

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF-APPELLEE, VS.
PONCIANO TAROK, DEFENDANT-APPELLANT.***G.R. No. 47453. October 09, 1941*

Ponente: LAUREL, J.

Read online (full-text search, related cases, audio case brief): <https://batas.org/library/g-r-no-47453/>**LAUREL, J.:**

On October 16, 1938, the appellant and his wife (the deceased Inocencia Itok) went to the house of one Sotera Baroro for the purpose of asking the latter permission to extract oil from some of her coconuts. Having been granted permission, Inocencia Itok borrowed a bolo with which to husk the coconuts. When the deceased saw that her husband was not doing anything to help her, she asked one Segundino Itok, son of Sotera Barorp, to assist her in husking the coconuts; whereupon the appellant told the deceased to give him the bolo as he would do the husking himself. On receiving the bolo, the appellant turned on his wife and started hacking her, as a result of which she was wounded in several parts of her body. The appellant was consequently indicted for the crime of serious physical injuries, to which he pleaded guilty, and was sentenced to suffer a penalty of seven months and one day. While appellant was serving this sentence, Inocencia Itok died of meningitis which was caused by the infection of the wound on her forehead inflicted by the appellant; whereupon he was indicted in the Court of First Instance of Oriental Negros for the crime of parricide. To this charge the appellant interposed the plea of double jeopardy, but the lower court found him guilty of the crime as charged and sentenced him to an indeterminate sentence of six years and one day of prison mayor to twelve years and one day of reclusion temporal, with the accessory penalties provided by law, to indemnify the heirs of the deceased in the amount of ₱2,000, without subsidiary imprisonment in case of insolvency, and to pay the costs. Hence, this appeal.

The question here presented is: May the defendant who had previously been convicted of serious physical injuries be subsequently prosecuted for parricide involving the same assault charged and proven in the first prosecution, in view of the provision of section 9, Rule 113 of our Rules, here- inbelow quoted?

We are not unmindful of the rule laid down in several cases that the protection against a second jeopardy is only for the same offense, not for the same act. (People vs. Espino, G. R. No. 46123, Jan. 30, 1940; People vs. Cabrera, 43 Phil., 82; U. S. vs. Vitog, 37 Phil., 42; Gavieres vs. U. S., 220 U. S., 338, 55 L. ed., 489; 41 Phil., 961; Kepner vs. U. S., 195 U. S., 100; U. S. vs. Capurro, 7 Phil., 24; U. S. vs. Ching Po, 23 Phil., 578.) There is, however, considerable discordance in the cases in determining the test as to when two offenses are substantially the same. One test is to ascertain whether the facts alleged in the second information would, if given in evidence, have warranted a conviction on the first, and if this is the case, then the offenses are assumed to be identical. (U. S. vs. Ching Po, supra; U. S. vs. Lim Tigdien, 30 Phil., 222; Gavieres vs. U. S., supra; People vs. Cabrera, supra; People vs. Alvarez, 45 Phil., 472; People vs. Martinez, 55 Phil., 6; People vs. Defoor, 100 Cal., 150; State vs. Price, 127 Iowa, 301; Newton vs. Commonwealth, 198 Ky., 707; Moore vs. State, 59 Miss., 25; Nochderffer vs. State, 34 Okla. Cr., 215.) In other cases, the plea of former conviction or acquittal is sufficient if the proof shows the second case to be the same transaction as the first. (Roberts v. State, 14 Ga. 8; Burnam v. State, 2 Ga. App., 395; Newton v. Commonwealth, 198 Ky. 707; State v. Mowser, 92 N. J. L., 474; Love v. State, 41 Okla. Cr., 291;

Smith v. State, 159 Tenn., 674.) Another test is to inquire whether the two offenses are in substance precisely the same or of the same nature or of the same species, so that the evidence which proves the one would prove the other; or if this is not the case, then the one crime must be an ingredient of the other. (People vs. Alvarez, 45 Phil., 472, 478; U. S. vs. Gustilo, 19 Phil., 208; U. S. vs. Capurro, 7 Phil., 24; Grey v. U. S., 172 Fed., 101; Wilcox v. U. S., 161 Fed., 109.)

