ZENON R. PEREZ, Petitioner, vs. PEOPLE OF THE PHILIPPINES and SANDIGANBAYAN, Respondents.

G.R. No. 164763. February 12, 2008

Ponente: REYES, R.T., J.

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REYES, R.T., J.:

PETITIONER Zenon R. Perez seeks a review[1] of his conviction by the Sandiganbayan[2] for malversation of public funds[3] under Article 217 of the Revised Penal Code.

This is not a big case but its implications are wide-ranging and the issues We resolve include the rights to speedy trial and speedy disposition of a criminal case, the balancing test, due process, and cruel and unusual punishment.

The Facts

On December 28, 1988, an audit team headed by Auditor I Arlene R. Mandin, Provincial Auditor's Office, Bohol,[4] conducted a cash examination on the account of petitioner, who was then the acting municipal treasurer of Tubigon, Bohol.

Petitioner was absent on the first scheduled audit at his office on December 28, 1988. A radio message was sent to Loon, the town where he resided, to apprise him of the on-going audit. The following day, the audit team counted the cash contained in the safe of petitioner in his presence. In the course of the audit, the amount of P21,331.79 was found in the safe of petitioner.

The audit team embodied their findings in the Report of Cash Examination,[5] which also contained an inventory of cash items. Based on the said audit, petitioner was supposed to have on hand the total amount of P94,116.36, instead of the P21,331.79, incurring a shortage of P72,784.57.[6]

The report also contained the Cash Production Notice[7] dated January 4, 1989, where petitioner was informed and required to produce the amount of P72,784.57, and the cash count sheet signed and acknowledged by petitioner indicating the correctness of the amount of P21,331.79 found in his safe and counted in his presence. A separate demand letter[8] dated January 4, 1989 requiring the production of the missing funds was sent and received by petitioner on January 5, 1989.

When asked by the auditing team as to the location of the missing funds, petitioner verbally explained that part of the money was used to pay for the loan of his late brother, another portion was spent for the food of his family, and the rest for his medicine.[9]

As a result of the audit, Arlene R. Mandin prepared a memorandum[10] dated January 13, 1989 addressed to the Provincial Auditor of Bohol recommending the filing of the appropriate criminal case against petitioner.

On January 16, 1989, petitioner remitted to the Office of the Provincial Treasurer of Bohol the amounts of P10,000.00 and P15,000.00, respectively. On February 14, 1989, petitioner again remitted to the Provincial Treasurer an additional amount of P35,000.00, followed by remittances made on February 16, 1989 in the

amounts of P2,000.00 and P2,784.00.

An administrative case was filed against petitioner on February 13, 1989. He filed an Answer[11] dated February 22, 1989 reiterating his earlier verbal admission before the audit team.

On April 17, 1989, petitioner again remitted the amount of P8,000.00 to the Provincial Treasurer of Bohol. Petitioner had then fully restituted his shortage in the amount of P72,784.57. The full restitution of the missing money was confirmed and shown by the following receipts:[12]

Official Receipt No. Date Issued and Received Amount

8266659 January 16, 1989 P10,000.00

8266660 January 16, 1989 P15,000.00

8266662 February 14, 1989 P35,000.00

8266667 February 16, 1989 P 2,000.00

8266668 February 16, 1989 P 2,784.00

8266675 April 17, 1989 P 8,000.00

TOTAL - P72,784.57

Later, petitioner was charged before the Sandiganbayan with malversation of public funds, defined and penalized by Article 217 of the Revised Penal Code in an Information that read:

> That on or about the period covering from December 28, 1988 to January 5, 1989, and for sometime prior thereto, in the Municipality of Tubigon, Province of Bohol, Philippines and within the jurisdiction of this Honorable Court, the above-named accused Zenon R. Perez, a public officer being then Acting Municipal Treasury of the said Municipality, by reason of the duties of his official position was accountable for the public funds collected and received by him, with grave abuse of confidence did then and there willfully, unlawfully and feloniously misappropriate, misapply, embezzle and take away from the said funds the total amount of SEVENTY-TWO THOUSAND SEVEN HUNDRED EIGHTY-FOUR PESOS and 57/100 (P72,784.57), which said fund was appropriated and converted by the said accused to his own personal use and benefit to the damage and prejudice of the government in the aforementioned amount.
>
> CONTRARY TO LAW.[13] (Underscoring supplied)

On March 1, 1990, petitioner, duly assisted by counsel de parte, entered a plea of “not guilty.”[14]

Pre-trial was initially set on June 4-5, 1990 but petitioner’s counsel moved for postponement. The Sandiganbayan, however, proceeded to hear the case on June 5, 1990, as previously scheduled, due to the presence of prosecution witness Arlene R. Mandin, who came all the way from Bohol.

On said date, the Sandiganbayan dispensed with pre-trial and allowed the prosecution to present its witness. Arlene R. Mandin testified as narrated above.

The defense presented evidence through petitioner Zenon R. Perez himself. He denied the contents of his first Answer[15] to the administrative case filed against him by the audit team. He claimed it was prepared without the assistance of counsel and that at the time of its preparation and submission, he was not in peak mental and physical condition, having been stricken with diabetes mellitus.[16]

He then revoked his Answer dated February 22, 1989 and filed his second Answer dated March 2, 1989.[17] In

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the latter, he vehemently denied that he incurred a cash shortage P72,784.57.

According to petitioner, the alleged shortage was in the possession and custody of his accountable personnel at the time of the audit examination. Several amounts totalling P64,784.00 were remitted to him on separate dates by his accountable officer, starting January 16, 1989 to February 16, 1989. The same were turned over by him to the Office of the Provincial Treasurer, leaving an unremitted sum of P8,000.00 as of February 16, 1989.[18] He remitted the P8,000.00 on April 17, 1989 to the Provincial Treasurer of Bohol, fully restoring the cash shortage.

