GEMMA T. JACINTO, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

G.R. No. 162540. July 13, 2009

Ponente: PERALTA, J.

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PERALTA, J.:

Before us is a petition for review on certiorari filed by petitioner Gemma T. Jacinto seeking the reversal of the Decision[1] of the Court of Appeals (CA) in CA-G.R. CR No. 23761 dated December 16, 2003, affirming petitioner's conviction of the crime of Qualified Theft, and its Resolution[2] dated March 5, 2004 denying petitioner's motion for reconsideration.

Petitioner, along with two other women, namely, Anita Busog de Valencia y Rivera and Jacqueline Capitle, was charged before the Regional Trial Court (RTC) of Caloocan City, Branch 131, with the crime of Qualified Theft, allegedly committed as follows:

> That on or about and sometime in the month of July 1997, in Kalookan City, Metro Manila, and within the jurisdiction of this Honorable Court, the above-named accused, conspiring together and mutually helping one another, being then all employees of MEGA FOAM INTERNATIONAL INC., herein represented by JOSEPH DYHENGCO Y CO, and as such had free access inside the aforesaid establishment, with grave abuse of trust and confidence reposed upon them with intent to gain and without the knowledge and consent of the owner thereof, did then and there willfully, unlawfully and feloniously take, steal and deposited in their own account, Banco De Oro Check No. 0132649 dated July 14, 1997 in the sum of P10,000.00, representing payment made by customer Baby Aquino to the Mega Foam Int'l. Inc. to the damage and prejudice of the latter in the aforesaid stated amount of P10,000.00.
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> CONTRARY TO LAW.[3]

The prosecution's evidence, which both the RTC and the CA found to be more credible, reveals the events that transpired to be as follows.

In the month of June 1997, Isabelita Aquino Milabo, also known as Baby Aquino, handed petitioner Banco De Oro (BDO) Check Number 0132649 postdated July 14, 1997 in the amount of P10,000.00. The check was payment for Baby Aquino's purchases from Mega Foam Int'l., Inc., and petitioner was then the collector of Mega Foam. Somehow, the check was deposited in the Land Bank account of Generoso Capitle, the husband of Jacqueline Capitle; the latter is the sister of petitioner and the former pricing, merchandising and inventory clerk of Mega Foam.

Meanwhile, Rowena Ricablanca, another employee of Mega Foam, received a phone call sometime in the middle of July from one of their customers, Jennifer Sanalila. The customer wanted to know if she could issue checks payable to the account of Mega Foam, instead of issuing the checks payable to CASH. Said customer had apparently been instructed by Jacqueline Capitle to make check payments to Mega Foam payable to CASH. Around that time, Ricablanca also received a phone call from an employee of Land Bank, Valenzuela Branch,

who was looking for Generoso Capitle. The reason for the call was to inform Capitle that the subject BDO check deposited in his account had been dishonored.

Ricablanca then phoned accused Anita Valencia, a former employee/collector of Mega Foam, asking the latter to inform Jacqueline Capitle about the phone call from Land Bank regarding the bounced check. Ricablanca explained that she had to call and relay the message through Valencia, because the Capitles did not have a phone; but they could be reached through Valencia, a neighbor and former co-employee of Jacqueline Capitle at Mega Foam.

Valencia then told Ricablanca that the check came from Baby Aquino, and instructed Ricablanca to ask Baby Aquino to replace the check with cash. Valencia also told Ricablanca of a plan to take the cash and divide it equally into four: for herself, Ricablanca, petitioner Jacinto and Jacqueline Capitle. Ricablanca, upon the advise of Mega Foam's accountant, reported the matter to the owner of Mega Foam, Joseph Dyhengco.

Thereafter, Joseph Dyhengco talked to Baby Aquino and was able to confirm that the latter indeed handed petitioner a BDO check for P10,000.00 sometime in June 1997 as payment for her purchases from Mega Foam.[4] Baby Aquino further testified that, sometime in July 1997, petitioner also called her on the phone to tell her that the BDO check bounced.[5] Verification from company records showed that petitioner never remitted the subject check to Mega Foam. However, Baby Aquino said that she had already paid Mega Foam P10,000.00 cash in August 1997 as replacement for the dishonored check.[6]

Generoso Capitle, presented as a hostile witness, admitted depositing the subject BDO check in his bank account, but explained that the check came into his possession when some unknown woman arrived at his house around the first week of July 1997 to have the check rediscounted. He parted with his cash in exchange for the check without even bothering to inquire into the identity of the woman or her address. When he was informed by the bank that the check bounced, he merely disregarded it as he didn't know where to find the woman who rediscounted the check.