Other negative tests have also been laid down; viz.: (1) A single act may be an offense against two statutes, and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution or conviction under the other. (Gavieres v. United States, 220 U. S., 338; Morey v. Commonwealth, 108 Mass., 433; State v. Hooker, 145 N. C., 581; People v. Alvarez, supra.) (2) If the evidence required to convict under the first indictment would not be sufficient to convict under the second indictment, but proof of an additional fact would be necessary to constitute the offense charged in the second, the former conviction or acquittal is not a bar. (Blair v. State, 81 Ga., 629; 7 S. E., 855; State v. White, 123 Iowa, 425. 98 N. W. 1027.) (3) Unless the two offenses charged are the same in law and in fact, they are not the same offense. (Ruble v. State, 51 Ark., 170; Com. v. Rody, 12 Pick., 496, 503; State v. Kingsbury, 147 Wash., 426, 432.) In the case of Diaz vs. United States, (223 U. S., 432), it was held that a conviction upon an indictment for assault and battery is not a bar to a subsequent prosecution for homicide, where the person assaulted died of the injury inflicted. In that case the Supreme Court of the United States said:

"The homicide charged against the accused in the court of first instance and the assault and battery for which he was tried before the justice of the peace, although identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense. (Com. v. Roby, 12 Pick. Am. Rep., 335; Johnson v. State, 19 Tex. App., 453; 53 Am. Rep., 385.)"

At first glance, it would seem that the aforecited case of Diaz vs. U. S. furnishes a concrete basis upon which the solution to the question herein presented may be predicated. Here as in the Diaz case, the death of the victim had not ensued at the time proceedings were had on the first information and the crime of parricide for which the defendant was prosecuted on the second information was then not yet consummated. But a further examination of the aforecited case reveals that jeopardy for the higher offense could not have attached for the reason that, unlike in the case at bar, the accused was tried for assault and battery in the justice of the peace court, which was without jurisdiction to try him for homicide, and, of course, the jeopardy incident to the trial in that court did not extend to an offense beyond its jurisdiction.

The principle in the above-cited case of Diaz vs. United States, supra, was applied by this court in the cases of United States vs. Ledesma and Bernad (29 Phil., 431), and People vs. Espino, G. R. No. 46123, promulgated January 30, 1940. In both cases the defendants were previously convicted in the justice of the peace court of slight physical injuries and were later charged with grave physical injuries in the Court of First Instance. In the case, however, of People vs. Martinez (55 Phil., 6), where the accused was first charged with lesiones menos graves in the Court of First Instance and later prosecuted for lesiones graves in the same court, this court upheld the plea of autrefois convict or former jeopardy, holding that "not only was the first case an ingredient of the second case but the allegations in the second information would also, if proven, have been sufficient to support the former information."

Upon the other hand, the Rules of Court recently promulgated by this court and which took effect on July 1, 1940, prescribe in section 9, Rule 113, thereof as follows:

"Sec. 9. Former conviction or acquittal or former jeopardy.—When a defendant shall have been convicted or

acquitted, or the case against him dismissed or otherwise terminated without the express consent of the defendant, by a court of competent jurisdiction, upon a valid complaint or information or other formal charge sufficient in form and substance to sustain a conviction, and after the defendant had pleaded to the charge, the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

That is to say, under the New Rules, one offense shall be considered the same as the other not only when one is identical to the other but also when one necessarily includes or is necessarily included in the other. This section 9, Rule 113, is in lieu of sections 26, 27 and 28 of General Orders No. 58. It will be noted that this section 9 is a composite of sections 26 and 28 of General Orders No. 58, with some modifications. It will also be "noted that section 27 of General Orders No. 58 has been eliminated.

Section 26 of General Orders No. 58 was the main law on jeopardy prior to the promulgation of the Rules of Court. Section 27 merely provides for an exception to the general rule expressed in section 26 and contemplates a situation where jeopardy does not attach. Section 28 is but another defense available to the defendant similar to jeopardy.