Petitioner further testified that on July 30, 1989, he submitted his Position Paper[19] before the Office of the Ombudsman, Cebu City and maintained that the alleged cash shortage was only due to oversight. Petitioner argued that the government did not suffer any damage or prejudice since the alleged cash shortage was actually deposited with the Office of the Provincial Treasurer as evidenced by official receipts.[20]

Petitioner completed his testimony on September 20, 1990. He rested his case on October 20, 1990.[21]

Sandiganbayan Disposition

On September 24, 2003, the Sandiganbayan rendered a judgment of conviction with a fallo reading:

> WHEREFORE, judgment is hereby rendered finding the accused ZENON R. PEREZ, GUILTY beyond reasonable doubt of the crime of Malversation of Public Funds as defined in and penalized by Article 217 of the Revised Penal Code and, there being one mitigating circumstance without any aggravating circumstance to offset the same, is hereby sentenced to suffer an indeterminate penalty of from TEN (10) YEARS and ONE (1) DAY of prision mayor as the minimum to FOURTEEN (14) YEARS and EIGHT (8) MONTHS of reclusion temporal as the maximum and to suffer perpetual special disqualification. The accused Zenon R. Perez is likewise ordered to pay a FINE equal to the total amount of the funds malversed, which is Seventy-Two Thousand Seven Hundred Eighty-Four Pesos and Fifty-Seven Centavos (P72, 784.57).
>
> SO ORDERED.[22] (Emphasis in the original)

On January 13, 2004, petitioner filed a motion for reconsideration[23] which the prosecution opposed on January 28, 2004.[24] Petitioner replied[25] to the opposition. On August 6, 2004, petitioner's motion was denied with finality.

On September 23, 2004, petitioner resorted to the instant appeal[26] raising the following issues, to wit:

> - THE HON. SANDIGANBAYAN BY UNDULY AND UNREASONABLY DELAYING THE DECISION OF THE CASE FOR OVER THIRTEEN (13) YEARS VIOLATED THE PETITIONER'S RIGHT TO SPEEDY DISPOSITION OF HIS CASE AND DUE PROCESS.
>
> - THE LAW RELIED UPON IN CONVICTING THE PETITIONER AND THE SENTENCE IMPOSED IS CRUEL AND THEREFORE VIOLATES SECTION 19 OF ARTICLE III (BILL OF RIGHTS) OF THE CONSTITUTION.[27] (Underscoring supplied)

Our Ruling

Before addressing petitioner's twin assignment of errors, We first tackle the propriety of petitioner's conviction for malversation of public funds.

I. Petitioner was correctly convicted
of malversation.

Malversation is defined and penalized under Article 217 of the Revised Penal Code. The acts punished as malversation are: (1) appropriating public funds or property, (2) taking or misappropriating the same, (3)

consenting, or through abandonment or negligence, permitting any other person to take such public funds or property, and (4) being otherwise guilty of the misappropriation or malversation of such funds or property.[28]

There are four elements that must concur in order that one may be found guilty of the crime. They are:

> (a) That the offender be a public officer;
>
> (b) That he had the custody or control of funds or property by reason of the duties of his office;
>
> (c) That those funds or property involved were public funds or property for which he is accountable; and
>
> (d) That he has appropriated, took or misappropriated or consented or, through abandonment or negligence, permitted another person to take them.[29]

Evidently, the first three elements are present in the case at bar. At the time of the commission of the crime charged, petitioner was a public officer, being then the acting municipal treasurer of Tubigon, Bohol. By reason of his public office, he was accountable for the public funds under his custody or control.

The question then is whether or not petitioner has appropriated, took or misappropriated, or consented or through abandonment or negligence, permitted another person to take such funds.

We rule in the affirmative.

In malversation, all that is necessary to prove is that the defendant received in his possession public funds; that he could not account for them and did not have them in his possession; and that he could not give a reasonable excuse for its disappearance. An accountable public officer may be convicted of malversation even if there is no direct evidence of misappropriation and the only evidence is shortage in his accounts which he has not been able to explain satisfactorily.[30]

Verily, an accountable public officer may be found guilty of malversation even if there is no direct evidence of malversation because the law establishes a presumption that mere failure of an accountable officer to produce public funds which have come into his hands on demand by an officer duly authorized to examine his accounts is prima facie case of conversion.[31]

Because of the prima facie presumption in Article 217, the burden of evidence is shifted to the accused to adequately explain the location of the funds or property under his custody or control in order to rebut the presumption that he has appropriated or misappropriated for himself the missing funds. Failing to do so, the accused may be convicted under the said provision.

However, the presumption is merely prima facie and a rebuttable one. The accountable officer may overcome the presumption by proof to the contrary. If he adduces evidence showing that, in fact, he has not put said funds or property to personal use, then that presumption is at end and the prima facie case is destroyed.[32]

In the case at bar, petitioner was not able to present any credible evidence to rebut the presumption that he malversed the missing funds in his custody or control. What is extant in the records is that the prosecution, through witness Arlene R. Mandin, was able to prove that petitioner malversed the funds under his custody and control. As testified by Mandin:

Was Mr. Zenon Perez actually and physically present during the time of your cash examination?

Atty. Caballero:

Q: Was Mr. Zenon Perez actually and physically present during the time of your cash examination?

Witness:

A. Yes, Sir.

Q: From December 28, to January 5, 1989?

