54171, 28 October 1980, 100 SCRA 467; Association of Baptists for World Evangelism v. Fieldmen's Ins. Co., No. L-28772, 21 September 1983, 209 Phil. 505 (1983). See also People v. Bustinera, supra note 42.

[52] The distinction being "inconsequential" if the criminal charge is based on a special law such as the Dangerous Drugs Law. See e.g., People v. Enriquez, G.R. No. 99838, October 23 1997, 281 SCRA 103, 120.

[53] 38 Phil. 754 (1918).

[54] Id. at 755.

[55] Id.

[56] Id. at 755-756.

[57] Supra note 4.

[58] Supra note 4 at 227.

[59] Id.

[60] People v. Diño, supra note 27 at 3450.

[61] Id.

[62] Id.

[63] Id. at 3451.

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[64] People v. Flores, supra note 28 at 840.

[65] Id. at 836. The Court of Appeals in Flores did not identify the character of these stolen merchandise.

[66] Id. at 841.

[67] Id.

[68] People v. Diño, supra note 27 at 841.

[69] People v. Naval and Beltran, CA 46 O.G. 2641.

[70] See note 62.

[71] AQUINO, supra note 29 at 122.

[72] Id. at 110.

[73] C.A. G.R. No. 20105-R, 4 October 1958, 55 O.G. 1388.

[74] Id. at 1391. Citations omitted.

[75] CA G.R. No. 2107-R, 31 May 1949.

[76] Note the similarity between this holding and the observations of Chief Justice Aquino in note 72.

[77] REYES, supra note 29 at 113.

[78] Supra note 5.

[79] "REVISED PENAL CODE, Art. 310 states that the crime of theft shall "be punished by the penalties next higher by two degrees than those respectively expressed in the next preceding article x x x if the property stolen x x x consists of coconuts taken from the premises of a plantation, x x x." Thus, the stealing of coconuts when they are still in the tree or deposited on the ground within the premises is qualified theft. When the coconuts are stolen in any other place, it is simple theft. Stated differently, if the coconuts were taken in front of a house along the highway outside the coconut plantation, it would be simple theft only.

[In the case at bar, petitioners were seen carrying away fifty coconuts while they were still in the premises of the plantation. They would therefore come within the definition of qualified theft because the property stolen consists of coconuts "taken from the premises of a plantation."] Empelis v. IAC, supra note 5, at 379, 380.

[80] Empelis v. IAC, supra note 5, at 380.

[81] Id.

[82] Art. 234, Código Penal Español de 1995. See Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal, http://noticias.juridicas.com/base_datos/Penal/ lo10-1995.html (Last visited, 15 April 2007). The traditional qualifier "but without violence against or intimidation of persons nor force upon things," is instead incorporated in the definition of robbery ("robos") under Articulo 237 of the same Code ("Son reos del delito de robo los que, con ánimo de lucro, se apoderaren de las cosas muebles ajenas empleando fuerza en las cosas para acceder al lugar donde éstas se encuentran o violencia o intimidación en las personas.")

By way of contrast, the Theft Act 1968 of Great Britain defines theft in the following manner: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it; and "thief" and "steal" shall be construed accordingly." See Section 1(1), Theft Act 1968 (Great Britain). The most notable difference between the modern British and Spanish laws on theft is the absence in the

former of the element of animo lucrandi. See note 42.

[83] 1 S. VIADA, CODIGO PENAL REFORMADO DE 1870 (1926 ed) at 103.

[84] "Considerando que según se desprende de la sentencia recurrida, los dependientes de la sastrería de D. Joaquin Gabino sorprendieron al penado Juan Gomez Lopez al tomar una capa que había en un maniquí, por lo que hubo de arrojarla al suelo, siendo detenido despues por agentes de la Autoridad yque esto supuesto es evidente que el delito no aparece realizado en toda la extensión precisa para poderlo calificar como consumado, etc." Id. at 103-104.

[85] The other examples cited by Viada of frustrated theft are in the case where the offender was caught stealing potatoes off a field by storing them in his coat, before he could leave the field where the potatoes were taken, see Viada (supra note 83, at 103), where the offender was surprised at the meadow from where he was stealing firewood, id.

[86] E. CUELLO CALON, II DERECHO PENAL (1955 ed.), at 799 (Footnote 1).

[87] Id. at 798-799.

[88] Laurel v. Abrogar, G.R. No. 155076, 27 February 2006, 483 SCRA 243, 266, citing United States v. Wiltberger, 18 U.S. 76 (1820).

[89] Laurel v. Abrogar, G.R. No. 155076, 27 February 2006, 483 SCRA 243. See also Dowling v. United States, 473 U.S. 207 (1985).

[90] See e.g., People v. Bustinera, supra note 42.

[91] AQUINO, supra note 29, at 110.

[92] People v. Obillo, 411 Phil. 139, 150 (2001); People v. Bernabe, 448 Phil. 269, 280 (2003); People v. Bustinera, supra note 42 at 295.

[93] 44 Phil. 720 (1923).

[94] Id. at 726.

[95] Justice Regalado cautions against "putting a premium upon the pretensions of an accused geared towards obtention of a reduced penalty." REGALADO, supra note 47, at 27.

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