Under the New Rules, the pleas available to a defendant under sections 26 and 28 of General Orders No. 58 are all considered as pleas of former jeopardy or former conviction or acquittal. The important change, however, lies in the wording of the last part of the New Rules (sec. 9, Rule 113) which was taken from section 26, General Orders No. 58. The original provision of section 26, General Orders No. 58, states: "the conviction, acquittal, or jeopardy shall be a bar to another information or indictment for the offense charged, or for an attempt to commit the same, or for a frustration thereof, or for any offense necessarily therein included of which he might have been convicted under such complaint or information."

To our mind, the principle embodied in the New Rules of Court is a clear expression of selection of rule amidst conflicting theories. We take the position that when we amended section 26 of General Orders No. 58 by providing that the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for any offense not only necessarily therein included but which necessarily includes the offense charged in the former complaint or information, we meant what we have, in plain language, stated. We certainly did not mean to engage in the simple play of words. That we are correct in this assertion is borne by the fact that soon after we approved the Rules, doubt arose as to the wisdom of the amendment, and suggestion was made to revert to the old rule but no agreement was reached. If we made a mistake in changing the rule and we find it necessary or advisable to go back to the former rule, judicial candor demands that we so state and recognize the error for the guidance of ourselves and of the legal profession and of all concerned. While, indeed, there are weighty considerations for the reversion to the former doctrine, we are of the opinion that there are no less weighty reasons for the maintenance of the present rule as contained in section 9 of Rule 113:

(1) In the present case the defendant had already been convicted of, and had more than begun to serve sentence for, the crime of *lesiones graves*. This offense is necessarily included in the greater crime of parricide, and "as the government cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest, with precisely the same result." (*People vs. Cox*, 107 Mich., 435, 438.)

(2) The injustice suffered which, it is alleged, would result from the bar of the subsequent prosecution for the greater offense, could, in our opinion, be remedied by requiring prosecuting attorneys not to take precipitated action in cases of this kind, but to use their best judgment in watching for the development of the case, as after all there is no danger of prescription or this danger is too remote. The administrative field here is as wide as its range is effective. To our mind, there is as much injustice in subjecting a person to double prosecution

with all its concomitant and consequent annoyance and difficulties as there may be in barring a subsequent prosecution for the greater offense. We admit that a criminal prosecution must necessarily entail difficulties, for if the prosecution is justified, the resultant affects must either be tolerated or accepted. But from a single prosecution to a double or repeated prosecution in a case arising from the same transaction, there must be some difference. If and when the Government is in a position to avoid or forestall unnecessary harassment and humiliation—placed in having to select between the two alternatives—we readily incline to shelter the individual and exact fairness and a higher degree of vigilance from the State. There is no substantial difference in principle between this case and one where the Government elects to prosecute on the lower offense where it is in a position to elect between trying the defendant on the lower or higher offense into which it may be divisible. In the former, it is responsible for the precipitated action; and in the latter, the election is at its peril. The result is the same. In both cases the Government must assume the responsibility, stop and ponder to improve upon its machinery of administration of criminal justice.

(3) Conviction of the greater offense of parricide in this case means necessarily conviction of the constituent offense of lesiones graves. To avoid injustice, the eventual absorption of the penalty imposed in the former prosecution for the lesser offense is here suggested, so that the accused shall only serve the sentence imposed for the greater offense in accordance with the rule laid down in the Espino case (People vs. Espino, G. R. No. 46123) which was decided January 30, 1940, before the Rules of Court went into effect. If this rule of eventual absorption is applied in a case of subsequent conviction for the higher offense, it should also be applied in case of acquittal for the higher offense for, certainly, acquittal for parricide means acquittal for lesiones graves produced by the same act or arising from the same transaction. But, if the rule of eventual absorption is not possible in the latter case, under what process of logical reasoning may the rule of eventual absorption be justified in the former case? Why should there be absorption in case of conviction and no such absorption in case of acquittal?

