

GENEROSO ESMEÑA AND ALBERTO ALBA, PETITIONERS, VS. JUDGE JULIAN B. POGOY, CITY COURT OF CEBU CITY, BRANCH III, PEOPLE OF THE PHILIPPINES AND RICARDO B. TABANAO, AS SPECIAL COUNS...

G.R. No. 54110. February 20, 1981

Ponente: AQUINO, J.

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AQUINO, J.:

This case poses the issue of whether the revival of a grave coercion case, which was provisionally dismissed (after the accused had been arraigned) because of complainant's failure to appear at the trial, would place the accused in double jeopardy, considering their constitutional right to have a speedy trial.

Petitioners Generoso Esmeña and Alberto Alba and their co-accused, Genaro Alipio, Vicente Encabo and Bernardo Villamira were charged with grave coercion in the city court of Cebu City for having allegedly forced Reverend Father Tomas Tibudan of the Jaro Cathedral, Iloilo City to withdraw the sum of five thousand pesos from the bank and to give that amount to the accused because the priest lost it in a game of cards.

The case was calendared on October 4, 1978 presumably for arraignment and trial. Upon the telegraphic request of Father Tibudan, the case was reset on December 13, 1978. Because Esmeña and Alba were not duly notified of that hearing, they were not able to appear.

The two pleaded not guilty at their arraignment on January 23, 1979. No trial was held after the arraignment because complainant Father Tibudan requested the transfer of the hearing to another date.

In the meantime, the fiscal lost his record of the case. So, the hearing scheduled on June 18, 1979 was cancelled at his instance. On that date, respondent judge issued an order setting the trial "for the last time on August 16, 1979 at 8:30 o'clock in the morning" (p. 21, Rollo).

When the case was called on that date, the fiscal informed the court that the private prosecutor received from complainant Father Tibudan a telegram stating that he was sick. The counsel for petitioners Esmeña and Alba opposed the cancellation of the hearing. They invoked the right of the accused to have a speedy trial.

Their counsel told the court: "x x x we are now invoking the constitutional right of the accused to a speedy trial of the case. x x x We are insisting on our stand that the case be heard today; otherwise, it will (should) be dismissed on the ground of invoking (sic) the constitutional right of the accused particularly accused Alberto Alba and Ganeroso Esmeña" (pp. 50 and 52, Rollo).

Respondent judge provisionally dismissed the case as to the four accused who were present because it "has been dragging all along and the accused are ready for the hearing" but the fiscal was not ready with his witness. The court noted that there was no medical certificate indicating that the complainant was really sick. The case was continued as to the fifth accused who did not appear at the hearing. His arrest was ordered (p. 23, Rollo).

Twenty-seven days later, or on September 12, 1979, the fiscal filed a motion for the revival of the case. He attached to his motion a medical certificate under oath attesting to the fact that Father Tibudan was sick of influenza on August 16, 1979.

The fiscal cited the ruling that a provisional dismissal with the conformity of the accused lacks the impress of finality and, therefore, the case could be revived without the filing of a new information (*Lauchengco vs. Alejandro*, L-49034, January 31, 1979, 88 SCRA 175).

The accused did not oppose the motion. Respondent judge granted it in his order of October 8, 1979 (p. 26, Rollo).

On October 24, 1979, Esmeña and Alba filed a motion to dismiss the case on the ground of double jeopardy. They pointed out that they did not consent to the provisional dismissal of the case. Hence, the provisional dismissal amounted to an acquittal which placed them in jeopardy. Its revival would place them in double jeopardy.

The fiscal opposed the motion. He called the court's attention to the fact that Father Tibudan had appeared in court several times but the hearing was not held. The court denied the motion to dismiss.

That order denying the motion to dismiss is assailed in this special civil action of certiorari. The Solicitor General agrees with the petitioners that the revival of the case would place the accused in double jeopardy since the provisional dismissal of the case without their consent was in effect an acquittal.

The rule on double jeopardy (*non bis in idem* or not twice for the same) is found in section 22, Article IV (Bill of Rights) of the Constitution which provides that "no person shall be twice put in jeopardy of punishment for the same offense". This is complemented by Rule 117 of the Rules of Court which provides 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 a 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.

