

**MARIANO CU UNJIENG, PETITIONER, VS. LEONARD S. GODDARD,
JUDGE OF FIRST INSTANCE OF MANILA, AND THE HONGKONG
& SHANGHAI BANKING CORPORATION, RESPONDENTS.**

G.R. No. 40342. October 27, 1933

Ponente: BUTTE, J.

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BUTTE, J.:

This is an original petition for writ of certiorari, mandamus and prohibition. The petition sets out three "causes of action" and we will dispose of them seriatim.

The petitioner is on trial in the Court of First Instance of Manila in criminal case No. 40649, entitled "The People of the Philippine Islands vs. Mariano Cu Unjieng et al.", in which the accused are charged with the crime of estafa thru falsification of commercial documents. The respondent, the Honorable Leonard S. Goddard, is the judge presiding at said trial.

On Wednesday, August 9, 1933, while the petitioner, as a witness in his own behalf in the said case, was on the stand under cross-examination, the court asked the following questions and received the following answers:

"COURT. Q. Who were some of the brokers in Manila that charged such commissions?—A. Mr. Isaac Barza; he was the former president of the Philippine Chamber of Commerce.

"Q. Who else? — A. Mr. Molina.

"Q. Do you know his first name? — A. Juan.

"Q. Who else? — A. Mr. Eduardo Alcantara.

"Q. Any more? — A. Yes, your Honor.

"Q. Do you mean to say that these three that you have named charged as much as 5 per cent for securing loans for 30 days? —A. I did not mean for 30 days, Your Honor; I mean for securing loans.

"Q. No matter what the length of time that the loan was to run? — A. That may depend upon the agreement between the broker and the debtor."

The petition alleges that immediately after the question first above quoted, counsel for the defendant "by way of protest" asked the respondent judge if he did not think it was hard on the accused to require him to disclose the names of the brokers thereby making personal enemies of them, to which the respondent judge replied in substance that it would probably make them his enemies too; that if they had no better way of making a living, then that they all ought to be in Bilibid; that immediately after the last answer quoted above, the respondent judge, in open court, without suspending the proceedings or declaring a recess, dictated to the court stenographer a letter addressed to the city fiscal, as follows:

"The City Fiscal

"Manila

"Sir: From the evidence given by Mariano Cu Unjieng in criminal case No. 42649, entitled 'The People of the P. I. vs. Mariano Cu Unjieng, et al.', it appears that the following brokers and others in the City of Manila are charging as much as 5 per cent for securing loans regardless of the time such loans are to run:

Mr. Isaac Barza;

Mr. Juan Molina;

Mr. Eduardo Alcantara.

"In view of this evidence, the court believes that an investigation should be made and you are requested to make such an investigation which the court believes would be to the interest of the public in Manila.

"Very respectfully,

"LEONARD S. GODDARD

"Judge, Branch IV"

Upon learning that the above quoted letter to the city fiscal was not included in the certified transcript of the proceedings in said case, the petitioner, on August 12, 1933, filed a verified motion praying that the court order the stenographer to correct the official transcript by including the said letter therein in its proper place as an incident of the trial. The letter is transcribed in said motion verbatim and the correctness of the transcription is not questioned.

In ruling on said motion, the court below under date of August 17, 1933, stated the following:

"The letter to the fiscal, quoted in paragraph (1) of the motion, was dictated to the stenographer when it appeared from the testimony that there had been a probable violation of law. Such being the case the court had a right to call the city fiscal's attention to the testimony and request an investigation. The letter certainly cannot be construed as a statement made by the Judge with reference to the case now being tried by him, or to any of the parties thereto, witnesses or attorneys, during the hearing of this case. Nor is there any provision of law or rule of evidence that obligates this court to grant the request that said letter be made of record in the stenographic notes. It was not in reality a part of the proceedings in this case, as alleged in the motion under consideration. Its inclusion in said notes could not in any way affect the decision in this case."

