

**PEOPLE OF THE PHILIPPINES, PETITIONER, VS. HONORABLE
MARIANO P. FUENTEBELLA, JOSE DAYRIT, JESUS CARMONA,
VIRGILIO CLASIO AND REYNATA DAYRIT, RESPONDENTS.**

G.R. No. 51759, October 30, 1980

Ponente: BARREDO, J.

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BARREDO, J.:

Petition for certiorari originally filed by the private prosecution but subsequently joined by the Solicitor General praying that the orders of respondent judge dated June 18, 1979 and September 18, 1979 in Criminal Case No. 2867 of the Municipal Court of Pili, Camarines Sur, which dismissed the case of theft against private respondents Jose Dayrit, Jesus Carmona, Virgilio Clasio and Reynata Dayrit on the ground of double jeopardy be annulled and set aside and the amended complaint therein ordered reinstated for further proceedings, allegedly because double jeopardy could not be availed of or invoked by said respondents inasmuch as they were precisely the ones who asked for the previous provisional dismissal of the case against them, apart from their having been guilty of deception in securing said dismissal which fortunately was set aside by the regular judge, the Honorable Rolando Carandang, who, subsequently, however, inhibited himself from further attending to the case, thereby causing the Executive Judge of the Court of First Instance of Camarines Sur to designate herein respondent judge, Honorable Mariano Fuentebella, Municipal Judge of Bula, to act in his place.

The essential background facts are stated, without dispute by respondents, in the Solicitor General's Comment of December 27, 1979 as follows:

"The salient and antecedent facts obtaining herein which led to the issuance of the questioned orders and the consequent filing of the case at bar are these:

1. Respondent spouses Jose Dayrit and Reynata Dayrit, Jesus Carmona and Virgilio Clasio were charged with theft in an amended complaint filed on June 21, 1976, before the Municipal Court of Pili, Camarines Sur, docketed as Criminal Case No. 2867. Private complainant therein is the Bicol Sur Development Corporation (BISUDECO) (Vide, Annex 'A', Petition).
2. The arraignment set for July 23, 1976 was postponed upon motion of accused spouses Jose and Reynata Dayrit while the scheduled arraignment and trial on August 25, 1976 did not push through.
3. When all the accused were finally arraigned on October 12, 1976, each pleading not guilty, the trial which was set simultaneously with the arraignment was postponed because counsels for the spouses Dayrit and Virgilio Clasio were not ready.
4. Subsequent hearings of the case on the following dates were all postponed at the instance of counsels for the accused for various reasons: (a) November 16, 1976, for failure of counsel for accused Carmona to appear; (b) December 17, 1976, by agreement of counsels; (c) January 28, 1977, postponed indefinitely upon manifestation of defense counsels that they would file a motion to quash but which they never did; and (d) May 12, 1977, postponed upon motion of accused Clasio without objection on the part of the other accused;

5. Upon the resetting of the case on June 27, 1977, trial finally proceeded with the prosecution presenting its first witness in the person of Patrolman Leonardo Argamosa. Cross examination of said witness was deferred for lack of material time.

6. The next hearing scheduled in August, 1977, was again postponed due to lack of appearances on the part of counsels for accused Clasio and Carmona, while the trial set for September 20, 1977 was also postponed upon motion of the private prosecutor;

"7. On November 4, 1977, trial of the case proceeded with the cross examination of the prosecution's first witness, albeit counsel for accused Clasio again failed to appear at said hearing;

8. On December 6, 1977, the hearing of the case was postponed again on account of the absence of Atty. Fandino, counsel for accused Clasio;