Meanwhile, Dyhengco filed a Complaint with the National Bureau of Investigation (NBI) and worked out an entrapment operation with its agents. Ten pieces of P1,000.00 bills provided by Dyhengco were marked and dusted with fluorescent powder by the NBI. Thereafter, the bills were given to Ricablanca, who was tasked to pretend that she was going along with Valencia's plan.

On August 15, 2007, Ricablanca and petitioner met at the latter's house. Petitioner, who was then holding the bounced BDO check, handed over said check to Ricablanca. They originally intended to proceed to Baby Aquino's place to have the check replaced with cash, but the plan did not push through. However, they agreed to meet again on August 21, 2007.

On the agreed date, Ricablanca again went to petitioner's house, where she met petitioner and Jacqueline Capitle. Petitioner, her husband, and Ricablanca went to the house of Anita Valencia; Jacqueline Capitle decided not to go with the group because she decided to go shopping. It was only petitioner, her husband, Ricablanca and Valencia who then boarded petitioner's jeep and went on to Baby Aquino's factory. Only Ricablanca alighted from the jeep and entered the premises of Baby Aquino, pretending that she was getting cash from Baby Aquino. However, the cash she actually brought out from the premises was the P10,000.00 marked money previously given to her by Dyhengco. Ricablanca divided the money and upon returning to the jeep, gave P5,000.00 each to Valencia and petitioner. Thereafter, petitioner and Valencia were arrested by NBI agents, who had been watching the whole time.

Petitioner and Valencia were brought to the NBI office where the Forensic Chemist found fluorescent powder on

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the palmar and dorsal aspects of both of their hands. This showed that petitioner and Valencia handled the marked money. The NBI filed a criminal case for qualified theft against the two and one Jane Doe who was later identified as Jacqueline Capitle, the wife of Generoso Capitle.

The defense, on the other hand, denied having taken the subject check and presented the following scenario.

Petitioner admitted that she was a collector for Mega Foam until she resigned on June 30, 1997, but claimed that she had stopped collecting payments from Baby Aquino for quite some time before her resignation from the company. She further testified that, on the day of the arrest, Ricablanca came to her mother's house, where she was staying at that time, and asked that she accompany her (Ricablanca) to Baby Aquino's house. Since petitioner was going for a pre-natal check-up at the Chinese General Hospital, Ricablanca decided to hitch a ride with the former and her husband in their jeep going to Baby Aquino's place in Caloocan City. She allegedly had no idea why Ricablanca asked them to wait in their jeep, which they parked outside the house of Baby Aquino, and was very surprised when Ricablanca placed the money on her lap and the NBI agents arrested them.

Anita Valencia also admitted that she was the cashier of Mega Foam until she resigned on June 30, 1997. It was never part of her job to collect payments from customers. According to her, on the morning of August 21, 1997, Ricablanca called her up on the phone, asking if she (Valencia) could accompany her (Ricablanca) to the house of Baby Aquino. Valencia claims that she agreed to do so, despite her admission during cross-examination that she did not know where Baby Aquino resided, as she had never been to said house. They then met at the house of petitioner's mother, rode the jeep of petitioner and her husband, and proceeded to Baby Aquino's place. When they arrived at said place, Ricablanca alighted, but requested them to wait for her in the jeep. After ten minutes, Ricablanca came out and, to her surprise, Ricablanca gave her money and so she even asked, "What is this?" Then, the NBI agents arrested them.

The trial of the three accused went its usual course and, on October 4, 1999, the RTC rendered its Decision, the dispositive portion of which reads:

> WHEREFORE, in view of the foregoing, the Court finds accused Gemma Tubale De Jacinto y Latosa, Anita Busog De Valencia y Rivera and Jacqueline Capitle GUILTY beyond reasonable doubt of the crime of QUALIFIED THEFT and each of them is hereby sentenced to suffer imprisonment of FIVE (5) YEARS, FIVE (5) MONTHS AND ELEVEN (11) DAYS, as minimum, to SIX (6) YEARS, EIGHT (8) MONTHS AND TWENTY (20) DAYS, as maximum.
>
> SO ORDERED.[7]

The three appealed to the CA and, on December 16, 2003, a Decision was promulgated, the dispositive portion of which reads, thus:

> IN VIEW OF THE FOREGOING, the decision of the trial court is MODIFIED, in that:
>
> (a) the sentence against accused Gemma Jacinto stands;
> (b) the sentence against accused Anita Valencia is reduced to 4 months arresto mayor medium.
> (c) The accused Jacqueline Capitle is acquitted.
>
> SO ORDERED.

