

TEOFISTO GUINGONA, JR., ANTONIO I. MARTIN, AND TERESITA SANTOS, PETITIONERS, VS. THE CITY FISCAL OF MANILA, HON. JOSE B. FLAMINIANO, ASST. CITY FISCAL FELIZARDO N. LOTA AND CLEM...

G.R. No. 60033. July 18, 1985

Ponente: AQUINO, J.

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AQUINO, J.:

Respondent Clement David filed a motion for the reconsideration of this Court's decision dated April 4, 1984, 128 SCRA 577. He contends that this Court failed to consider that the petitioners entered in the records and books of the Nation Savings and Loan Association only P305,821.92 out of his deposits in the amounts of P1,145,546.20, P15,531.94 and \$75,000 and that they admitted that they did not deliver the difference when they assumed in their personal capacities the obligation to pay him. He argues that the petitioners committed estafa through misappropriation.

On the other hand, the petitioners contend that the decision had already become final because the Solicitor General did not file any motion for reconsideration; that David cannot adopt a theory which is inconsistent with his original theory; that his claim is clearly civil, not criminal; that his claim has been novated, and that prohibition is proper to stop a void proceeding, to prevent the unlawful and oppressive exercise of lawful authority and to provide a just and orderly administration of justice.

The petitioners filed this prohibition action because their obligation is allegedly civil in character and because of the adverse publicity supposedly instigated by David.

The factual background may be restated as follows:

1. Clement David and his sister Denise Kuhne during the period from March 20, 1979 to March, 1981 made placements with the Nation Savings and Loan Association, Inc. in the total sum of P1,145,546.20 as evidenced by seven bankers acceptances and five certificates of time deposits.

He and his sister Denise also had savings deposits in the Nation Savings in the sum of P13,531.94 as shown in Passbooks Nos. 6-632 and 29-740.

They also invested in Nation Savings US\$75,000 in 1980 as evidenced by receipts, of which \$50,000 was deposited in the account of Teofisto Guingona, Jr. with the Security Bank and Trust Company.

Aggregate investments of David and Kuhne in Nation Savings: P1,159,078.14 in local currency and 75,000 in U.S. dollars. Nation Savings allegedly paid David from 1979 to the early part of 1981 interests of P240,000 a year (p. 193, Rollo).

At the time the deposits were made, Antonio I. Martin was the president of Nation Savings, Teresita G. Santos was its general manager, and Guingona was a director.

2. On March 21, 1981, Nation Savings was placed under receivership by the Central Bank because of serious fraud and irregularities committed by its key officers (Annex 12).
3. On June 17, 1981, Guingona and Martin executed a promissory note acknowledging a debt of P1,336,614.02 and \$75,000 to be paid in installments within 180 days from said date with interest at 16% per annum from July 1, 1981 until fully paid.
4. The promissory note was novated by another note, antedated June 17, 1981, whereby Guingona acknowledged one-half of the obligation as his debt or the sums of P668,307.01 and \$37,500 and secured the same by second mortgages on his Quezon City properties (Annex D). Guingona paid P200,000 on that note.
5. Martin assumed the other half of the total debt. He secured it with the pledge of a ring valued according to him at P560,000 but appraised by a jewel appraiser at 280,000. Martin is also indebted to David in the sum of P60,000 which David paid to Monte de Piedad to redeem the ring.
6. On July 22, 1981, David received a report from the Central Bank that only P305,821.92 of the placements made by him and his sister were entered in the NSLA records (Annex 4, p. 218, Rollo). The director of the CB Department of Rural Banks and Savings and Loan Associations in a report dated June 23, 1981 recommended that the irregularities be brought to the attention of the CB consultant on criminal cases for appropriate investigation of Nation Savings' officials (p. 240, Rollo).
7. In view of the promissory note and the mortgages, David, on July 22, 1981, executed an affidavit wherein he bound himself to desist from any prosecution of Guingona without prejudice to the balance of his claim against Nation Savings (Annex M, p. 46, Rollo).
8. On November 19, 1981, Guingona filed against David Civil Case No. Q-33865 in the Quezon City Court of First Instance. He prayed for damages of P785,000 against David for his failure to accept payment of a cashier's check for P300,000 (in addition to the P200,000) and to release one of the mortgaged properties (Annex K, p. 37, Rollo).
9. On December 22, 1981, David filed with the City Fiscal's Office, Manila I.S. No. 81-31938, a complaint for estafa and violation of CB Circular No. 364 and related regulations. He claimed that the difference between his placements of P1,159,078.14 and \$75,000, on one hand, and the sum of P305,821.92, the amount entered in Nation Savings' books, on the other hand, constitutes the defraudation against him.
10. He filed the complaint against Guingona, as board chairman, director and principal stockholder of Nation Savings; Martin, as vice-president, director and shareholder, and Santos, as general manager. David dealt directly with Guingona, Martin and Santos in his transactions with Nation Savings. The three filed a counter charge of perjury against David and his lawyers (p. 59, Rollo).
11. On January 20, 1982, David sought to foreclose extrajudicially the two mortgages (p. 58, Rollo). The foreclosure was restrained by the Quezon City Court of First Instance.
12. On March 15, 1982, the Solicitor General, in behalf of the Central Bank, filed a petition in the Court of First Instance of Manila for assistance in the liquidation of Nation Savings as an insolvent firm (Spec. Proc. No. 82-7552, p. 111, Rollo). The receivership was challenged by Nation Savings stockholders in Special Proceedings No. 82-1655 (p. 125, Rollo). The Solicitor General answered that petition by alleging that Nation Savings was plagued with irregularities (p. 225, Rollo).