9. Before the scheduled hearing on January 25, 1978, however, accused Carmona, through counsel, Atty. Elpidio Borja, filed on January 23, 1978, a motion for postponement alleging that he would leave for Manila on January 23, 1978 (Annex B, Petition). Accused spouses Jose Dayrit and Reynata Dayrit, through counsel, likewise filed an urgent motion for postponement of the hearing set January 25, 1978, alleging that the Governor of Camarines Sur had ordered him to bring to Manila on the same date certain papers and documents (Annex C, Petition). Copy of the aforesaid motion of the spouses was personally served by Atty. Prila on private prosecutor Atty. Juanito B. Ilao in the morning of January 25, 1978. On this occasion, Atty. Prila personally requested the private prosecutor to give his conformity to the postponement and to refrain from attending the hearing that afternoon. Inasmuch as Atty. Daniel Fandiño, counsel for accused Clasio, had verbally agreed to the postponement and had also assured private prosecutor that he would no longer attend the hearing, Atty. Ilao eventually acceded to the request. His conformity was evidenced by his handwritten initial followed by his notation '11/25/78 OK 3/1/78' at the bottom of the said Motion for Postponement (Annex C-1, Petition).

10. However, during the hearing of the said case in the afternoon of January 25, 1978, in the absence of the three defense counsels and private prosecutor, all of the four accused, represented by a new common counsel in the person of Atty. Ernesto Atienza, moved for the withdrawal of their respective Motions for Postponement and insisted on the hearing of the case and, finally, for the dismissal thereof because of the absence of the private prosecutor.

11. Unaware of the circumstances above narrated, the Court granted the motion to withdraw their postponement. On further motion by the accused, the Court likewise ordered the provisional dismissal of the case predicated on the right to speedy trial invoked by the defense and on the failure of the prosecution to appear and prosecute the case (Annex 'D', Petition).

"12. On February 6, 1978, the private prosecutor filed a Motion for Reconsideration of the Order dated January 25, 1978, dismissing the case against all the accused (herein private respondents) on the ground that the prosecution had been misled into not attending said trial (Annex 'E', Petition).

13. On April 20, 1978, the Presiding Judge, Honorable Rolando Carandang, finding merit in the motion for reconsideration, issued an Order setting aside the Order of January 25, 1978 and ordering the complaint in Criminal Case No. 2867 reinstated (Annex 'F', Petition).

14. Later, on July 10, 1978, the Executive Judge of the Court of First Instance of Camarines Sur issued an order granting the Petition for Inhibition filed by the Honorable Rolando Carandang and designated herein respondent Judge, Honorable Mariano P. Fuentebella, Municipal Judge of Bula, Camarines Sur to hear said criminal case (Annex 'G', Petition).

15. On May 14, 1979, after the reinstated criminal case had been calendared for trial for around nine times, but the hearings were postponed or not attended by the accused for about eight times, the accused Virgilio Clasio,

through his new counsel, Atty. Rolando V. Falcon, filed a Motion to dismiss alleging that the reinstatement of the case placed him in double jeopardy (Annex 'H', Petition). Accused spouses Jose Dayrit and Reynata Dayrit, through their counsel, Atty. Anastacio Prila, filed a Manifestation adopting the Motion to Dismiss filed by accused Virgilio Clasio (Annex 'I', Petition).

16. On June 18, 1979, the respondent Judge, Honorable Mariano P. Fuentebella, issued an Order for the dismissal of Criminal Case No. 2867 on the ground that its previous dismissal on January 25, 1978, is a bar to its subsequent prosecution (Annex 'J', Petition).

"17. On July 6, 1979, the private prosecutor seasonably filed a Motion for Reconsideration of the Order dated June 18, 1979, alleging that the reinstatement of said criminal case did not place the accused in double jeopardy considering the peculiar circumstances attending said case (Annex 'K', Petition)." (Pp. 86-90, Record.)

To the foregoing, it should be added that the order of September 18, 1979 denied the motion for reconsideration of the private prosecution of the order of dismissal of June 18, 1979.

As a matter of fact, herein respondents availed of two constitutional channels in their desperate attempt to have the prosecution against them terminated without trial. The first was by invoking the right to speedy trial, but not without brazenly deceiving the private prosecution and the fiscal and more, importantly, trifling with the court itself.