The petitioner contends that in refusing to permit said letter to be incorporated in the official transcript of the proceedings in said case, the respondent judge violated the mandatory provision of section 1 of Act No. 4011 of the Philippine Legislature, which reads as follows:

"SECTION 1. Any statement made by a judge of First Instance or Public Service Commissioner with reference to a case tried by him, or to any of the parties thereto, witnesses or attorneys, during the hearing of such case, shall be made of record in the stenographic notes if requested by either of the parties." The answer of the respondent denies that said letter constitutes a statement made by the judge with reference to the case being tried by him or that it was made during the hearing of such case. But if it should be held that said letter and the incidents connected therewith are embraced in section 1 aforesaid, the respondent contends that said Act is unconstitutional and void in so far as it attempts to cut down the "inherent power of the courts of record in these Islands to control their own records."

It requires no citation of authorities to reinforce a statement of the elementary rule that certiorari does not lie if the petitioner has or may have an adequate review by way of appeal of any ruling of the court to which he has made a

proper objection and taken the proper exception. Apparently, every material fact which the petitioner contends should appear in the official transcript in connection with said letter is set out in the said motion and not denied by the respondent. (Compare the order dated August 17, 1933, Exhibit E.) The said motion and the order thereon are actually a part of the record of the case. There is nothing, therefore, to prevent petitioner, in the event of his conviction, from presenting upon an appeal the identical question which he now presents in his first cause of action on this certiorari. It follows, therefore, that the prayer for writ of mandamus in the first cause of action is not in order and must be denied.

The petitioner's second cause of action relates to two separate incidents which we will designate for convenience, A and B.

A

During the hearing of said criminal case on August 9, 1933, while the accused Mariano Cu Unjieng, the petitioner herein, was testifying on cross-examination by counsel for the private prosecution, the witness testified as follows:

"Q. In what amount? —A. That is what I said, that it was guaranteed to give at least 2 per cent per month. Now, before going any further, following exactly your procedure, I will show that Warner, Barnes had been charging Rafael Fernandez not only 10 per cent as the document shows, but working on the same basis as Mr. DeWitt wants to put before the court, it will show that they were charging him 40 per cent per annum."

Thereupon, the following proceedings took place:

"Mr. DeWitt. We ask to have that stricken out as entirely non-responsive.

"COURT. Strike it out.

"Mr. Gibbs. I except.

"Mr. DeWitt. And I will have that expunged from the record. May we have that expunged from the record?

"Mr. Gibbs. I object, Your Honor, and I protest against the expunging of the answer of the witness from the record; it is a part of the witness' testimony, and I do not like to have the record mutilated that way.

"COURT. Expunge it from the record.

"Mr. Gibbs. Exception."

It appears from the order of the court dated August 17, 1933, above referred to, that the portion of the answer of the witness which was ordered expunged is the following:

"Now, before going any further, following exactly your procedure, I will show that Warner, Barnes had been charging Rafael Fernandez not only 10 per cent as the document shows; but working on the same basis as Mr. DeWitt wants to put before the court, it will show that they were charging him 40 per cent per annum."

The court also ordered an amendment of the record to be made by interlining the following sentence just before the expunged passage: "The latter part of this answer was expunged upon motion of the prosecution over the objection of the defense."

The petitioner contends that in obliterating from the record the answer of the witness precisely as it was actually given in response to the question, the respondent judge violated the mandatory provisions of section 32 of the Code of Criminal Procedure (General Orders, No. 58) which reads as follows:

"Sec. 32. In courts of first instance or of similar jurisdiction each witness must be duly sworn and his testimony reduced to writing as a deposition by the court or under its direction. The deposition must state the name, residence, and occupation of the witness. It must contain all questions put to the witness and his answers thereto. If a question put is objected to and the objection be either overruled or sustained, the fact of objection

and its nature together with the ground on which it shall have been sustained or overruled must be stated, or if a witness declines to answer a question put, the fact and the proceedings taken thereon shall be entered in the record. The deposition must be read to the witness and made to conform to what he declares to be the truth. He must sign the same, or, if he refuses, his reason for such refusal must be stated. It must also be signed by the magistrate and certified by the clerk. In cases where an official stenographer is engaged, the testimony and proceedings may be taken by him in shorthand, and it will not then be necessary to read the testimony to the witness nor for the latter to sign the same; but a transcript of the record made by the official stenographer and certified as correct by him shall be prima facie a correct statement of such testimony and proceedings."