(4) An attempted or frustrated crime is included in the consummated. Both under the General Orders No. 58 and the New Rules of Court, a person convicted of a consummated offense may not be, for the same act, prosecuted for any attempt or frustration thereof. If, after trial and conviction for an attempted or frustrated offense, there should supervene a consummated offense, we express the opinion that conviction or acquittal of the lesser offense is a bar to subsequent prosecution for the consummated offense. There is no distinction in principle between this case and the case at bar.

(5) Error or even possible combination on the part of the prosecuting attorney in prosecuting for the lesser offense is of course possible; but, in our opinion, there is as much peril in one case as in the other. The problem is to minimize the error or danger of combination.

We must observe that we are not here concerned with a case where the lesser offense is included in the greater offense over which the inferior court had no jurisdiction. On this point the Diaz case is not in point. If the Diaz case may be invoked, it is on the principle that at the time of the prosecution for the lesser offense the greater offense had not as yet been consummated, and that therefore the prosecution for the higher offense was not barred by the prior conviction for the lesser offense. But with this principle we were familiar at the time we approved the rule above referred to. Nevertheless, we departed there-from.

The judgment of the lower court, herein appealed from, is accordingly reversed, and the information for parricide against the defendant-appellant, Ponciano Tarok, hereby dismissed, with cost de oficio. So ordered.

Avanceña, C. J., Abad Santos, and Horrilleno, JJ., concur.

Diaz, M., disidente:

Disiento, porque no creo que la regla 113 de los Nuevos Reglamentos requiere una interpretacion tan liberal como

la que le da la mayoría, que justifique la declaración de que hay jeopardy donde no lo hay.

El apelante infligió varias lesiones a su mujer dándole tajes en diferentes partes del cuerpo; y por haber creído el Fiscal que ella sanaría de sus lesiones en cuarenta días, se apresuró a procesar a dicho apelante, por lesiones graves solamente. Convicto, poco después, el apelante, del delito de lesiones graves de que fue acusado, por haberse confesado culpable de dicho delito, el Juzgado de Primera Instancia de Siquijor le impuso únicamente la pena de siete meses y un día de prisión correccional. Habiendo fallecido la ofendida de resultas de sus lesiones mientras el apelante se hallaba extinguiendo su condena en la cárcel, el Fiscal volvió a procesarle acusándole esta vez del delito de parricidio. Entonces, interpuso la defensa de jeopardy, y en esta instancia la mayoría le da la razón.

La Comisión de Filipinas que es la fuente de la mencionada regla 113 de los Nuevos Reglamentos contiene una disposición que dice:

"No se pondrá a una persona en peligro de ser castigada (jeopardy) dos veces por la misma infracción. Si un acto estuviere penado por una ley general y una ordenanza, la condena o absolución bajo una acusación u otra será óbice a otro procesamiento por el mismo acto." (Título III, Art. 1, inciso 20, Constitución de Filipinas.)

Parece no haber duda alguna por ser evidente, que lesiones graves y parricidio constituyen en sí dos infracciones de ley, enteramente distintas una de otra, no solamente por razón de su propia naturaleza, sino también por las penas con que cada una de ellas es castigada por la ley. Elemento esencial del delito de lesiones graves es, que se haya causado a otro, alguna herida o lesión del carácter de las mencionadas en el artículo 263 del Código Penal Revisado. En el delito de parricidio, el elemento indispensable es la muerte de un cónyuge, causada por el otro. Este último delito está castigado con una pena muy severa: reclusión perpetua a muerte, mientras el de lesiones graves como el de que fue convicto anteriormente el apelante, lo está solamente con arresto mayor en su grado máximo a prisión correccional en su grado mínimo.

Cuando el apelante fue procesado por lesiones, no existía aun ni era siquiera inminente el parricidio de que más tarde fue acusado. La muerte de su esposa ocurrió mucho después, estando ya preso en la cárcel, extinguiendo su condena de prisión correccional. Este solo hecho no permite considerar existente el delito de parricidio cuando se le procesó por lesiones graves y fue convicto y condenado a sufrir la pena ya indicada.