As recounted by the Solicitor General, the criminal complaint against respondents was filed on June 21, 1976 and although they were finally arraigned on October 12, 1976, two postponements of the arraignment and trial had already been secured by them. In fact, the trial simultaneously set for October 12, 1976 was postponed upon their motion. Subsequently, on November 16, 1976, January 28, 1977 and May 12, 1977, the trial had to be set for other days because of the non-appearance of one or the other of them. In August 1977, a resetting had to be done due to their absence. While at the trial on November 4, 1977, counsel for accused Clasio again failed to appear. This absence was repeated on December 6, 1977 and trial had again to be postponed.

Then came the day of trickery and deception. On January 25, 1978, respondent Carmona, thru counsel, Atty. Elpidio Borja, filed a motion for postponement alleging that he would be needed in Manila on January 25, 1978, the afternoon of which was set for the continuation of the trial, and simultaneously respondents Jose and Reynata Dayrit also asked for postponement representing that they were being sent to Manila on a mission by the Governor of Camarines Sur. Atty. Prila, the counsel of the Dayrits, personally served copy of said motion on the private prosecutor, Atty. Juanito B. Ilao in the morning of January 25, 1978 requesting the latter to give his conformity and to refrain from attending the hearing that afternoon. Inasmuch as Atty. Fandiño had also asked for postponement and assured Atty. Ilao he would not also be present, Atty. Ilao acceded to the request for conformity and even gave the same in writing.

And then, what happened in the afternoon of January 25, 1978? A new common counsel, Atty. Ernesto Atienza appeared and moved for withdrawal of the two motions for postponement, insisted on the trial and, because of the absence of the prosecutor, asked for dismissal on the ground of denial of speedy trial. The regular judge, who was then acting, the Honorable Rolando Carandang, unaware of the actual circumstances, found himself with no alternative than to grant the dismissal prayed for, albeit provisionally. Fortunately, however, and to his credit, upon being apprised of what had actually happened thru a motion of Atty. Ilao, filed on February 6, 1978, Judge Carandang set aside said dismissal on April 20, 1978, and reinstated the case. Thereafter, for reasons not revealed in the record, Judge Carandang inhibited himself from trying the case, hence the designation of herein respondent Judge Mariano P. Fuentebella on July 20, 1978.

Undaunted and using the aforementioned provisional dismissal as basis, respondents next came out with the plea of double jeopardy. On May 4, 1979, after the reinstated case had been calendared nine times, only to be postponed or unattended by the accused eight times, one of them, herein respondent Clasio, thru a new counsel Atty. Rolando V. Falcon surprisingly filed a motion to dismiss on the ground that to proceed against his client after the provisional dismissal of January 25, 1978 would amount to subjecting him to double jeopardy. Of course, respondent Dayrits, thru their lawyer, the same Atty. Prila who had secured Atty. Ilao's conformity to the deceptive motion for postponement recounted above, joined the motion of Atty. Falcon, "finding (the same) as eruditely and excellently prepared." The said motions were set for hearing on May 21, 1979, and on June 18, 1979, respondent judge issued his first impugned order thus:

"O R D E R

"The issue involved in this case narrows down to a question of law: Could a Court revive and reinstate a criminal case which it has previously dismissed, predicated upon the right of the accused to a speedy trial? Does it amount to an acquittal on the merit which bars subsequent prosecution of the accused for the same offense?