A: He was present on December 28, 1988 and January 4 and 5, 1989, Sir.

Q: Did he not make any verbal explanation as the reason why he was short of about P72,000.00, after you conducted the cash count on January 5, 1989?

A: Yes, Sir, he did.

Q: What did he tell you?

A: He told us that he used some of the money to pay for the loan of his brother and the other portion was spent for food of his family; and the rest for his medicine.[33] (Emphasis supplied)

Petitioner gave himself away with his first Answer filed at the Office of the Provincial Treasurer of Bohol in the administrative case filed against him.

In that Answer, petitioner narrated how he disposed of the missing funds under his custody and control, to wit: (1) about P30,000.00 was used to pay the commercial loan of his late brother; (2) he spent P10,000.00 for the treatment of his toxic goiter; and (3) about P32,000.00 was spent for food and clothing of his family, and the education of his children. He there stated:

> 1. That the circumstances surrounding the cash shortage in the total amount of P72,784.57 during the examination of the respondent's cash accounts by the Commission on Audit on December 28-29, 1988 and January 4-5, 1989 are as follows, to wit:
> (a) That respondent paid the amount of about P30,000.00 to the Philippine National Bank, Tagbilaran Branch as interests of the commercial loan of his late brother Carino R. Perez using respondent's house and lot as collateral thereof. If the interests would not be paid, the loan would be foreclosed to respondent's great prejudice and disadvantage considering that he and his family are residing in said house used as collateral;
>
> (b) That respondent spent the amount of P10,000.00 in connection with the treatment of his toxic goiter;
>
> (c) That the rest of the amount amounting to about P32,000.00 was spent by him for his family's foods, clothings (sic), and education of his children because his monthly salary is not enough for the needs of his family.[34]

By the explicit admission of petitioner, coupled with the testimony of Arlene R. Mandin, the fourth element of the crime of malversation was duly established. His conviction thus stands in terra firma.

True it is that petitioner filed another Answer on March 2, 1989 with the Office of the Provincial Treasurer of Bohol, substantially changing the contents of his earlier answer of February 22, 1989. His second Answer averred:

> 3. That the truth of the matter is that the alleged total cash shortage of P72,784.57 were still in the possession and custody of his accountable personnel at the time of the examination held by the auditor of the Commission on Audit;
>
> 4. That out of the alleged cash shortage of P72,784.57, almost all of said amount were already remitted to him by his accountable personnel after January 5, 1989, and only the remaining amount of P8,000.00 remains to be remitted to him by his accountable personnel.[35]

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The sudden turnaround of petitioner fails to convince Us. To Our mind, petitioner only changed his story to exonerate himself, after realizing that his first Answer put him in a hole, so to speak.

It is contended that petitioner's first Answer of February 22, 1989 should not have been given probative weight because it was executed without the assistance of counsel.[36]

There is no law, jurisprudence or rule which mandates that an employee should be assisted by counsel in an administrative case. On the contrary, jurisprudence is in unison in saying that assistance of counsel is not indispensable in administrative proceedings.

Walang batas, hurisprudensiya, o tuntunin na nagsasabi na ang isang kawani ay dapat may tulong ng abogado sa isang kasong administratibo. Sa katunayan, ang hurisprudensiya ay iisa ang sinasabi na ang pagtulong ng isang abogado ay hindi kailangang-kailangan sa kasong administratibo.

The right to counsel, which cannot be waived unless the waiver is in writing and in the presence of counsel, is a right afforded a suspect or accused during custodial investigation. It is not an absolute right and may be invoked or rejected in a criminal proceeding and, with more reason, in an administrative inquiry.[37]

Ang karapatang magkaroon ng abogado, na hindi maaaring talikdan malibang ang waiver ay nakasulat at sa harap ng abogado, ay karapatang ibinibigay sa suspek o nasasakdal sa isang custodial investigation. Ito ay hindi lubos na karapatan at maaring hingin o tanggihan sa isang prosesong kriminal, at lalo na sa isang administratibong pagsisiyasat.

While investigations conducted by an administrative body may at times be akin to a criminal proceeding, the fact remains that under existing laws, a party in an administrative inquiry may or may not be assisted by counsel, irrespective of the nature of the charges and of respondent's capacity to represent himself, and no duty rests on such body to furnish the person being investigated with counsel.[38]

Thus, the right to counsel is not imperative in administrative investigations because such inquiries are conducted merely to determine whether there are facts that merit disciplinary measures against erring public officers and employees, with the purpose of maintaining the dignity of government service.[39]

Kung gayon, ang karapatang magkaroon ng abogado ay hindi sapilitan sa isang administratibong imbestigasyon sapagkat ito ay ginagawa lamang upang malaman kung may sapat na batayan na patawan ng disiplina ang nagkasalang opisyal o empleyado, para mapanatili ang dignidad ng paglilingkod sa pamahalaan.

There is nothing in the Constitution that says that a party in a non-litigation proceeding is entitled to be represented by counsel and that, without such representation, he shall not be bound by such proceedings. The assistance of lawyers, while desirable, is not indispensable. The legal profession was not engrafted in the due process clause such that without the participation of its members, the safeguard is deemed ignored or violated. The ordinary citizen is not that helpless that he cannot validly act at all except only with a lawyer at his side.[40]

More than that, petitioner's first Answer may be taken against him, as he executed it in the course of the administrative proceedings below. This is pursuant to Rule 130, Section 26 of the Rules of Court which provides that the "act, declaration or omission of a party as to a relevant fact may be given against him." In People v. Lising,[41] the Court held:

> Extrajudicial statements are as a rule, admissible as against their respective declarants, pursuant to the rule that the act, declaration or omission of a party as to a relevant fact may be given against him. This is based upon the presumption that no man would declare anything against himself, unless such declarations were true. A man's act, conduct and declarations wherever made, provided they be voluntary, are admissible against him, for the

> reason that it is fair to presume that they correspond with the truth and it is his fault if they are not.

