

**LOURDES A. SABLE, PETITIONER, VS. PEOPLE OF THE PHILIPPINES
AND HON. ENRIQUETA LOQUILLANO-BELARMINO, PRESIDING
JUDGE, BRANCH 57, RTC, CEBU CITY, RESPONDENTS.**

G.R. No. 177961. April 07, 2009

Ponente: CHICO-NAZARIO, J.

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CHICO-NAZARIO, J.:

Before Us is a Petition for Certiorari[1] under Rule 65 of the Revised Rules of Court filed by petitioner Lourdes A. Sable seeking the reversal and the setting aside of the Decision[2] dated 14 December 2006 and Resolution[3] dated 21 February 2007 of the Court of Appeals in CA-G.R. CEB-CR No. 81981. In its assailed Decision, the Court of Appeals affirmed the Order[4] dated 22 July 2003 of the Regional Trial Court (RTC) of Cebu, Branch 57, disallowing petitioner's application for probation in Criminal Case No. CBU-35455, and denied petitioner's Motion for Reconsideration thereof.

The undisputed facts are as follows:

Petitioner, together with Concepcion Abangan (Concepcion), Ildefonsa Anoba (Ildefonsa) and Valentine Abellanosa (Valentine), is accused in Criminal Case No. CBU-35455 of Falsification of Public Documents under Article 172(1) in relation to Article 171 of the Revised Penal Code.

Petitioner and co-accused Ildefonsa were arraigned on 20 July 1994 while co-accused Concepcion was never arrested. During the initial trial, Atty. Gines Abellana, counsel for all the accused, manifested that co-accused Valentine was already dead and requested that his name be dropped from the information.

Petitioner and co-accused Ildefonsa are the grand-daughters of Eleuteria Abangan, who is one of the registered owners of Lot No. 3608, which is registered under Original Certificate of Title (OCT) No. RO-2740 in the names of Andrea Abangan, Fabian Abangan, Sergio Abangan, Antonino Abangan, Perfecta Abangan and Eleuteria Abangan. Private complainant Gaspar Abangan (Gaspar) is the grandson of Lamberto Abangan, who is a brother of the registered owners of the lot. Petitioner, together with her co-accused Ildefonsa, allegedly falsified an Extrajudicial Declaration of Heirs with Waiver of Rights and Partition Agreement, as the signatures contained therein were not the signatures of the true owners of the land. Petitioner and Ildefonsa also allegedly caused it to appear that a certain Remedios Abangan, who was already dead, signed the document.

By virtue of the Extrajudicial Declaration of Heirs, Lot No. 3608 was subdivided into two lots, namely, 3608-A and 3608-B; and OCT No. RO-2740 was cancelled. Lot No. 3608-A was transferred to the name of co-accused Concepcion and was registered under Transfer Certificate of Title (TCT) No. 113266. With respect to Lot No. 3608-B, petitioner was able to execute a Deed of Absolute Sale in favor of one Perpetua Sombilon, and accordingly, the title to the lot was transferred to the name of the latter under TCT No. 113267.

On 28 November 2000, the RTC convicted petitioner of the crime of Falsification of Public Documents under Article 172(1) in relation to Article 171 of the Revised Penal Code, but acquitted Ildefonsa. The dispositive

portion of the Decision reads:

WHEREFORE, in view of the foregoing, the court finds accused Ildefonsa Anoba not guilty. However, the court finds Lourdes Abellanosa Sable guilty beyond reasonable doubt of the crime charged and hereby sentences her to suffer an indeterminate penalty of FOUR (4) YEARS, TWO (2) MONTHS and ONE (1) DAY to SIX (6) YEARS.[5]

Thereafter, petitioner filed a Motion for Reconsideration[6] of said RTC Decision on 20 January 2001. After several postponements due to the vacancy in the court a quo, the motion was submitted for resolution only on 29 June 2001. The same was denied by respondent Judge Enriqueta Loquillano-Belarmino in an Order[7] dated 20 November 2003. On 13 December 2002, a copy of the Order denying reconsideration of the judgment was received by petitioner's counsel.