"The accused are charged with the crime of Theft before the Municipal Court of Pili, Camarines Sur, presided over by Judge Rolando M. Carandang. The record shows that upon arraignment the accused pleaded NOT GUILTY and the case was set for trial. Sometime on June 22, 1977, one, Leonardo Argamosa took the witness stand, but for lack of material time, the time to cross examine the witness was reset to September 26, 1977. During the intervening period, several motions for continuance were filed and were granted. Subsequently, during the scheduled hearing on January 25, 1978, both complainant and his counsel failed to appear, while the accused were present in Court. On motion of the accused, the Court dismissed the case, when it held:

'x x x it appearing that Atty. Juanito B. Ilao, private prosecutor, and the witness for the prosecution failed to appear at today's hearing, in spite of notice, and considering the constitutional ground of speedy trial invoked by the defense, for failure to appear and prosecute this case, the complaint in this case is provisionally dismissed, with cost de oficio.' (Italics supplied)

"On February 4, 1978 Atty. Juanito B. Ilao private prosecutor, filed a Motion for Reconsideration, alleging that the Court was misled, considering that the conformity of said counsel was procured by the defense in its motion for postponement; that the failure of the prosecution to appear did not violate the right of the accused to a speedy trial because the accused themselves were responsible for such non-appearance of the prosecution.

"In his order dated April 20, 1978, the Honorable Rolando M. Carandang granted the motion and ordered the complaint reinstated.

"Sometime on July 10, 1978, the Executive Judge of Branch VI, Court of First Instance of Camarines Sur, Hon. Esteban M. Lising, designated the undersigned Municipal Judge of Bula, Camarines Sur to hear the above-entitled case due to the inhibition of Judge Rolando M. Carandang to continue hearing the case.

"Before the Judge-designate, a Motion to Dismiss was filed by Atty. Rolando V. Falcon, defense counsel, reiterating "That the accused has already been acquitted by this Hon. Court when this case was dismissed last January 25, 1978, x x x and, therefore, to try the accused of the same offense, he is being placed in jeopardy twice which is unconstitutional and, ultimately, this Court is already devoid of jurisdiction."

"The private prosecutor manifested that he adopts the same argument submitted with the Record, as contained in the Motion for Reconsideration.

"After a careful study of the arguments for and against the dismissal of this case, and the claim of the prosecution that it was misled to believe the sincerity of the accused in their motion for postponement, which reasons out his

non-appearance in Court suffice to say that while the prosecution may have a point against the opposing counsels, nevertheless in the practice of law, it is never safe to anticipate the ruling of the Court, for even joint motions by opposing counsels may be denied.

"Over and above the trouble that entailed among the lawyers crops up a question: Will those disputes change the fact that the case at bar was already dismissed, predicated upon the right of the accused to a speedy trial?

"In the most recent Decision of the Supreme Court in LEOPOLDO SALCEDO, Petitioner, vs. Hon. Judge Felimon Mendoza, and the PEOPLE OF THE PHILIPPINES, Respondents, G.R. No. L-49375, promulgated February 28, 1979, it was held:

'x x x. Time and again, we have said that the dismissal of a criminal case predicated on the right of the accused to speedy trial amounts to an acquittal on the merits which bars the subsequent prosecution of the accused for the same offense. x x x. This is an exception to the rule that a dismissal, upon the motion or with the express consent of the accused, will not be a bar to the subsequent prosecution of the accused for the same offense provided for in Sec. 9, Rule 113 of the Rules of Court. x x x.'

"WHEREFORE, in view of the foregoing, and considering that the issue involved in the aforecited case and the case at bar are almost identical, it is our considered opinion that said dismissal bars the subsequent prosecution of the accused for the same offense and, by reason thereof, this case should be as it is hereby ordered DISMISSED, with cost de officio.

"SO ORDERED." (Annex 'J', pp. 29-31, Record.)

Astounded by such turn of events, on July 5, 1979, Atty. Ilao filed a 13-page motion for reconsideration, setting it for hearing on July 11, 1978. After said hearing, on September 18, 1979, respondent judge issued his second order in question as follows:

"O R D E R

"From the policy laid down by this Court dated June 18, 1979 dismissing this case anew on the ground that Courts could not revive and reinstate a criminal case it has previously dismissed, without the consent of the accused, predicated upon their rights to a speedy trial, as it infringes the Constitutional guarantee against being put in jeopardy twice for the same offense, the prosecution filed this motion for reconsideration because he claims that the Court could revive the case. As his authority, he cited the case of Solis vs. Agloro and the People of the Philippines 64 SCRA 370, July 31, 1978 which he claims to have a similar factual setting with the case at bar.