There is also no merit in the contention that petitioner's sickness affected the preparation of his first Answer. He presented no convincing evidence that his disease at the time he formulated that answer diminished his capacity to formulate a true, clear and coherent response to any query. In fact, its contents merely reiterated his verbal explanation to the auditing team on January 5, 1989 on how he disposed of the missing funds.

II. There is no violation of the rights
to a speedy disposition of the case
and to due process of law.

We now discuss the right to a speedy trial and disposition, the balancing test, due process, and cruel and unusual punishment.

Petitioner asserts that his right to due process of law and to speedy disposition of his case was violated because the decision of the Sandiganbayan was handed down after the lapse of more than twelve years. The years that he had to wait for the outcome of his case were allegedly spent in limbo, pain and agony.[42]

We are not persuaded.

Due process of law as applied to judicial proceedings has been interpreted to mean "a law which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial."[43] Petitioner cannot complain that his right to due process has been violated. He was given all the chances in the world to present his case, and the Sandiganbayan rendered its decision only after considering all the pieces of evidence presented before it.

Petitioner's claim of violation of his right to a speedy disposition of his case must also fail.

The 1987 Constitution[44] guarantees the right of an accused to speedy trial. Both the 1973 Constitution in Section 16 of Article IV and the 1987 Constitution in Section 16 of Article III, Bill of Rights, are also explicit in granting to the accused the right to speedy disposition of his case.[45]

In Barker v. Wingo,[46] the United States Supreme Court was confronted for the first time with two "rigid approaches" on speedy trial as "ways of eliminating some of the uncertainty which courts experience protecting the right."[47]

The first approach is the "fixed-time period" which holds the view that "the Constitution requires a criminal defendant to be offered a trial within a specified time period."[48] The second approach is the "demand-waiver rule" which provides that "a defendant waives any consideration of his right to speedy trial for any period prior to which he has not demanded trial. Under this rigid approach, a prior demand is a necessary condition to the consideration of the speedy trial right."[49]

The fixed-time period was rejected because there is "no constitutional basis for holding that the speedy trial can be quantified into a specific number of days or months."[50] The demand-waiver rule was likewise rejected because aside from the fact that it is "inconsistent with this Court's pronouncements on waiver of constitutional rights,"[51] "it is insensitive to a right which we have deemed fundamental."[52]

The Court went on to adopt a middle ground: the "balancing test," in which "the conduct of both the prosecution and defendant are weighed."[53] Mr. Justice Powell, ponente, explained the concept, thus:

> A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four

> such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.
>
> The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.
>
> Closely related to length of delay is the reason the government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay. We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.
>
> A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.[54] (Emphasis supplied)

Philippine jurisprudence has, on several occasions, adopted the balancing test.

In 1991, in Gonzales v. Sandiganbayan,[55] this Court ruled:

> It must be here emphasized that the right to a speedy disposition of a case, like the right to speedy trial, is deemed violated only when the proceeding is attended by vexatious, capricious, and oppressive delays; or when unjustified postponements of the trial are asked for and secured, or when without cause or justifiable motive a long period of time is allowed to elapse without the party having his case tried. Equally applicable is the balancing test used to determine whether a defendant has been denied his right to a speedy trial, or a speedy disposition of a case for that matter, in which the conduct of both the prosecution and the defendant are weighed, and such factors as length of the delay, reason for the delay, the defendant's assertion or non-assertion of his right, and prejudice to the defendant resulting from the delay, are considered. (Underscoring supplied)

Subsequently, in Dela Peña v. Sandiganbayan,[56] this Court again enumerated the factors that should be considered and balanced, namely: (1) length of delay; (2) reasons for the delay; (3) assertion or failure to assert such right by the accused; and (4) prejudice caused by the delay.[57]

Once more, in Mendoza-Ong v. Sandiganbayan,[58] this Court reiterated that the right to speedy disposition of

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cases, like the right to speedy trial, is violated only when the proceedings are attended by vexatious, capricious and oppressive delays.[59] In the determination of whether said right has been violated, particular regard must be taken of the facts and circumstances peculiar to each case.[60] The conduct of both the prosecution and defendant, the length of the delay, the reasons for such delay, the assertion or failure to assert such right by accused, and the prejudice caused by the delay are the factors to consider and balance.[61]

Moreover, the determination of whether the delays are of said nature is relative and cannot be based on a mere mathematical reckoning of time.[62]

Measured by the foregoing yardstick, We rule that petitioner was not deprived of his right to a speedy disposition of his case.

More important than the absence of serious prejudice, petitioner himself did not want a speedy disposition of his case.[63] Petitioner was duly represented by counsel de parte in all stages of the proceedings before the Sandiganbayan. From the moment his case was deemed submitted for decision up to the time he was found guilty by the Sandiganbayan, however, petitioner has not filed a single motion or manifestation which could be construed even remotely as an indication that he wanted his case to be dispatched without delay.

Petitioner has clearly slept on his right. The matter could have taken a different dimension if during all those twelve years, petitioner had shown signs of asserting his right to a speedy disposition of his case or at least made some overt acts, like filing a motion for early resolution, to show that he was not waiving that right.[64]

Currit tempus contra decides et sui juris contempores: Time runs against the slothful and those who neglect their rights. Ang panahon ay hindi panig sa mga tamad at pabaya sa kanilang karapatan. Vigilantis sed non dormientibus jura in re subveniunt. The law aids the vigilant and not those who slumber in their rights. Ang batas ay tumutulong sa mga mapagbantay at hindi sa mga humihimbing sa kanilang karapatan.