The petitioner emphasizes the sentence in said section which provides that the deposition of a witness "must contain all questions put to the witness and his answers thereto."

On the face of it, the answer which was ordered expunged is not responsive to the question. It appears to be a statement of fact volunteered by the witness which may have been associated in his mind with some other aspect of the case but was certainly not within the reasonable intendment of the question propounded to him. The question thus presented is whether section 32 of the Code of Criminal Procedure requires the court to include in the deposition of the witness statements volunteered by him which are not "answers" to "questions put to the witness". We are inclined to the view that although the provision referred to in section 32 is mandatory, nevertheless, it is mandatory only as regards answers that are responsive to the question put to the witness. If that were not true, a designing witness could clutter up a record with unfair or scandalous or unduly lengthy statements. Obviously, an unfair statement which is not responsive to the question could be slipped into the record and counsel for the opposing side be deprived of all opportunity of objecting thereto. We do not mean to hold that answers alleged to be irrelevant may be obliterated from the record. The question of relevancy of an answer may be the subject of review in this court; but statements which are volunteered and are alien to the question put to the witness may, for the sake of orderly procedure and within the exact terms of section 32, be omitted from the record.

We recognize the importance of a true, full and accurate record of all the incidents in a criminal trial, especially in this jurisdiction where we do not have the safeguard of trial by jury. (Cf. *United States vs. Salanatin*, 7 Phil., 199; *United States vs. Custan*, 28 Phil., 19, 23.) An order of expunction, like the one here in question, may, like any other order of the trial court, be reviewed on appeal if proper objection and exception have been made. Hence, wherever practicable, it seems expedient and just that the trial courts should not render it impossible for the appellant to present the issue on appeal.

It may be stated, in passing, that the case of *Corporacion de Padres Agustinos Recoletos vs. Crisostomo* (32 Phil., 427), relied on by respondent, in which it is stated: "allegations of mere evidenciary or immaterial facts may be expunged from the pleadings or may be stricken out on motion", does not involve section 32 of the Code of Criminal Procedure. The statement quoted refers to the pleadings filed in the cause, and in such cases the expunction is not physical but theoretical only; in other words, the stricken matter is still preserved in the record.

Our conclusion, therefore, upon count A of the petitioner's second cause of action is that the matter ordered expunged is not in any true sense an "answer" to the "question put to the witness" and, therefore, does not fall within the mandatory requirements of section 32 of our Code of Criminal Procedure.

B

Under the same circumstances as A, on the same day and in the same case, the following proceedings took place:

"Mr. DeWitt. Q. Were these two checks, about which you have just testified, Exhibits 745 and YY-4860 for P3,000 and P3,012, respectively, included in this Exhibit 751? —A. Yes, sir, on page 1.

"Q. There was another transaction at about that same time, that is, March 19 1931, represented by the check Exhibit 873 which Fernandez borrowed from you for P500 also, and which was delivered to Maria A. de Buyson, and also another check in like amount which he borrowed from you on May 2, 1931, Exhibit 1512, for P500. Why did you draw these checks which Fernandez used to pay Maria A. de Buyson? — A. Exhibit 873 was paid to Rafael Fernandez; only Exhibit 1512 was made payable to Maria A. de Buyson.

"Q. Your testimony shows that the check of March 19, 1931, was payable to Maria Buyson, according to my notes. — A. That is probably wrong, the exhibit was a mistake.

"Mr. DeWitt. I misunderstood the testimony. I would like to have that question expunged from the record based upon my misapprehension of the testimony.

"Mr. GIBBS. It is already answered, if Your Honor please.