"A perusal of the facts in the aforecited case reveals that:

"In the order provisionally dismissing the case, it was explicitly made clear that defense counsel announced the readiness of the accused to give their express conformity to the provisional dismissal of their case. More than that, it was therein stated that respondent judge called for the accused and asked them singly and individually whether they are willing to have this case dismissed with their express conformity, explaining to them that such dismissal will mean possible revival of this case against them, to which each answered in the affirmative. Accordingly it was set in the dispositive portion that the case 'is hereby ordered dismissed with the express conformity of the accused Cenon Solis, Delfin Solis and Bonifacio Solis y Lualhati alias Pacio with cost de officio.' There being such a provisional dismissal, there is no merit to the contention that a revival of the case would amount to a disregard of the constitutional prohibition against double jeopardy. 'xxx

"It is to be noted that the constitutional right of the accused against double jeopardy is not dependent on any other circumstance beyond that which is required by law. Double jeopardy attached 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 charges. (Rule 117, Section 9, Rules of Court).

"Incidentally, the provisional dismissal granted by the Court in the Agloro case was with the express consent of the accused, in the case at bar such express consent is wanting.

"In the Fajardo case (17 SCRA 495) and from the comments of Justice Paras Vol. IV, Page 278-280, 'The rule of import to our view is that after the defendant has pleaded to the charge, before the competent Court under an information sufficient in form and substance to sustain conviction, any form of dismissal of the case or any mode of termination thereof shall constitute jeopardy unless the same is waived by the defendants by giving their express consent thereto'. In other words, the form of termination of the case is immaterial. What is material is the existence or non-existence of a waiver on the part of the defendant.

"The case at bar is a case of termination without the express consent of the defendants by a court of competent jurisdiction.

"What is termination without express consent?"

"Definitely, the above phrase does not apply in cases of conviction or acquittal. It applies only when the case is dismissed or otherwise terminated. Mere silence should not be construed as consent. It does not mean over his objection or against his will. (People vs. Cosare, L-6544, August 25, 1954)

"The main essence of the case at bar is whether, by virtue of the provisional dismissal, double jeopardy attached and, consequently, bar another prosecution for the same offense and not whether the court, in granting the provisional dismissal, erred in taking into consideration the constitutional right of the accused to speedy trial, considering the standard set in the Agloro case.

"The prosecution in citing the Solis-Agloro case has centered on the aspect that, since the dismissal was provisional, double jeopardy does not lie.

"The nature of the dismissal is immaterial. What is of import is the presence or absence of the express consent given by the accused, which constitutes a waiver of his right against double jeopardy." (Fajardo case)

"That even if the defendant thru counsel moves for the dismissal, such does not constitute consent nor tantamount to waiver." (Labatete case)

"In Lagunilla vs. Reyes, G.R. No. L-17377 April 29, 1961, it was held, that: 'the dismissal is equivalent to an acquittal for it is founded on the prosecution's failure to prove the defendant's guilt. It being an acquittal, it becomes final immediately after promulgation and it consequently bars another prosecution for the same offense.'

"After a complete scrutiny of the different cases cited by the herein movant, we find a striking difference in their factual settings with the case at bar. What caused the High Court to rule in the Agloro case that there was no infringement of the Constitutional guarantee against being put twice in jeopardy was the waiver of the accused. Without which, the ruling would have been different. In fine, it is the considered opinion of this Court that the ruling in the Agloro case will not apply to the case at bar.

"WHEREFORE, in view of the foregoing, the 'Motion for Reconsideration of Order dated June 18, 1979' dated July 5, 1979 is hereby DENIED.

"SO ORDERED." (Annex "L", pp. 46-48, Rec.)