Pending his conviction by the Sandiganbayan, petitioner may have truly lived in suspicion and anxiety for over twelve years. However, any prejudice that may have been caused to him in all those years was only minimal. The supposed gravity of agony experienced by petitioner is more imagined than real.

This case is analogous to Guerrero v. Court of Appeals.[65] There, the Court ruled that there was no violation of petitioner's right to speedy trial and disposition of his case inasmuch as he failed seasonably to assert his rights:

> In the present case, there is no question that petitioner raised the violation against his own right to speedy disposition only when the respondent trial judge reset the case for rehearing. It is fair to assume that he would have just continued to sleep on his right – a situation amounting to laches – had the respondent judge not taken the initiative of determining the non-completion of the records and of ordering the remedy precisely so he could dispose of the case. The matter could have taken a different dimension if during all those ten years between 1979 when accused filed his memorandum and 1989 when the case was re-raffled, the accused showed signs of asserting his right which was granted him in 1987 when the new Constitution took effect, or at least made some overt act (like a motion for early disposition or a motion to compel the stenographer to transcribe stenographic notes) that he was not waiving it. As it is, his silence would have to be interpreted as a waiver of such right.
>
> While this Court recognizes the right to speedy disposition quite distinctly from the right to a speedy trial, and although this Court has always zealously espoused protection from oppressive and vexatious delays not attributable to the party involved, at the same time, we hold that a party's individual rights should not work against and preclude the people's equally important right to public justice. In the instant case, three people died as a result of the crash of the airplane that the accused was flying. It appears to us that the delay in the disposition of the case prejudiced not just the accused but the people as well. Since the accused has completely

> failed to assert his right seasonably and inasmuch as the respondent judge was not in a position to dispose of the case on the merits due to the absence of factual basis, we hold it proper and equitable to give the parties fair opportunity to obtain (and the court to dispense) substantial justice in the premises.

III. The law relied upon in convicting petitioner is not cruel and unusual. It does not violate Section 19, Article III of the Bill of Rights.

What constitutes cruel and unusual punishment has not been exactly defined.[66] The Eighth Amendment of the United States Constitution,[67] the source of Section 19, Article III of the Bill of Rights[68] of our own Constitution, has yet to be put to the test to finally determine what constitutes cruel and inhuman punishment.[69]

Cases that have been decided described, rather than defined, what is meant by cruel and unusual punishment. This is explained by the pronouncement of the United States Supreme Court that "[t]he clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[70]

In Wilkerson v. Utah,[71] Mr. Justice Clifford of the United States Supreme Court opined that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, x x x and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the constitution."[72]

In In Re: Kemmler,[73] Mr. Chief Justice Fuller of that same Court stated that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies x x x something more inhuman and barbarous, something more than the mere extinguishment of life."[74]

Again, in Weems v. U.S.,[75] Mr. Justice McKenna held for the Court that cadena temporal and its accessory penalties "has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genus from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in character. Its punishments come under the condemnation of the Bill of Rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a Federal enactment, and not taken from an alien source."

In Echegaray v. Executive Secretary,[76] this Court in a per curiam Decision held that Republic Act No. 8177,[77] even if it does not provide in particular the details involved in the execution by lethal injection, is not cruel, degrading or inhuman, and is thus constitutional. Any infliction of pain in lethal injection is merely incidental in carrying out the execution of the death penalty and does not fall within the constitutional proscription against cruel, degrading or inhuman punishment.[78]

The Court adopted the American view that what is cruel and unusual is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice and must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[79]

In his last ditch effort to exculpate himself, petitioner argues that the penalty meted for the crime of malversation of public funds "that ha[ve] been replenished, remitted and/or returned" to the government is cruel and therefore unconstitutional, "as government has not suffered any damage."[80]

The argument is specious on two grounds.

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First. What is punished by the crime of malversation is the act of a public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take and misappropriate or shall consent, or through abandonment or negligence shall permit any other person to take such public funds or property, wholly or partially, or shall otherwise be guilty of the misappropriation or malversation of such funds or property.[81]

Payment or reimbursement is not a defense for exoneration in malversation; it may only be considered as a mitigating circumstance. This is because damage is not an element of malversation.

Second. There is strong presumption of constitutionality accorded to statutes.

It is established doctrine that a statute should be construed whenever possible in harmony with, rather than in violation of, the Constitution.[82] The presumption is that the legislature intended to enact a valid, sensible and just law and one which operates no further than may be necessary to effectuate the specific purpose of the law.[83] It is presumed that the legislature has acted within its constitutional powers. So, it is the generally accepted rule that every statute, or regularly accepted act, is, or will be, or should be, presumed to be valid and constitutional.[84]

He who attacks the constitutionality of a law has the onus probandi to show why such law is repugnant to the Constitution. Failing to overcome its presumption of constitutionality, a claim that a law is cruel, unusual, or inhuman, like the stance of petitioner, must fail.

IV. On the penalty

The Sandiganbayan sentenced petitioner to an indeterminate sentence of ten (10) years and one (1) day of prision mayor, as minimum, to fourteen (14) years and eight (8) months of reclusion temporal, as maximum. In imposing the penalty, it found that petitioner was entitled to the mitigating circumstance of payment which is akin to voluntary surrender.