La referida regla 113 de los Nuevos Reglamentos dispone en verdad, en su artículo 9, que:

"* * * the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."; pero, si el delito de parricidio incluye el de lesiones graves, de ningún modo puede decirse que el último incluye el de parricidio. Al adoptar el Tribunal la citada regla no tuvo el propósito de darle el alcance que la mayoría ahora le da; pues, bien sabía que no le estaba permitido legislar, declarando que no es punible un delito o que deja de serlo, aunque lo sea claramente por expresa disposición de una ley sustantiva, cual es el Código Penal Revisado, solamente por apresuramientos impremeditados, impacencias injustificadas o capricho del Fiscal, o por cualquier otro acto más o menos irreflexivo o imprudente de su parte. Interpretar la regla en el sentido expresado en la opinión de la mayoría, es sencillamente dar lugar a que no se castiguen como debieran castigarse, delitos manifiestamente e inusitadamente graves.

Tengo para mí que la regla se refiere a casos en que pueden inversamente considerarse dos delitos incluido el uno en el otro, vgr. el de falsificación de un documento privado que incluye el de estafa mediante falsificación de documento privado; el de rebelión y algunas formas de sedición; el de importación ilegal de drogas prohibidas y uso, o venta ilegal de las mismas; el de malversación de propiedades públicas y algunas formas de exacción ilegal, si de lo cobrado ilegalmente se apropia el funcionario público que lo haya cobrado; el de bandolerismo y el de robo en cuadrilla; el de traición y ciertas formas del delito de sostener correspondencia con país enemigo,

prohibido y penado en el artículo 120 del Código Penal Revisado; el de encubrimiento del delito de falsificación de documentos públicos, oficiales o mercantiles y el uso de dichos documentos cometido con infracción del artículo 172 del mismo Código, etc. etc.

Así lo da a entender por otra parte, el artículo 5 de la regla 116 de los Reglamentos, que puede considerarse complementario del artículo 9 de la tantas veces mencionada regla 113, siendo dicho primer artículo del siguiente tenor:

"Sec. 5. When an offense includes or is included in another.—An offense charged necessarily includes that which is proved, when some of the essential elements or ingredients of the former, as this is alleged in the complaint or information, constitute the latter. And the offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form a part of those constituting the latter."

El elemento esencial del delito de parricidio es, como ya se ha dicho, la muerte de un conyuge causada por el otro; y en el caso del apelante, este hecho de la muerte no había surgido aun cuando fue procesado, convicto y condenado por sentencia firme, por lesiones graves, porque su mujer siguió viviendo hasta entonces y hasta varias semanas después, no habiéndole sobrevenido la muerte sino solamente el 29 de noviembre de 1938, es decir, 26 días después de haberse dictado la sentencia que le condenó por lesiones graves.

Para conseguir una condena por parricidio, algo más que las lesiones causadas a la víctima y la naturaleza de las mismas debe probarse: debe probarse el hecho de su muerte. En materias de jeopardy, para que el mismo exista, las pruebas deben ser de tal naturaleza que sirvan para sostener con igual éxito, cualquiera de los dos procesos. (Pueblo contra Martínez, 55 Jur. Fil., 6.) Esto no ocurre en el caso de autos porque las pruebas presentadas en el primer proceso no bastaban para demostrar la comisión del delito de parricidio.

Para no tener que sufrir el apelante dos penas, por las lesiones que infirió a su mujer y por la muerte de esta de resultas de dichas lesiones, se debiera acreditarle la que ya se le impuso por lesiones graves, siguiendo el mismo que se dijo en la causa de Pueblo contra Espino, R.G. No. 46123. Por las razones expuestas, voto por la imposición al apelante de la pena de reclusión perpetua, que es la pena prescrita para el delito de parricidio, según el artículo 246 en relación con la regla 3." del artículo 63 del Código Penal Revisado, pero sin perjuicio de acreditarle la pena que le fue impuesta en su proceso anterior por lesiones graves.

Moran. J., dissenting:

For having hacked his wife with a bolo, the accused herein was charged with, and, upon plea of guilty, convicted of, the crime of serious physical injuries. While he was serving sentence, the victim died of the same wounds inflicted upon her, and to the subsequent indictment for parricide presented against him, he interposed the plea of double jeopardy which was overruled, and after trial, he was found guilty of the crime charged.

