

**CALIXTO BERBARI, PETITIONER, VS. THE HONORABLE PEDRO CONCEPCION, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, AND THE PROSECUTING ATTORNEY OF MANILA, RESPONDENTS.***G.R. No. 16189. February 26, 1920*

Ponente: TORRES, J.

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Counsel for Calixto Berbari filed a complaint against the Judge of the Court of First Instance, the Honorable Pedro Concepcion, and the Prosecuting Attorney of the city of Manila. Said complaint prays that after proceeding as to law judgment be rendered declaring null and void all the proceedings had before the respondent judge on and after January 23, 1920, in the criminal cause for estafa No. 18492 against the petitioner Berbari, and that the aforementioned judge and prosecuting attorney be commanded to refrain henceforth from proceeding with said criminal cause and to suspend the hearing thereof until the question raised in a civil action is definitely decided by the civil court; and alleges in effect that the petitioner Berbari brought an ordinary civil action in the Court of First Instance against Alfredo Chicote for the recovery, with legal interest, of the sum of forty eight thousand four hundred and eighty pesos (P48,480), given to the latter as a deposit and belonging to the plaintiff (Berbari) in said action; that said civil action prays to compel the defendant (Chicote) to render a full and complete accounting and to order the plaintiff and the defendant to liquidate certain business; and that, in case Chicote refuses to do so, he be condemned to pay the petitioner the sum of one hundred and nine thousand eight hundred and fifty six pesos (P109,856) or one-half of the profits corresponding to him (Berbari) with interest from the date of the filing of the complaint; and that as an act of reprisal, the defendant Chicote, by twisting the facts, succeeded in having the prosecuting attorney of the city file an information against Berbari for estafa for the sum of thirty seven thousand five hundred pesos (P37,500) which is 25 per cent of the sum of one hundred fifty thousand pesos (P150,000), the capital subscribed by Chicote in an oil corporation, and that said sum of P37,500 was received by him (Berbari) from the complaining witness, Chicote.

The sum of P37,500 aforesaid has been delivered to Berbari by Chicote in order to pay the 25 per cent of P150,000, half of the capital of the "Tayabas Oil Co., according to their agreement. Berbari affirms that he did not fulfill this trust and that he appropriated to himself the money because Chicote was owing him an amount much more greater than said sum of P37,500.

The claim for the amount greater than the sum of P37,500 and that amount which would result from the rendition of the accounting prayed for by Berbari in the civil action pending between said Berbari and Chicote, has no connection whatever with the fact of Berbari's appropriating to himself said sum of P37,500, without previously deciding whether he lawfully or illegally or maliciously appropriated it.

Chicote might be indebted to Berbari in a sum greater or smaller than said sum of P37,500. But the question for decision in the civil action No. 16925 before the Court of First Instance is not only a prejudicial question but is

not even a question requiring a decision before deciding whether or not Berbari fraudulently committed the crime of estafa to the prejudice of Chicote.

Prejudicial question is understood in law to be that which must precede the criminal action, that which requires a decision before a final judgment is rendered in the principal action with which said question is closely connected. Not all previous questions are prejudicial, although all prejudicial questions are necessarily previous.

The fact admitted by Berbari of having appropriated to himself the lump sum he had received from Chicote for a fixed object is entirely distinct, independent and absolutely separated from the acts or contracts from which the debits claimed in the civil action might have been derived. It matters not that the same contracting parties were the ones that are called in the criminal action as the embezzler and the person defrauded, and that the criminal act, granting it to be true and certain, might have been perpetrated on account of the business and mercantile relations between them, inasmuch as the decision of the question pending between Berbari as the plaintiff-creditor in the civil action, and Chicote as the defendant-debtor, cannot decide by anticipation nor be the cause of a prior determination of the existence of the crime and the consequent liability of the accused.

Berbari alleges that he suspended the application of the sum received from Chicote as directed by the latter in order to collect, after compensating the sum aforesaid, the amount which Chicote may still owe him according to the result of the pending suit. But even if this suit is decided in his favor and Chicote be sentenced to pay him a sum much greater than that alleged to have been embezzled by him, Berbari will not thereby be exempted from criminal responsibility if he has committed any. In order that the compensation, Berbari's final object, might take place, either his acquittal or his conviction is indispensable, because in case of his conviction it is necessary that the courts declare what was the amount embezzled and which he is obliged to return. For this reason if any action at all must be suspended, it would be the civil and in no way the criminal action. But for the reasons expressed above, the criminal act imputed to Berbari is a distinct and an independent act which, characterized by deceit and fraud according to the information, has no connection with the business then existing between them. Wherefore, the question whether Chicote was or was not indebted to Berbari is neither a prejudicial nor a previous question for determining whether or not the latter committed the crime of estafa to the damage and prejudice of the former. Such being the case, in no way whatsoever is it proper to order the suspension of the trial of the criminal cause. But each cause (civil and criminal) should continue on their ordinary course, inasmuch as the criminal cause has a different procedure under the law than that followed in a civil action.

Moreover, the hearing on the counterclaim interposed by Chicote against Berbari for the recovery of the amount embezzled must be suspended in accordance, with the doctrine laid down in the decision of this court in the case of Almeida Chan Tanco vs. Abaroa (8 Phil. Rep., 178), decision affirmed by the Supreme Court of the United States.[1]

From the foregoing discussion it is deduced that the civil action brought by Berbari against Chicote, now pending, arose out of certain contracts entered into between them on account and on the occasion of their business transaction, while the criminal action for the crime of estafa arose out of this alleged crime, independent of the contracts aforesaid. Wherefore, we cannot apply to the instant case the doctrine laid down in the interpretation and application of articles 3, 4, 5 and 7 in connection with articles 111 and 114 of the Law of Criminal Procedure of 1882, cited in rule 95 of the Provisional Law for the observance of the Penal Code and referred to in the last sentence of section 1 of General Orders No. 58.

The compilation of the laws of criminal procedure of Spain as amended in 1880 did not have any provision concerning questions requiring judicial decision before the institution of a criminal prosecution. Wherefore, in order to decide said questions in case they are raised before the courts of these Islands, it would be necessary to

look for the Law of Criminal Procedure of 1882, which has repealed the former procedural laws and is the only law in force in Spain in 1884 when the Penal Code was made applicable to these Islands. Said law of 1882 is clothed, therefore, of the character of supplementary law containing respectable doctrine, inasmuch as there is no law in this country on said prejudicial questions.

From the foregoing considerations the petition of counsel for Calixto Berbari dated February 3, 1920, is hereby denied with the costs against petitioner. Let this decision be notified to the judge of the court of first instance and to the parties herein. So ordered.

Arellano, C. J., Johnson, Araullo, Street, Malcolm, and Avanceña, JJ., concur.

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[1] 218 U. S., 476; 54 L. ed., 1116.

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