A Partial Motion for Reconsideration of the foregoing CA Decision was filed only for petitioner Gemma Tubale Jacinto, but the same was denied per Resolution dated March 5, 2004.

Hence, the present Petition for Review on Certiorari filed by petitioner alone, assailing the Decision and Resolution of the CA. The issues raised in the petition are as follows:

- Whether or not petitioner can be convicted of a crime not charged in the information;

- Whether or not a worthless check can be the object of theft; and

- Whether or not the prosecution has proved petitioner's guilt beyond reasonable doubt.[8]

The petition deserves considerable thought.

The prosecution tried to establish the following pieces of evidence to constitute the elements of the crime of qualified theft defined under Article 308, in relation to Article 310, both of the Revised Penal Code: (1) the taking of personal property - as shown by the fact that petitioner, as collector for Mega Foam, did not remit the customer's check payment to her employer and, instead, appropriated it for herself; (2) said property belonged to another – the check belonged to Baby Aquino, as it was her payment for purchases she made; (3) the taking was done with intent to gain - this is presumed from the act of unlawful taking and further shown by the fact that the check was deposited to the bank account of petitioner's brother-in-law; (4) it was done without the owner's consent - petitioner hid the fact that she had received the check payment from her employer's customer by not remitting the check to the company; (5) it was accomplished without the use of violence or intimidation against persons, nor of force upon things - the check was voluntarily handed to petitioner by the customer, as she was known to be a collector for the company; and (6) it was done with grave abuse of confidence - petitioner is admittedly entrusted with the collection of payments from customers.

However, as may be gleaned from the aforementioned Articles of the Revised Penal Code, the personal property subject of the theft must have some value, as the intention of the accused is to gain from the thing stolen. This is further bolstered by Article 309, where the law provides that the penalty to be imposed on the accused is dependent on the value of the thing stolen.

In this case, petitioner unlawfully took the postdated check belonging to Mega Foam, but the same was apparently without value, as it was subsequently dishonored. Thus, the question arises on whether the crime of qualified theft was actually produced.

The Court must resolve the issue in the negative.

Intod v. Court of Appeals[9] is highly instructive and applicable to the present case. In Intod, the accused, intending to kill a person, peppered the latter's bedroom with bullets, but since the intended victim was not home at the time, no harm came to him. The trial court and the CA held Intod guilty of attempted murder. But upon review by this Court, he was adjudged guilty only of an impossible crime as defined and penalized in paragraph 2, Article 4, in relation to Article 59, both of the Revised Penal Code, because of the factual impossibility of producing the crime. Pertinent portions of said provisions read as follows:

> Article 4(2). Criminal Responsibility. - Criminal responsibility shall be incurred:
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> x x x x
>
> 2. By any person performing an act which would be an offense against persons or property, were it not for the inherent impossibility of its accomplishment or on account of the employment of inadequate to ineffectual means. (emphasis supplied)

Article 59. Penalty to be imposed in case of failure to commit the crime because the means employed or the aims sought are impossible. - When the person intending to commit an offense has already performed the acts for the execution of the same but nevertheless the crime was not produced by reason of the fact that the act intended was by its nature one of impossible accomplishment or because the means employed by such person are essentially inadequate to produce the result desired by him, the court, having in mind the social danger and the degree of

criminality shown by the offender, shall impose upon him the penalty of arresto mayor or a fine ranging from 200 to 500 pesos.

Thus, the requisites of an impossible crime are: (1) that the act performed would be an offense against persons or property; (2) that the act was done with evil intent; and (3) that its accomplishment was inherently impossible, or the means employed was either inadequate or ineffectual. The aspect of the inherent impossibility of accomplishing the intended crime under Article 4(2) of the Revised Penal Code was further explained by the Court in Intod[10] in this wise:

> Under this article, the act performed by the offender cannot produce an offense against persons or property because: (1) the commission of the offense is inherently impossible of accomplishment; or (2) the means employed is either (a) inadequate or (b) ineffectual.
>
> That the offense cannot be produced because the commission of the offense is inherently impossible of accomplishment is the focus of this petition. To be impossible under this clause, the act intended by the offender must be by its nature one impossible of accomplishment. There must be either (1) legal impossibility, or (2) physical impossibility of accomplishing the intended act in order to qualify the act as an impossible crime.
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> Legal impossibility occurs where the intended acts, even if completed, would not amount to a crime.
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> x x x x
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> The impossibility of killing a person already dead falls in this category.
>
> On the other hand, factual impossibility occurs when extraneous circumstances unknown to the actor or beyond his control prevent the consummation of the intended crime. x x x [11]

In Intod, the Court went on to give an example of an offense that involved factual impossibility, i.e., a man puts his hand in the coat pocket of another with the intention to steal the latter's wallet, but gets nothing since the pocket is empty.

Herein petitioner's case is closely akin to the above example of factual impossibility given in Intod. In this case, petitioner performed all the acts to consummate the crime of qualified theft, which is a crime against property. Petitioner's evil intent cannot be denied, as the mere act of unlawfully taking the check meant for Mega Foam showed her intent to gain or be unjustly enriched. Were it not for the fact that the check bounced, she would have received the face value thereof, which was not rightfully hers. Therefore, it was only due to the extraneous circumstance of the check being unfunded, a fact unknown to petitioner at the time, that prevented the crime from being produced. The thing unlawfully taken by petitioner turned out to be absolutely worthless, because the check was eventually dishonored, and Mega Foam had received the cash to replace the value of said dishonored check.

The fact that petitioner was later entrapped receiving the P5,000.00 marked money, which she thought was the cash replacement for the dishonored check, is of no moment. The Court held in Valenzuela v. People[12] that under the definition of theft in Article 308 of the Revised Penal Code, "there is only one operative act of execution by the actor involved in theft â”€ the taking of personal property of another." Elucidating further, the Court held, thus:

> x x x 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."
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> x x x x

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> x x x 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. x x x
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> x x x x
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> x x x 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. x x x
>
> x x x Unlawful taking, which is the deprivation of one's personal property, is the element which produces the felony in its consummated stage. x x x [13]

From the above discussion, there can be no question that as of the time that petitioner took possession of the check meant for Mega Foam, she had performed all the acts to consummate the crime of theft, had it not been impossible of accomplishment in this case. The circumstance of petitioner receiving the P5,000.00 cash as supposed replacement for the dishonored check was no longer necessary for the consummation of the crime of qualified theft. Obviously, the plan to convince Baby Aquino to give cash as replacement for the check was hatched only after the check had been dishonored by the drawee bank. Since the crime of theft is not a continuing offense, petitioner's act of receiving the cash replacement should not be considered as a continuation of the theft. At most, the fact that petitioner was caught receiving the marked money was merely corroborating evidence to strengthen proof of her intent to gain.

Moreover, the fact that petitioner further planned to have the dishonored check replaced with cash by its issuer is a different and separate fraudulent scheme. Unfortunately, since said scheme was not included or covered by the allegations in the Information, the Court cannot pronounce judgment on the accused; otherwise, it would violate the due process clause of the Constitution. If at all, that fraudulent scheme could have been another possible source of criminal liability.

IN VIEW OF THE FOREGOING, the petition is GRANTED. The Decision of the Court of Appeals, dated December 16, 2003, and its Resolution dated March 5, 2004, are MODIFIED. Petitioner Gemma T. Jacinto is found GUILTY of an IMPOSSIBLE CRIME as defined and penalized in Articles 4, paragraph 2, and 59 of the Revised Penal Code, respectively. Petitioner is sentenced to suffer the penalty of six (6) months of arrresto mayor, and to pay the costs.

SO ORDERED.

Ynares-Santiago, (Chairperson), Chico-Nazario, Velasco, Jr., and Nachura, JJ., concur.

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[1]Penned by Associate Justice Mario L. Guariña III, with Associate Justices Martin S. Villarama, Jr. and Jose C. Reyes, Jr., concurring; rollo, pp. 70-77.

[2] Id. at 86.

[3] Records, p. 107.

[4] TSN, February 11, 1998, p. 8.

[5] Id. at 14.

[6] TSN, February 11, 1998, pp. 9-10.

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[7] Rollo, p. 51.

[8] Id. at 128.

[9] G.R. No. 103119, October 21, 1992, 215 SCRA 52.

[10] Supra.

[11] Id. at 57-58.

[12] G.R. No. 160188, June 21, 2007, 525 SCRA 306, 324 .

[13] Id. at 327, 343-345.

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