The question here raised is: Upon the foregoing facts, may the defendant who had been previously convicted of serious physical injuries be subsequently prosecuted for parricide involving the same assault charged and proved in the first prosecution? The majority takes the position that even if the latter offense of which he was subsequently charged was non-existent at the time of his conviction for the former, as it necessarily includes the offense of which he was previously convicted, the case falls squarely within the provision of the last part of Rule 113, section 9, of the Rules of Court, and therefore the second prosecution will not lie. I do not share this view.

Rule 113 section 9, in part provides:

"* * * the conviction or acquittal of the defendant or the dismissal of the case shall be a bar to another prosecution for the offense charged, or for any attempt to commit the same or frustration thereof, or for any

offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

In *Diaz v. United States* (223 U. S., 442), defendant therein after having been convicted of assault and battery was, upon the subsequent death of the victim, prosecuted again for homicide, and in overruling the plea of double jeopardy, the Federal Supreme Court held:

"* * * the provision against double jeopardy in the Philippine Civil Government Act of July 1, 1902, 32 Stat. 691, c. 1969, sec. 5, is in terms restricted to instances where the second jeopardy is 'for the same offense' as was the first. *Cavieres v. United States*, 220 U. S. 338. That was not the case here. The homicide charged against the accused in the Court of First Instance and the assault and battery for which he was tried before the justice of the peace, although identical in some of their elements, were distinct offenses both in law and in fact. The death of the injured person was the principal element of the homicide, but was no part of the assault and battery. At the time of the trial for the latter the death had not ensued, and not until it did ensue was the homicide committed. Then, and not before, was it possible to put the accused in jeopardy for that offense. *Commonwealth v. Roby*, 12 Pick. 496; *SUde v. Littlefield*, 70 Maine, 452; *Johnson v. State*, 19 Tex. App. 453."

I see no reason why this doctrine cannot be made controlling upon the instant case. Here, as in the *Diaz* case, the parricide charged against the accused and the serious physical injuries of which he was previously convicted, although identical in some elements, were distinct offenses both in law and in fact. The supervening death of the offended party was the principal element of the parricide and was no part of the offense of serious physical injuries. Here, as in the *Diaz* case, at the time of the trial for serious physical injuries the death of the victim had not as yet ensued, and not until it did ensue was parricide committed.

Then, and not before, was it possible to place the accused in jeopardy for that offense.

We followed and applied that doctrine in *United States vs. Ledesma and Bernad* (29 Phil., 431), and *People vs. Espino*, G. R. No. 46123, January 30, 1940. In the latter case, the facts of which are closely analogous to those of the instant one, the Chief Justice, in concurring with the majority opinion, said:

"Estoy conforme con la decision so lamente porque al ser condenado el apelante por la primera vez no existia aun el delito por el que se le conden6 por segunda vez." And, as far as I know, that is the settled rule of American jurisprudence. Thus, in *State v. Howe* (27 Ore. 138, 44 Pac. 672, 673) it was held "that a conviction or acquittal upon one indictment is a bar to a subsequent prosecution upon another, when the facts alleged in the second indictment would, if given in evidence, have warranted a conviction on the first"; but this rule "must be accepted with some qualification, and as only true in a general sense. Thus, if, after a conviction of assault and battery the injury resulted in death, the defendant, it is said, may be prosecuted for manslaughter or murder, although, under the facts set out in the second indictment, he might have been convicted of the crime charged in the first. 1 Bishop New Criminal Law, sec. 1059." (See also cases cited in *Diaz v. United States*, supra; 28 An. Cas. 1913C, 1138; 24 An. Cas. 1912C, 669-670; *Peo. v. Defoor*, 100 Cal. 150; *Hopkins v. U. S.*, 4 App. 430; *State v. Littlefield*, 70 Me. 452, 35 Am. R. 355; *Com. v. Cutler*, 9 Allen 486; *Com. v. Roby*, 12 Pick. 496; *Peo. v. Warren*, 109 N. Y. 615, 15 N. E. 880; *Burns v. Peo.*, 1 Park. Cr. 182; *State v. Ross*, 4 Ch. S. & C. P. 5, 2 Ch. NP. 368; *Com. v. Mezzanotti*, 219 Pc. 210, 68 A. 186; *Com. v. Ramunno*, 219 Pa. 204, 208, 68 A. 184; *Com. v. Neeley*, 2 Chest. Co. 191; *McNulty v. State*, 110 Tenn. 402, 75 S. W. 1015; *Curtis v. State*, 22 Tex. A. 227, 3 S. W. 86 *Johnson v. State*, 19 Tex. A. 455; *Winn v. State*, 82 Wis. 576, 52 N. W. 775.) An this is said to be a "well-recognized exception to the rule." (16 C. J., 276.)