Due to petitioner's failure to interpose a timely appeal, an entry of judgment was issued on 5 June 2003. Petitioner, through counsel, filed Motions to Recall Warrant of Arrest and to Vacate Entry of Judgment with Reconsideration and Explanation[8] on 12 June 2003 alleging, among other things, that petitioner's counsel did not receive the Order because it was received by a certain Che who was undergoing practicum in her counsel's law office. On the day of receipt thereof, it was Che's last day at the office. Petitioner's counsel further alleged that he was of the belief that his Motion for Reconsideration of the judgment of conviction would be rescheduled for hearing after the same had been postponed due to the vacancy in the court a quo.

Pending resolution of the Motions to Recall Warrant of Arrest and to Vacate Entry of Judgment with Reconsideration, petitioner filed a Notice of Appeal on 17 June 2003.[9]

Subsequently, in an Order[10] dated 22 July 2003, respondent Judge denied the Motions to Recall Warrant of Arrest and to Vacate Entry of Judgment. Petitioner's Notice of Appeal was also denied for having been filed out of time.

On 25 August 2003, petitioner moved for the reconsideration of the 22 July 2003 Order and intimated her desire to apply for probation instead of appealing the judgment of conviction.[11] In a Motion[12] dated 15 October 2003, petitioner again prayed for the Recall of the Warrant of Arrest against her, while her Motion for Reconsideration and her application for probation were pending resolution before the RTC.

Finally, on 20 November 2003, the RTC issued the assailed Order, the dispositive portion of which reads as follows:

WHEREFORE, accused's motion for reconsideration of the Order dated July 22, 2003, motion to recall warrant of arrest and motion to allow accused to avail of the benefits of the Probation Law, all are hereby denied.[13]

Petitioner filed a Petition for Certiorari under Rule 65 before the Court of Appeals docketed as CA-G.R. CEB-CR No. 81981, raising the sole issue of whether or not the respondent court acted with grave abuse of discretion in denying the application for probation.

In its Decision[14] dated 14 December 2006, the Court of Appeals denied the petition for lack of merit, stating that the alleged failure of petitioner's counsel to timely appeal the judgment of conviction following the denial of the reconsideration thereof could not amount to excusable negligence. It further enunciated that a notice of appeal of judgment filed six months after the denial of the motion for reconsideration was denied is filed out of time and, as a result, the application for probation must necessarily fail because the remedies of appeal and probation are alternative and mutually exclusive of each other.

The Court of Appeals refused to reconsider its earlier Decision in a Resolution dated 21 February 2007.

Hence, this Petition for Certiorari under Rule 65 of the Rules of Court raising the sole issue:

WHETHER OR NOT THE HONORABLE COURT OF APPEALS ACTED WITH GRAVE ABUSE OF DISCRETION AMOUNTING TO LACK OR EXCESS OF JURISDICTION IN AFFIRMING THE TRIAL COURT'S ORDER DENYING PETITIONER'S APPLICATION FOR PROBATION.[15]

The petitioner prays that the instant petition be granted by allowing her to apply for probation and ordering the RTC through respondent Judge to act on the application for probation by the petitioner, based upon the recommendation of the probationer who may be assigned to conduct the investigation of said application.

For the State, the Solicitor General argues that the Court of Appeals properly denied the petition before it because, first, it is procedurally flawed for being an improper recourse; and secondly, for non-compliance with the mandatory requirement of the law that an application for probation must be filed within the period for perfecting an appeal.

We find the Petition devoid of merit.

Probation is a special privilege granted by the state to a penitent qualified offender. It essentially rejects appeals and encourages an otherwise eligible convict to immediately admit his liability and save the state the time, effort and expenses to jettison an appeal.[16]

The pertinent provision of the Probation Law, as amended, reads:

Sec. 4. Grant of Probation.--Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, That no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.[17] (Emphasis supplied.)