In order that legal jeopardy may exist, there should be (a) a valid complaint or information (b) before a court of competent jurisdiction and (c) the accused has been arraigned and has pleaded to the complaint or information.

When these three conditions are present, the acquittal or conviction of the accused or the dismissal or termination of the case without his express consent constitutes *res judicata* and is 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 included therein (4 Moran's Comments on the Rules of Court, 1980 Ed., p. 240).

Previous acquittal (*autrefois acquit*), previous conviction (*autrefois convict*) or the dismissal or termination of the case without his consent precludes his subsequent indictment for the same offense as defined in section 9.

In the instant case, we hold that the petitioners were placed in jeopardy by the provisional dismissal of the grave coercion case. That provisional dismissal would not have placed the petitioners in jeopardy if respondent judge had taken the precaution of making sure that the dismissal was with their consent. In this case, it is not very clear that the petitioners consented to the dismissal of the case.

It is the practice of some judges before issuing an order of provisional dismissal in a case wherein the accused had

already been arraigned to require the accused and his counsel to sign the minutes of the session or any available part of the record to show the conformity of the accused or his lack of objection to the provisional dismissal.

The judge specifies in the order of provisional dismissal that the accused and his counsel signified their assent thereto. That procedure leaves no room for doubt as to the consent of the accused and precludes jeopardy from attaching to the dismissal.

The petitioners were insisting on a trial. They relied on their constitutional right to have a speedy trial. The fiscal was not ready because his witness was not in court. Respondent judge on his own volition provisionally dismissed the case. The petitioners did not expressly manifest their conformity to the provisional dismissal. Hence, the dismissal placed them in jeopardy.

Even if the petitioners, after invoking their right to a speedy trial, moved for the dismissal of the case and, therefore, consented to it, the dismissal would still place them in jeopardy. The use of the word "provisional" would not change the legal effect of the dismissal (*Esguerra vs. De la Costa*, 66 Phil. 134; *Gandicela vs. Lutero*, 88 Phil. 299).

"If the defendant wants to exercise his constitutional right to a speedy trial, he should ask, not for the dismissal, but for the trial of the case. After the prosecution's motion for postponement of the trial is denied and upon order of the court the fiscal does not or cannot produce his evidence and, consequently, fails to prove the defendant's guilt, the court upon defendant's motion shall dismiss the case, such dismissal amounting to an acquittal of the defendant" (4 Moran's Comments on the Rules of Court, 1980 Ed., p. 202, citing *Gandicela vs. Lutero*, 88 Phil. 299, 307 and *People vs. Diaz*, 94 Phil. 714, 717).

The dismissal of a criminal case upon motion of the accused because the prosecution was not prepared for trial since the complainant and his witnesses did not appear at the trial is a dismissal equivalent to an acquittal that would bar further prosecution of the defendant for the same offense (*Salcedo vs. Mendoza*, L-49375, February 28, 1979, 88 SCRA 811; *Lagunilla vs. Hon. Reyes, etc. and Motas*, 111 Phil. 1020 citing *People vs. Tacneng*, 105 Phil. 1298 and *People vs. Robles*, 105 Phil. 1016. See *Taladua vs. Ochotorena*, L-25595, February 15, 1974, 55 SCRA 528; *Acebedo vs. Sarmiento*, L-28025, December 16, 1970, 36 SCRA 247; *Baesa vs. Provincial Fiscal of Camarines Sur*, L-30363, January 30, 1971, 37 SCRA 437; *People vs. Cloribel*, 120 Phil. 775; *People vs. Abaño*, 97 Phil. 28; *People vs. Labatete*, 107 Phil. 697).

WHEREFORE, the order of respondent judge dated October 8, 1979, reviving the criminal case against the petitioners, and his order of December 14, 1979, denying petitioners' motion to dismiss, are reversed and set aside. No costs.

SO ORDERED.

Barredo, (Chairman), Concepcion, Jr., Abad Santos and De Castro, JJ., concur.

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