But the majority refuses to recognize the controlling force of the *Diaz* decision on the instant case upon the ground—and this, as I see it, is the gist of the majority opinion—that while we were familiar with the doctrine of the

Diaz case at the time of the adoption of the Rules, we nevertheless departed therefrom. The alleged departure consists in the wording of the last part of Rule 113, section 9, *supra*, which recites by way of addition to those specified in section 26 of General Orders No. 58* from which it was taken, not only the offense which is necessarily included in, but also that which necessarily includes the offense charged in the former complaint or information. And in this sense, the majority believes that the new rule represents "a clear expression of selection of rule amidst conflicting theories." I see no such departure nor do I think the present rule to be a selection of rule amidst conflicting theories, because no such conflicting theories ever existed at all before the adoption of the new Rules of Court.

The principle of double jeopardy is, as a matter of constitutional or statutory history, not of indigenous origin. Regarded as a part of the universal law of reason, justice and conscience (16 C. J., 233), and as such quite impossible to trace to any distinct origin, "it seems to have been always embedded in the common law of England as well as in the Roman Law, and doubtless in every other system of jurisprudence, and, instead of having a specific origin, it simply always existed." (*Stout v. State*, 36 01. 744, 756; 130 Pac. 553.) It found, however, definite expression in the Constitution of the United States, and from there, it found its way into this country, first, in the Philippine Bill of 1902, then in the Jones Law of 1916, and, finally in the present Philippine Constitution. Being thus a mere recognition of the maxim of the common law, and adopted from the Constitution of the United States, the principle of double jeopardy followed in this jurisdiction the same—no narrower or wider—line of development as in Anglo-Saxon jurisprudence.

It is true that under section 26 of General Orders No. 58, from which Rule 113, section 9, of the new Rules of Court, was taken, jeopardy may be pleaded only in cases of conviction and acquittal or for an attempt to commit the same offense, or for a frustration thereof, or for any offense necessarily included therein; and no mention is made of an offense which may necessarily include that with which an accused has previously been charged. But said section 26 of General Orders No. 58 was manifestly not expressive of the whole scope of the principle of double jeopardy as we know it in the established jurisprudence of the United States and, indeed, our own jurisprudence has not been canalized within the narrow limits of this statutory rule. It is to cure this deficiency that we included in the new Rules, as among the cases where double jeopardy may be pleaded, the offense which necessarily includes that for which an accused has been previously indicted. In other words, by such inclusion, we merely give expression to a principle already known and observed in our jurisdiction, and which section 26 of General Orders No. 58 failed to embody.

Thus, in 8 Ruling Case Law, 146, we read:

"Where a person is brought to trial and jeopardy has attached he cannot be tried thereafter for a greater offense arising out of the same criminal act." (See a long line of cases cited therein.)

In 16 Corpus Juris, 271, we read:

"One who is convicted of a crime less in degree than the offense for which he is indicted is by implication acquitted of the greater offense and may plead the acquittal as a bar to a subsequent indictment for it." (See a long line of cases cited therein.)

And in *People v. Cox* (107 Mich. 435, 438), the court observed:

"* * * as the Government cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result."