Truth to tell, the above-quoted orders prove respondent judge's rather unusual ability to analyze and rationalize his actions, and to even give them the semblance of legality with the citation of jurisprudence. But justice is not a

matter of rationalization, no matter how brilliant and persuasive. Quite truly, an accused in a criminal case who may indeed appear to be guilty may go scot free by successfully invoking a legal technicality. But the interests of truth and justice are better served where the court, giving due consideration to technical objections, goes deeper into the basic legal merits of the controversy and concentrates itself on the fundamental principles of fairness and square dealing which always outweigh technical considerations. In the instant case, there can be no doubt that the previous dismissal later alleged as the basis of the plea of double jeopardy was obtained with no little degree of malice, and what is worse, a clear instance of taking advantage of the good faith of the adverse counsel. This Court cannot and will never sanction such a despicable practice, so much so that We cannot but direct that proper disciplinary inquiry be undertaken to determine the administrative responsibility of the members of the bar responsible therefor.

We deem it unnecessary for the purposes of this case to tarry on the issue of whether or not the provisional dismissal rendered by Judge Carandang, tested in the light of the jurisprudence invoked by respondents, particularly that of *Salcedo vs. Mendoza*, 88 SCRA 811, amounts to an acquittal, albeit it may be well to point out that on p. 817 of the said decision, the Court did not fail to refer to former cases where dismissals must be unconditional and without reservation in order to be considered as acquittals, even if made upon motion of the accused himself. (*People vs. Sison*, L-11669, January 30, 1959, 105 Phil. 1249 [Unreported]; *Catilo vs. Abaya*, 94 Phil. 1014; *People vs. Yelo*, 83 Phil. 618; *People vs. Cloribel*, 11 SCRA 805) A clarification of *Salcedo* and similar rulings can be made in more appropriate instances than the one at bar. Here, We reiterate, We are concerned with a peculiar case of a dismissal secured by private respondents under questionable and reprehensible circumstances that affect the very legal essence of the action of the court in ordering the same. Indeed, the court, upon realizing it had been taken for a ride, so to speak, reversed itself as soon as possible, evidently having in mind that after all his order was expressly qualified as provisional only and the delay of the case even as of that time had been due to the fault of or upon request of one or the other of private respondents. Our sense of justice does not permit Us to treat cases of this nature with any degree of inclination to be technical much less to be in any sense liberal. More, respondent judge would have been better advised if he had taken those antecedent circumstances carefully into account rather than being seemingly beguiled by what Atty. Prila referred to as "eruditely and excellently prepared" motion of Atty. Falcon of respondent Clasio, for We are far from being impressed that there was any real erudition or excellence therein. On the contrary, We see in it nothing but a crude attempt to use resort to technicality, erroneously at that, with a flavoring of what might pass for apparent scholarship, albeit misdirected and improperly oriented.

In other words, while, as contended by respondents, there may be instances where provisional dismissals of criminal cases asked by the accused themselves may in law place the said accused under risk of another jeopardy prohibited by the Constitution, on the other hand, We hold that the peculiar circumstances of this case at bar and the attitude of private respondents herein and their counsel of deliberately delaying the trial, not only by securing repeated postponements but by even deceiving adverse counsel and not being candid with the court, what with their securing the conformity of Atty. Ilao to the postponement of their trial and inducing him and his witnesses not to appear, only for a new counsel representing said respondents to appear later on to withdraw the motion agreed to by Atty. Ilao, without informing the court of what must have been the reason for the absence of the prosecution, cannot under any view and concept of justice carry the day for herein private respondents. Such practice calls for nothing less than condemnation. It deprives their legal pose completely of legal basis.