Article 217 penalizes malversation in the following tenor:

> Article 217. Malversation of public funds or property. – Presumption of malversation. – Any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take and misappropriate or shall consent, or through abandonment or negligence shall permit any other person to take such public funds or property, wholly or partially, or shall otherwise be guilty of the misappropriation or malversation of such funds or property.
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> - The penalty of reclusion temporal in its medium and maximum periods, if the amount involved is more than 12,000 but is less than 22,000 pesos. If the amount exceeds the latter, the penalty shall be reclusion temporal in its maximum period to reclusion perpetua.

In all cases, persons guilty of malversation shall also suffer the penalty of perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled.

The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable upon demand by any duly authorized officer, shall be prima facie evidence that he has put such missing funds or property to personal uses. (Underscoring supplied)

The amount malversed totalled P72,784.57. The prescribed penalty is reclusion temporal in its maximum period to reclusion perpetua, which has a range of seventeen (17) years, four (4) months and one (1) day to forty (40) years.

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However, the commission of the crime was attended by the mitigating circumstance akin to voluntary surrender. As correctly observed by the Sandiganbayan, petitioner restituted the full amount even before the prosecution could present its evidence. That is borne by the records.

It bears stressing that the full restitution of the amount malversed will not in any way exonerate an accused, as payment is not one of the elements of extinction of criminal liability. Under the law, the refund of the sum misappropriated, even before the commencement of the criminal prosecution, does not exempt the guilty person from liability for the crime.[85] At most, then, payment of the amount malversed will only serve as a mitigating circumstance[86] akin to voluntary surrender, as provided for in paragraph 7 of Article 13[87] in relation to paragraph 10[88] of the same Article of the Revised Penal Code.

But the Court also holds that aside from voluntary surrender, petitioner is entitled to the mitigating circumstance of no intention to commit so grave a wrong,[89] again in relation to paragraph 10 of Article 13.[90]

The records bear out that petitioner misappropriated the missing funds under his custody and control because he was impelled by the genuine love for his brother and his family. Per his admission, petitioner used part of the funds to pay off a debt owed by his brother. Another portion of the misappropriated funds went to his medications for his debilitating diabetes.

Further, as shown earlier, petitioner restituted all but Eight Thousand Pesos (P8,000.00) of the funds in less than one month and a half and said small balance in three (3) months from receipt of demand of COA on January 5, 1999. Evidently, there was no intention to commit so grave a wrong.

Of course, the end does not justify the means. To condone what petitioner has done because of the nobility of his purpose or financial emergencies will become a potent excuse for malefactors and open the floodgates for more corruption in the government, even from “small fry” like him.

The bottom line is a guilty person deserves the penalty given the attendant circumstances and commensurate with the gravity of the offense committed. Thus, a reduction in the imposable penalty by one degree is in order. Article 64 of the Revised Penal Code is explicit:

> Art. 64. Rules for the application of penalties which contain three periods. – In cases in which the penalties prescribed by law contains three periods, whether it be a single divisible penalty or composed of three difference penalties, each one of which forms a period in accordance with the provisions of Articles 76 and 77, the courts shall observe for the application of the penalty, the following rules, according to whether there are no mitigating or aggravating circumstances:
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> x x x x
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> - When there are two or more mitigating circumstances and no aggravating circumstances are present, the court shall impose the penalty next lower to that prescribed by law, in the period that it may deem applicable, according to the number and nature of such circumstances. (Underscoring supplied)

Considering that there are two mitigating circumstances, the prescribed penalty is reduced to prision mayor in its maximum period to reclusion temporal in its medium period, to be imposed in any of its periods. The new penalty has a range of ten (10) years and one (1) day to seventeen (17) years and four (4) months. Applying the Indeterminate Sentence Law,[91] the maximum term could be ten (10) years and one (1) day of prision mayor maximum, while the minimum term is again one degree lower[92] and could be four (4) years, two (2) months and one (1) day of prision correccional maximum.

In the 1910 case of U.S. v. Reyes,[93] the trial judge entered a judgment of conviction against the accused and meted to him the penalty of “three years’ imprisonment, to pay a fine of P1,500.00, and in case of insolvency to

suffer subsidiary imprisonment at the rate of one day for every P2.50 that he failed to pay, which subsidiary imprisonment, however, should not exceed one third of the principal penalty" and to be "perpetually disqualified for public office and to pay the costs." This was well within the imposable penalty then under Section 1 of Act No. 1740,[94] which is "imprisonment for not less than two months nor more than ten years and, in the discretion of the court, by a fine of not more than the amount of such funds and the value of such property."

On appeal to the Supreme Court, the accused's conviction was affirmed but his sentence was modified and reduced to six months. The court, per Mr. Justice Torres, reasoned thus:

> For the foregoing reasons the several unfounded errors assigned to the judgment appealed from have been fully refuted, since in conclusion it is fully shown that the accused unlawfully disposed of a portion of the municipal funds, putting the same to his own use, and to that of other persons in violation of Act. No. 1740, and consequently he has incurred the penalty therein established as principal of the crime of misappropriation; and even though in imposing it, it is not necessary to adhere to the rules of the Penal Code, the court in using its discretional powers as authorized by law, believes that the circumstances present in the commission of crimes should be taken into consideration, and in the present case the amount misappropriated was refunded at the time the funds were counted.[95] (Underscoring supplied)

We opt to exercise an analogous discretion.

WHEREFORE, the Decision of the Sandiganbayan dated September 24, 2003 is AFFIRMED with the MODIFICATION that petitioner is hereby sentenced to suffer the indeterminate penalty of four (4) years, two (2) months and one (1) day of prision correccional, as minimum term, to ten (10) years and one (1) day of prision mayor, as maximum term, with perpetual special disqualification. He is likewise ORDERED to pay a fine of P72,784.57, the amount equal to the funds malversed.