It is quite clear from the afore-quoted provision that an application for probation must be made within the period for perfecting an appeal, and the filing of the application after the time of appeal has lapsed is injurious to the recourse of the applicant.

In the present petition before Us, petitioner filed the application for probation on 25 August 2003, almost eight months from the time the assailed judgment of the RTC became final. Clearly, the application for probation was filed out of time pursuant to Rule 122, Sec. 6 of the Rules of Court, which states that an "appeal must be taken within fifteen (15) days from promulgation of the judgment or from notice of the final order appealed from." In *Palo v. Militante*,[18] this Court held that what the law requires is that the application for probation must be filed within the period for perfecting an appeal. The need to file it within such period is intended to encourage offenders, who are willing to be reformed and rehabilitated, to avail themselves of probation at the first opportunity.

Furthermore, the application for probation must necessarily fail, because before the application was instituted, petitioner already filed a Notice of Appeal before the RTC on 17 June 2003. The Probation Law is patently clear that "no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction."

The law expressly requires that an accused must not have appealed his conviction before he can avail himself of

probation. This outlaws the element of speculation on the part of the accused -- to wager on the result of his appeal -- that when his conviction is finally affirmed on appeal, the moment of truth will be at hand and the service of his sentence inevitable, he now applies for probation as an "escape hatch," thus rendering nugatory the appellate court's affirmance of his conviction. Consequently, probation should be availed of at the first opportunity by convicts who are willing to be reformed and rehabilitated; who manifest spontaneity, contrition and remorse.[19]

This was the reason why the Probation Law was amended, precisely to put a stop to the practice of appealing from judgments of conviction even if the sentence is probationable, for the purpose of securing an acquittal and applying for the probation only if the accused fails in his bid.[20]

We also note that the petitioner is unable to make up her mind as to what recourse she will pursue, since in her petition for Certiorari she questioned the denial of her probation,[21] while in her Memorandum she questioned the denial of her appeal.[22] This just obviously manifests the intention of petitioner to benefit from the remedy of probation just in case the remedy of appeal is not given due course. Prevailing jurisprudence treats appeal and probation as mutually exclusive remedies because the law is unmistakable about it and, therefore, petitioner cannot avail herself of both.[23]

The explanation given by petitioner as to the cause of the failure to appeal the judgment of conviction is flimsy. Petitioner's counsel claims that the Order of the RTC denying the Motion for Reconsideration dated 20 January 2001 was received by a certain Che, who was a student doing practicum in his law office, and he attributed the non-receipt of the Order to her and claimed that the mistake was excusable. We agree with the Court of Appeals that to constitute excusable negligence, such must be due to some unexpected or unavoidable event, and not due to petitioner counsel's self- admitted mistake or negligence in not giving proper instruction to his staff.

Time and again, the Court has admonished law firms to adopt a system of distributing pleadings and notices, whereby lawyers working therein promptly receive notices and pleadings intended for cases. The Court has also often repeated that clerk's negligence that adversely affects the cases handled by lawyers is binding upon the latter.[24]

Finally, we find that there is an error in the mode of appeal used by petitioner. Under Rule 122, Section 3(e) of the Rules of Court, "[e]xcept as provided in the last paragraph of Section 13, Rule 124, all other appeals to the Supreme Court shall be by petition for review on certiorari under Rule 45."

Here, petitioner elevated this petition via a Petition for Certiorari under Rule 65. Under the Rules, subject to the exceptions,[25] appeal to the Supreme Court must be via a petition for Review under Rule 45. Since, this appeal is not within the exceptions, the proper mode of appeal should be a Petition for Review under Rule 45, not under Rule 65.