IN VIEW WHEREOF, the orders of respondent judge of June 18, 1979 and September 18, 1979 are hereby declared null and void, having been issued in grave abuse of discretion. They are both set aside and respondent court is ordered to proceed with the trial of herein respondents for the crimes for which they stand charged in the complaints filed therewith. The Executive Judge of Camarines Sur is hereby directed to designate another

municipal judge to continue said proceeding in lieu of respondent judge, who is hereby relieved from further acting therein. And Atty. Anastacio Prila of Pili, Camarines Sur, Atty. Rolando V. Falcon, Atty. Daniel Fandiño and Atty. Elpidio Borja, of PNB Building, Naga City, as well as Atty. Ernesto Atienza, also of Naga City, are hereby ordered to show cause, within fifteen (15) days from notice of this decision, within which to show cause why disciplinary action should not be taken against them for their respective roles in the deplorable deception and trickery played by the defense on Atty. Juanito Ilao and the respondent court as described and referred to above. Costs against private respondents.

Aquino, Concepcion, Jr., and Guerrero, JJ., concur.

De Castro, J., concurs with a separate opinion.

SEPARATE CONCURRING OPINION

DE CASTRO, J.:

I concur. I only wish, however, to make some observations which may perhaps address themselves more directly to the issue as raised in this petition and upon which the petition should, accordingly, be resolved - that of double jeopardy.

The order of Judge Rolando Carandang provisionally dismissing the case on January 25, 1978 on a verbal motion made by the accused's counsel, in open court, without notice to the prosecution, allegedly for violation of the right to speedy trial is what private respondents claim to have given rise to double jeopardy, when, upon motion of the prosecution seasonably filed, the case was reinstated on April 20, 1978. This claim was sustained when, on May 14, 1979, more than one year after the order of reinstatement of the case, and after nine hearings set for the reinstated case, respondents again moved for the dismissal of the action on the ground of double jeopardy. The order of the court dated June 18, 1979 granting the motion is what is sought to be annulled in the instant petition.

The provisional dismissal of the case as ordered by Judge Carandang on the ground of alleged denial of the right to speedy trial of the accused was, in my opinion, a nullity for lack of legal or factual basis. By the numerous and repeated postponements of the trial at the instance of the private respondents, the latter are deemed to have waived the right to speedy trial.[1] The court was in palpable error, acting with grave abuse of discretion, in granting dismissal on the invocation of a right that has been lost by waiver.

If the order of dismissal was not a complete nullity on the above account, a constitutional infirmity makes it so. The motion to dismiss was made orally without notice or hearing, insofar as the prosecution is concerned. The Judge should have required the motion, of such a grave consequence as the possible dismissal of the case, to be reduced into writing, with notice to the prosecuting fiscal and set for proper hearing. The failure to observe the cardinal requirements of procedural due process to which the People is as much entitled in all criminal actions as the accused,[2] afflicted the order of dismissal dated January 25, 1978 with constitutional infirmity, which gravely affected the jurisdiction of the court to act with competence on the matter before it. Since one of the requisites of double jeopardy[3] is that of a court acting with competent jurisdiction, the legally defective order of January 25, 1978 cannot sustain a plea of double jeopardy, aside from the lack of a fundamental prerequisite for its validity - that of due process.

But the simplest reason against such a plea in the instant case is the fact that the dismissal was only provisional. For having consented to a mere provisional dismissal, respondents clearly indicated thereby their acquiescence to the dismissal being set aside or withdrawn on valid and legal grounds. Indeed, the qualification of the dismissal as "provisional" has always been intended to preclude the raising of plea of double jeopardy.[4] It is meant to permit, without the obstacle of such a plea, the lifting of the provisional dismissal, so as not to bar the prosecution of the

same offense that has earlier been stopped, but only temporarily, provided of course that valid grounds are shown to justify legally the reinstatement of the case, or the filing of a new one, as such a ground has been pointedly shown in the majority decision in the characteristically vigorous language of the ponente, Justice Barredo. For what sense is there in qualifying the dismissal as only "provisional" if it has the same effect, for purposes of double jeopardy, as a permanent and absolute dismissal?