Costs against petitioner.

SO ORDERED.

Ynares-Santiago, (Chairperson), Austria-Martinez, Corona, and Nachura, JJ., concur.

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* Vice Associate Justice Minita V. Chico-Nazario. Justice Nazario is on official leave per Special Order No. 484 dated January 11, 2008.

[1] Under Rule 45 of the Rules of Court per A.M. No. 00-5-03-SC.

[2] Penned by Associate Justice Diosdado M. Peralta, with Associate Justices Teresita Leonardo-De Castro (now a member of this Court) and Francisco H. Villaruz, Jr., concurring; rollo, pp. 25-38.

[3] Criminal Case No. 14230.

[4] Pursuant to Office Order No. 88-55 dated December 22, 1988 issued by Provincial Auditor Fausto P. De La Serna. (Annex "B")

[5] Exhibit "C."

[6] Exhibit "E."

[7] Exhibit "D."

[8] Exhibit "F."

[9] TSN, June 25, 1990, p. 25.

[10] Exhibit “E.”

[11] Exhibit “G.”

[12] Exhibits “H” & “H-1” to “H-5.”

[13] Rollo, pp. 25-26.

[14] Id. at 26.

[15] Exhibit “G.”

[16] Exhibits “1” to “3.”

[17] Exhibit “5-B.”

[18] Exhibit “5.”

[19] Exhibit “7.”

[20] Exhibits “7-a” to “7-f.”

[21] Rollo, p. 26.

[22] Id. at 37.

[23] Id. at 39-44.

[24] Id. at 45-48.

[25] Id. at 49-52.

[26] Id. at 11-24.

[27] Id. at 17.

[28] Reyes, L.B., The Revised Penal Code (Book II), 15th ed., rev. 2001, pp. 393-394.

[29] Id. at 394. See also Nizurtado v. Sandiganbayan, G.R. No. 107838, December 7, 1994, 239 SCRA 33, 42; Peñanueva, Jr. v. Sandiganbayan, G.R. Nos. 98000-02, June 30, 1993, 224 SCRA 86, 92.

[30] De Guzman v. People, G.R. No. L-54288, December 15, 1982, 119 SCRA 337, 347 (emphasis ours), citing Aquino, The Revised Penal Code, Vol. II, 1976 ed., citing People v. Mingoa, 92 Phil. 856 (1953); U.S. v. Javier, 6 Phil. 334 (1906); U.S. v. Melencio, 4 Phil. 331 (1905). See also Quizo v. Sandiganbayan, G.R. No. L-77120, April 6, 1987, 149 SCRA 108.

[31] Quizo v. Sandiganbayan, supra at 113, citing U.S. v. Catolico, 18 Phil. 504 (1911).

[32] Id.

[33] TSN, June 5, 1990, p. 25.

[34] Exhibit “G.”

[35] Exhibit “5.”

[36] TSN, September 20, 1990, pp. 37-39.

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[37] Lumiqued v. Exevea, G.R. No. 117565, November 18, 1997, 282 SCRA 125, 138-139.

[38] Id. at 140, citing Bancroft v. Board of Governors of Registered Dentists of Oklahoma, 210 P. 2d 666 (1949).

[39] Id. at 141.

[40] Nera v. The Auditor General, G.R. No. L-24957, August 3, 1988, 164 SCRA 1.

[41] G.R. Nos. 106210-11, January 30, 1998, 285 SCRA 595, 624, citing Vicente, F., Evidence, 1990 ed., p. 305.

[42] Rollo, p. 19. Petitioner claims that he had to wait for more than thirteen (13) years. However, this is erroneous. The records would show that he rested his case on October 20, 1990, while the Sandiganbayan handed down its questioned Decision on September 24, 2003, or after the lapse of twelve (12) years and eleven (11) months.

[43] 16C C.J.S. Constitutional Law, Sec. 946.

[44] Bill of Rights of the Constitution (1987), Art. III, Sec. 14 provides:

(1) No person shall be heard to answer for a criminal offense without due process of law.

(2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witness face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused provided that he has been duly notified and his failure to appear is unjustifiable. (Emphasis supplied)

[45] “All persons shall have the right to a speedy disposition of their cases before all judicial, quasi-judicial, or administrative bodies.”

[46] 407 US 514, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1972).

[47] Barker v. Wingo, id. at 112.

[48] Id.

[49] Id. at 114.

[50] Id. at 113.

[51] Id. at 114.

[52] Id. at 116.

[53] Id.

[54] Id. at 116-118.

[55] G.R. No. 94750, July 16, 1991, 199 SCRA 298, 307.

[56] G.R. No. 144542, June 29, 2001, 360 SCRA 478.

[57] Dela Peña v. Sandiganbayan, id. at 485, citing Blanco v. Sandiganbayan, G.R. Nos. 136757-58, November 27 2000, 346 SCRA 108; Dansal v. Fernandez, Sr., G.R. No. 126814, March 2, 2000, 327 SCRA 145, 153; Alvizo v. Sandiganbayan, G.R. No. 101689, March 17, 1993, 220 SCRA 55, 63.

[58] G.R. Nos. 146368-69, October 18, 2004, 440 SCRA 423, 425-426.

[59] Mendoza-Ong v. Sandiganbayan, id., citing Dimayacyac v. Court of Appeals, G.R. No. 136264, May 28, 2004, 430 SCRA 121.

[60] Id., citing Rodriguez v. Sandiganbayan, G.R. No. 141710, March 3, 2004, 424 SCRA 236.