"Mr. DeWitt. I assumed that the two checks were payable to Maria A. Buyson, but I find that only the last one was payable to her, but the two checks were paid back by Fernandez by one check. I asked the question through a misapprehension of the facts and I ask that it be expunged from the record.

"Mr. GIBBS. I object, if Your Honor please . . .

"Court. Expunge it. "Mr. Gibbs. I except, and I protest against these mutilations of the record.

* * * * *

"Mr. Gibbs. I ask that the stenographer furnish me a certified copy of all of these parts which have been ordered expunged."

The answers of the witness as set out above are responsive to the questions put to him. Whether they are relevant or irrelevant, true or false, correct or incorrect, they must be transcribed in the record in conformity with the mandate of section 32 of General Orders, No. 58. That section makes no provision, nor can any be read into it by implication, to the effect that questions having actually been put and answers made thereto may be obliterated from the record because of an assertion of counsel that he misapprehended the testimony, in the face of the protest and objection of counsel for the accused.

The respondent judge, in his order of August 17, 1933, stated in substance that "no good purpose would be served by leaving them in the record" * * * "the question and answer are certainly irrelevant and in no way material; they cannot be of any benefit to the accused." It is to be observed that no objection was made to the relevancy of the question nor is there any expression in section 32 of General Orders, No. 58 which makes benefit or lack of benefit to the accused, the criterion for determining what questions and answers the trial judge may obliterate from the record. Counsel for the accused insisted that the record stand as it was made and he excepted and protested against the mutilation of the record. Section 32, supra, sustains him; and the respondent judge must be required and directed to require the court stenographer to correct his official transcript of the proceedings in the said criminal case No. 42649 by including therein at the proper place the questions and answers ordered expunged by the respondent judge as set out hereinabove in paragraph B.

The petitioner's third "cause of action" complains of general orders of the court to the court stenographers not to take down the arguments of counsel; that said orders have resulted in delegating judicial powers to the stenographers; that the stenographers have denied the request of counsel for the defense to take down statements made for the record as grounds of objections or of motions and the rulings of the court and the exceptions of counsel thereto; and that unless prohibited from so doing, the respondent will continue to instruct stenographers not to take down statements of counsel for the defense as aforesaid.

The petitioner cites no specific instances to support the foregoing general allegations. The answer of the

respondent admits that the respondent judge has given general orders to the court stenographer not to take down arguments of counsel, but alleges that such action has been acquiesced in by the petitioner and his counsel during the trial.

It further appears from the answer that the trial of said cause has proceeded almost continuously since October 19, 1931; that the transcript of the evidence contains nearly 21,000 pages and there are between 40,000 and 45,000 exhibits in the record at the present time. We were informed at the oral argument in this court that the trial is approaching its end. It is apparent, therefore, that the petitioner is tardy in seeking the relief prayed for in his third cause of action, even assuming that it stated a cause of action of which we could take cognizance. Therefore, as regards the third cause of action, the petition for the writ of prohibition is denied.

Let the writ of mandamus issue as hereinabove set out under the petitioner's second cause of action, paragraph B; in all other respects, the petition is denied without special allocation of costs.

Street, Malcolm, Villa-Real, Abad Santos, and Imperial, JJ., concur.

DISSENTING IN PART

HULL, J.:

I regard the letter, the basis of the first cause of action, as without the provisions of section 1 of Act No. 4011. I concur with the holding that the trial court has the right to expunge from the record an answer volunteered by a witness, especially so when the remarks made are derogatory to a person not a party to the trial.

I cannot agree with the majority of the court that relief should be granted relative to 2B. (Beech vs. Crossfield, 12 Phil., 555-558.) The matter is too trivial to be given serious consideration by an appellate court. Defendants were not harmed by the exclusion and cannot possibly be benefited by this court's action in ordering its restoration to the record.

As to the fourth cause of action, a court has the inherent right to expunge from the record arguments of counsel, and the denial of relief on the fourth ground should be predicated upon that power of the trial court, not on the delay of petitioner.

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