It has been held that the proper remedy of the party aggrieved by a decision of the Court of Appeals is a petition for review under Rule 45, which is not identical with a petition for review under Rule 65. Under Rule 45, decisions, final orders or resolutions of the Court of Appeals in any case, i.e., regardless of the nature of the action or proceedings involved, may be appealed to us by filing a petition for review, which would be but a continuation of the appellate process over the original case. On the other hand, a special civil action under Rule 65 is an independent action based on the specific ground therein provided and, as a general rule, cannot be availed of as a substitute for the lost remedy of an ordinary appeal, including that to be taken under Rule 45.[26] One of the requisites of certiorari is that there be no available appeal or any plain, speedy and adequate remedy. Where an appeal is available, certiorari will not prosper even if the ground therefor is grave abuse of discretion.[27] Accordingly, when a party adopts an improper remedy, as in this case, his petition may be dismissed outright.[28]

Therefore, there is no abuse of discretion amounting to lack or excess of jurisdiction in the Court of Appeals' Decision and Resolution affirming the trial court's Orders denying petitioner's Notice of Appeal, Motions to Recall Warrant of Arrest and to Vacate Entry of Judgment, and the application for probation. There is nothing capricious in not granting an appeal after the time to file the same has lapsed, nor is there anything arbitrary in denying an application for probation after a notice of appeal has been filed.

WHEREFORE, premises considered, the instant Petition for Certiorari under Rule 65 is hereby DISMISSED. The Decision dated 14 December 2006 and Resolution dated 21 February 2007 of the Court of Appeals are AFFIRMED. No costs.

SO ORDERED.

Ynares-Santiago, (Chairperson), Carpio Morales[*], Nachura, and Peralta, JJ. concur.

[*] Per Special Order No. 602, dated 20 March 2009, signed by Chief Justice Reynato S. Puno, designating Associate Justice Conchita Carpio Morales to replace Associate Justice Ma. Alicia Austria-Martinez, who is on official leave.

[1] Rollo, pp. 4-9.

[2] Penned by Associate Justice Romeo F. Barza with Associate Justices Isaias P. Dicdican and Priscilla Baltazar-Padilla, concurring. Id. at 37-43.

[3] Id. at 47-48.

[4] Penned by Hon. Enriqueta Loquillano-Belarmino; id. at 39.

[5] Id. at 16.

[6] Id. at 17- 21.

[7] Id. at 22-23.

[8] Id. at 24- 25.

[9] Id. at 39.

[10] Id. at 32-35.

[11] Id. at 40.

[12] Id. at 36.

[13] Id. at 23.

[14] Id. at 37-43.

[15] Id. at 7.

[16] *Francisco v. Court of Appeals*, 313 Phil. 241, 254-255 (1995).

[17] Presidential Decree No. 968 as amended by Presidential Decree No. 1990.

[18] G.R. No. 76100, 18 April 1990, 184 SCRA 395, 400.

[19] *Francisco v. Court of Appeals*, supra note 16 at 256-257.

[20] *People v. Judge Evangelista*, 324 Phil. 80, 86-87 (1996).

[21] *Rollo*, p. 7.

[22] *Id.* at 157.

[23] *Llamado v. Court of Appeals*, G.R. No. 84850, 29 June 1989, 174 SCRA 566, 572-573; *Bala v. Martinez*, G.R. No. 67301, 29 January 1990, 181 SCRA 459, 468-469.

[24] *Negros Stevedoring Co., Inc. v. Court of Appeals*, G.R. No. L-36003, 21 June 1988, 162 SCRA 371, 375.

[25] Rule 124, Section 13 (2nd paragraph). Whenever the Court of Appeals finds that the penalty of death, reclusion perpetua, or life imprisonment should be imposed in a case, the court, after discussion of the evidence and the law involved, shall render judgment imposing the penalty of death, reclusion perpetua, or life imprisonment as the circumstances warrant. However, it shall refrain from entering the judgment and forthwith certify the case and elevate the entire record thereof to the Supreme Court for review.

[26] *Mercado v. Court of Appeals*, G.R. No. 150241, 4 November 2004, 441 SCRA 463, 469.

[27] *VMC Rural Electric Service Cooperative, Inc. v. Court of Appeals*, G.R. No. 153144, 16 October 2006, 504 SCRA 336, 352.

[28] *Mercado v. Court of Appeals*, *supra* note 26.

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