It might be true as held in a number of cases^[5] that the dismissal of a criminal case due to a denial of the right to speedy trial amounts to an acquittal, and it makes no difference if the dismissal is labelled provisional.^[6] The obvious reason for this, which the respondent judge failed to perceive, is that it would be nugatory to dismiss the case for trial having been unduly delayed in violation of the right to speedy trial, and still allow, after an even greater delay that would exacerbate or aggravate the violation of the right, the prosecution to be resumed on a new complaint for the same offense, or on the same complaint being reinstated. To permit this to happen would be to render meaningless the dismissal of the case based on the violation of the right to speedy trial. To give substance and real meaning to the dismissal, and avoid a plain mockery of justice, same should be given the effect of an acquittal that would entitle one to the protection of the double jeopardy clause of the Constitution, and bar another prosecution for the same offense.

This, of course, should be the rule only when there is a real and actual denial of the right to speedy trial as had obtained in all the cases where the dismissals due to denial of speedy trial were held to amount to an acquittal.^[7] But when there is no such denial as when the delay in the trial was imputable to no one but the accused themselves, like the private respondents in this case, they cannot profit from their own fault or wrong doing. Judge Carandang qualifying the dismissal as he ordered to be merely provisional, with its natural connotation akin to that of being "without prejudice", must have been intentional, and certainly well-advised, in view not only of the waiver of the right to speedy trial by the private respondents, as earlier explained, but also, and with greater force, the lack of compliance with the requirements of due process, to permit the prosecution to move for the setting aside of the order of dismissal, as it actually did, which the judge might have thought would be unavailing if he had not qualified the dismissal as only provisional. His order for reinstatement of the case, consequently, was perfectly legal and free from any constitutional vice or infirmity.

Even assuming that double jeopardy was properly invocable when the court ordered the reinstatement of the case, there was also a waiver thereof when the plea was made more than one year after the issuance of the order of reinstatement of the case, and only after, the reinstated case have been set for hearing nine times. Hence, for not pleading double jeopardy seasonably, which should have been before the order of reinstatement has attained finality, the plea may not prosper by reason of waiver thereof, double jeopardy being waivable, as has been so held when the assertion of the right was not made at the earliest opportunity after the reinstatement of the case, but only when actual trial was held after a postponement of the trial set earlier.^[8]

[1] *People vs. Jabajab*, 100 Phil. 307; *Kalaw vs. Apostol*, 64 Phil. 852; *Solis vs. Agloro*, 64 SCRA, 370.

[2] *People vs. Cabero*, 61 Phil. 121; *People vs. Balicasan*, 17 SCRA 1119; *People vs. Gomez*, 20 SCRA 293; *Serino vs. Zosa*, 40 SCRA 433; *People vs. Surtida*, 43 SCRA 29; *People vs. Catolico*, 43 SCRA 519; *Mendoza vs. CFI of Quezon*, 51 SCRA 369; *People vs. Navarro*, 63 SCRA 264; *People vs. Hon. Pablo, et al.*, L-37271, June 25, 1980.

[3] Rule 117, Section 9.

[4] *Republic vs. Agoncillo*, August 31, 1971, 40 SCRA 579.

[5] Gandicela vs. Lutero, 88 Phil. 299; People vs. Diaz, 94 Phil. 714; People vs. Robles, 105 Phil. 1016; People vs. Obsanio, 23 SCRA 1249; People vs. Montemayor, 26 SCRA 687; Acebedo vs. Sarmiento, 36 SCRA 247.

[6] People vs. Cloribel, 11 SCRA 815, citing Gandicela vs. Lutero, 88 Phil. 299 and People vs. Diaz, 94 Phil. 714; Taladua vs. Ochotorena, 55 SCRA 528, 531.

[7] People vs. Salico, 85 Phil. 54; People vs. Diaz, 94 Phil. 714; People vs. Robles, 105 Phil. 1016; People vs. Tacneng, 105 Phil. 1021; Acebedo vs. Sarmiento, 36 SCRA 247.

[8] Rule 117, Section 10; People vs. Quimsing, et al. 120 Phil. 1352; People vs. Casiano, 1 SCRA 478.

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