We cited this case with approval in *United vs. Lim Suco* (11 Phil., 484), we applied the principle in United States

vs. Ledesma (29 Phil., 431), and we recognized it in *People vs. Martinez* (55 Phil., 6, 10).

Notwithstanding, therefore, the omission in section 26 of General Orders No. 58 of an offense which necessarily includes that of which an accused has previously been indicted, we had always regarded it as a case embraced within the scope of double jeopardy. In thus including this matter in the new Rules, we only give expression to what is already established and uniformly observed in this jurisdiction. Rule 113, section 9, furnishes, therefore, no new formula, adds nothing to, and takes nothing from, the time-honored principle of double jeopardy. It merely reiterates, in a clear and concise way, the existing statutory rule and the established jurisprudence thereon. To say that the present rule is a departure from the old rule and a selection "amidst conflicting theories" is to misconceive and misstate the legal history of the principle.

In the majority opinion mention is made as to an attempt to amend Rule 113, section 9, and to revert to the old rule. The fact is that sometime in May, 1940, it was suggested that the well-recognized exception to the rule of double jeopardy as enunciated in the *Diaz* decision, be embodied, for the sake of completeness and clarity, in Rule 113, section 9; but some members of this court entertained doubts as to the inclusion, and there being no quorum then, the matter was left unconsidered. It never occurred to this court, however, to abandon the doctrine of the *Diaz* case then, and, as far as I can recollect, not even a suggestion to this effect has ever been made. About five weeks after we had approved the Rules of Court we decided the *Espino* case (January 30, 1940), wherein we applied the *Diaz* doctrine, and nobody then thought that such doctrine has been abrogated by the Rules then recently approved. It may be said, therefore, that Rule 113, section 9, has been approved by this court without a deliberate purpose of abandoning the *Diaz* exception.

I have shown that the old and the present rule are the same, and, therefore, the premise upon which the majority has predicated its opinion is erroneous. It only remains to be noted that where the greater offense of which an accused is subsequently charged was not yet existing at the time he was convicted for the lesser offense, double jeopardy cannot be invoked. That was the *Diaz* case; that was the *Espino* case which we decided on January 30, 1940, after the approval of the Rules of Court; that is also the case here. And, as the old and the present rule are the same, the exception recognized before must perforce be recognized now. And the reason for this exception is obvious. Not until the offense exists in law and in fact could it be possible to place an accused in jeopardy thereof. To hold otherwise is to supply by a stretched fiction of law what is wanting in actuality. "Our laws (our Rules) should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character." (*In re Allen*, 2 Phil., 641).

Finally, practical consideration of public interest argues strongly against the majority view. Under it, if the prosecuting officer acts promptly in cases of this character, the anomalous situation may arise, as it did arise here, whereby the accused may be penalized lightly for what may turn out later to be a shockingly enormous offense, and no way is open by which such anomaly may be corrected. If, on the other hand, he stands by and watches the development of the case, as suggested by the majority, we punish the accused in advance by keeping him in a state of constant anxiety, with the fear of prosecution weighing upon him at every hour of waiting, not knowing when he shall stand trial for his offense and for what offense he shall be tried. Even worse still, the majority rule if I may be permitted to imagine such a wrong, widens the chances of collusion between the prosecuting officer and the accused to the grave detriment of public interest. All these cannot happen under the *Diaz* ruling. And, to avoid the injustice of the accused serving twice the penalty first imposed upon him, the same, or so much thereof as he has actually served, may be credited to the penalty imposed upon him for the graver offense, as we have done in the *Espino* case. With this, we do no injustice to the accused and afford a just public vindication for the wrong proportioned to its enormity.

Against this the majority argues, however, that as eventual absorption is impossible of application in case of acquittal for the graver offense, it would not be logical to insist in such absorption in case of conviction. But, if a principle is admittedly just and proper, the fact that it is impossible of application in one case should not prevent its application in another where such application is possible. The majority's reasoning is in effect as follows: "It is right to be charitable while you live; but since you cannot be charitable when you are dead, why should you be charitable when you are alive?" That this ratiocination is plainly illogical, seems to be self-evident.

Judgment reversed.

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