[61] Id., citing Ty-Dazo v. Sandiganbayan, G.R. Nos. 143885-86, January 21, 2002, 374 SCRA 200, 203.

[62] Id., citing Binay v. Sandiganbayan, G.R. Nos. 120681-83 & 128136, October 1, 1999, 316 SCRA 65.

[63] See Barker v. Wingo, supra note 46.

[64] See Dela Peña v. Sandiganbayan, supra note 56, at 488.

[65] G.R. No. 107211, June 28, 1996, 257 SCRA 703, 715-716.

[66] Weems v. U.S., 217 US 349, 30 S. Ct. 544, 54 L. Ed. 793, 19 Am. Ann. Cas. 705 (1910).

[67] The Eighth Amendment of the United States Constitution provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (Emphasis supplied)

[68] Bill of Rights of the Constitution (1987), Art. III, Sec. 19 provides:

Sec. 19. (1) Excessive fines shall not be imposed, nor cruel, degrading or inhuman punishment inflicted. Neither shall death penalty be imposed, unless, for compelling reasons involving heinous crimes, the Congress hereafter provides for it. Any death penalty already imposed shall be reduced to reclusion perpetua.

(2) The employment of physical, psychological, or degrading punishment against any prisoner or detainee, or the use of substandard or inadequate penal facilities under subhuman condition shall be dealt with by law. (Emphasis supplied)

[69] See note 43.

[70] Weems v. U.S., supra note 66, citing Mackin v. U.S., 117 US 348, 350, 29 L. Ed. 909, 910, 6 S. Ct. Rep. 777; Ex parte Wilson, 114 US 417, 427, 29 L. Ed. 89, 92.

[71] 99 US 130.

[72] Wilkerson v. Utah, id. at 135.

[73] 136 US 436, 10 S. Ct. 930, 34 L. Ed. 519.

[74] In Re: Kemmler, id. at 524.

[75] Supra note 66.

[76] G.R. No. 132601, October 12, 1998, 297 SCRA 754.

[77] An Act Designating Death by Lethal Injection as the Method of Carrying Out Capital Punishment, Amending For the Purpose Article 81 of the Revised Penal Code, As Amended by Section 24 of Republic Act No. 7659. Sections 17 and 19 of the Rules and Regulations to Implement Republic Act No. 8177 were, however, declared INVALID: (a) Section 17 because it "contravenes Article 83 of the Revised Penal Code, as amended by Section 25 of Republic Act No. 7659;" and (b) Section 19 because it "fails to provide for review and approval of the

Lethal Injection Manual by the Secretary of Justice, and unjustifiably makes the manual confidential, hence, unavailable to interested parties including the accused/convict and counsel."

[78] Echegaray v. Executive Secretary, supra at 777.

[79] Id. at 778-779, citing Ex Parte Granvel, 561 SW 2d 503, 509 (1978), citing Trop v. Dulles, 356 US 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958); Estella v. Gamble, 429 US 97, 97 S. Ct. 285, 290, 50 L. Ed. 2d 251, 258-259 (1976).

[80] Rollo, p. 22.

[81] See Revised Penal Code, Art. 217.

[82] Cruz v. Secretary of Environment and Natural Resources, G.R. No. 135385, December 6, 2000, 347 SCRA 128, citing San Miguel Corporation v. Avelino, G.R. No. L-39699, March 14, 1979, 89 SCRA 69; Phil. Long Distance Telephone Co. v. Collector of Internal Revenue, 90 Phil. 674 (1952); Teehankee v. Rovira, 75 Phil. 634 (1945).

[83] Id., citing In re Guarina, 24 Phil. 37 (1913).

[84] 16A C.J.S. Constitutional Law, Sec. 96(a).

[85] U.S. v. Reyes, 14 Phil. 718 (1910). See also People v. Livara, 94 Phil. 771 (1954).

[86] Estamos con el. Hon. Procurador General en que ha lugar a estimar la devolución hecha por e apelante de la cantidad defraudada como circumstancia atenuante especial sin ninguna agravante que la compense. Esto así, procede condenar al apelante a sufrir en su grado minímo la pena señalada por la ley. (People v. Velasquez, 72 Phil. 98, 100 [1941]) (Italics supplied)

[87] Revised Penal Code, Art. 13, Par. 7. That the offender had voluntarily surrendered himself to a person in authority or his agents, or that he had voluntarily confessed his guilt before the court prior to the presentation of the evidence for the prosecution.

[88] Id., Sec. 10. And, finally, any other circumstance of a similar nature and analogous to those above mentioned.

[89] Revised Penal Code, Art. 13, Par. 3. That the offender had no intention to commit so grave a wrong as that committed.

[90] Supra note 88.

[91] Act No. 4103, as amended, otherwise known as the Indeterminate Sentence Law, provides:

Section 1. Hereafter, in imposing a prison sentence for an offense punished by the Revised Penal Code, or its amendments, the court shall sentence the accused to an indeterminate sentence the maximum term of which shall be that which, in view of the attending circumstances, could be properly imposed under the rules of the said Code, and the minimum of which shall be within the range of the penalty next lower to that prescribed by the Code for the offense; and if the offense is punished by any other law, the court shall sentence the accused to an indeterminate sentence, the maximum term of which shall not exceed the maximum fixed by said law and shall not be less than the minimum term prescribed by the same. (As amended by Act. No. 4225)

[92] Guevarra v. Court of Appeals, G.R. No. 41061, July 16, 1990, 187 SCRA 484.

[93] 14 Phil. 718, 721 (1910).

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[94] Enacted on October 3, 1907.

[95] Id. at 725-726.

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