With the foregoing background, the prohibition petition should be dismissed. The petitioners have no cause of action for prohibition because the City Fiscal has jurisdiction to conduct the preliminary investigation. It has not been finished. The filing of this petition is premature. The case does not fall within any of the exceptions when prohibition lies to stop the preliminary investigation (*Hernandez vs. Albano*, 125 Phil. 513).

"As a general rule, an injunction will not be granted to restrain a criminal prosecution" (People vs. Mencias, 124 Phil. 1436, 1441). With more reason will injunction not lie when the case is still at the preliminary investigation stage. This Court should not usurp the primary function of the City Fiscal to conduct the preliminary investigation of the estafa charge and of the petitioners' countercharge for perjury, which was consolidated with the estafa charge (p. 59, Rollo).

The City Fiscal's office should be allowed to finish its investigation and make its factual findings. This Court should not conduct the preliminary investigation. It is not a trier of facts.[*]

The instant, case is primarily a litigation between David and the petitioners. The fact that the Solicitor General, as counsel of the public respondents, did not file a motion for reconsideration does not estop David from continuing with the prosecution of the petitioners. In the present posture of the case, the City Fiscal occupies the analogous position of judge. He has to maintain an attitude of neutrality, not that of partiality.

In view of the foregoing considerations, the decision is reconsidered, the petition is dismissed and the City Fiscal of Manila is directed to finish the preliminary investigation. No costs.

SO ORDERED.

Escolin, Gutierrez, Jr., De La Fuente, and Cuevas, JJ., concur.

Teehankee and Makasiar, JJ., see separate dissenting opinion.

Concepcion, Jr., J., see separate concurring opinion.

Abad Santos, J., vote to deny the motion for reconsideration.

Melencio-Herrera, J., concur with the Resolution and with the Concurring Opinion of J. Relova.

Relova, J., see concurring opinion.

Alampay, J., taken the same view expressed by J. Relova in this case.

Fernando, C.J., and Plana, JJ., no part.

[*] "SEC. 4. Duty of investigating fiscal. — If the investigating fiscal finds cause to hold the respondent for trial, he shall prepare the resolution and corresponding information. He shall certify under oath that he has examined the complainant and his witnesses, that there is reasonable ground to believe that a crime has been committed and that the accused is probably guilty thereof, that the accused was informed of the complaint and of the evidence submitted against him and that he was given an opportunity to submit controverting evidence. Otherwise, he shall recommend dismissal of the complaint.

"In either case, he shall forward the records of the case to the provincial or city fiscal or chief state prosecutor within five (5) days from his resolution. The latter shall take appropriate action thereon within ten (10) days from receipt thereof, immediately informing the parties of said action.

"No complaint or information may be filed or dismissed by an investigating fiscal without the prior written authority or approval of the provincial or city fiscal or chief state prosecutor.

"Where the investigating fiscal recommends the dismissal of the case but his findings are reversed by the provincial or city fiscal or chief state prosecutor on the ground that a probable cause exists, the latter may, by himself, file the corresponding information against the respondent or direct any other assistant fiscal or state

prosecutor to do so, without conducting another preliminary investigation.

"If upon petition by a proper party, the Minister of Justice reverses the resolution of the provincial or city fiscal or chief state prosecutor, he shall direct the fiscal concerned to file the corresponding information without conducting another preliminary investigation or to dismiss or move for dismissal of the complaint or information. (5a)" (Rule 112 of the 1985 Rules of Criminal Procedure).

Separate Vote and Statement

CONCEPCION, Jr., J.:

On December 23, 1981, private respondent Clement David, an Australian citizen, filed I.S. No. 81-31938 in the Office of the City Fiscal of Manila charging petitioners and one, Robert Marshall, together with eight others who were directors of the Nation Savings and Loan Association, with estafa and violation of Central Bank Circular No. 364 and related Central Bank circulars and regulations on foreign exchange transactions.

Briefly, David alleges that he delivered to petitioners P1,145,546.20, P15,531.94, and U.S. \$75,000 to be deposited as time deposits or savings account with Nation Savings and Loan Association. Of these amounts only P305,821.92 were entered in the records and books of the said Association.

At the start of the investigation, petitioners moved to dismiss the case "for lack of jurisdiction because the claims alleged in the charge comprise a purely civil obligation which has been novated," which motion was promptly denied.

The first witness of private respondent David was the Deputy Receiver of the Central Bank, Mrs. Yu Donato. After her testimony, petitioners again moved to dismiss the case on the same ground. This was also denied. Hence this petition.

The issue before Us is: Can We or should We stop the City Fiscal from completing his preliminary investigation on the ground that the charges are civil in nature?

I hold We cannot and We should not.

In the complaint before the City Fiscal's Office, there are some other respondents aside from petitioners. In addition to estafa there are charges of violation of Central Bank circulars. To determine who are liable, if any, and for what charges requires that the presentation of evidence be completed.

The procedure laid down by law is for the City Fiscal to complete his investigation and thereafter to make a resolution. Whatever be the resolution is subject to review by the Ministry of Justice.

In the case before Us, prohibition does not lie to stop the preliminary investigation being conducted by the City Fiscal.

To hold otherwise, would be to usurp the duties and functions of the City Fiscal and the power to review the resolution of the City Fiscal by the Ministry of Justice.

The Solicitor General is only a nominal party at most. The People of the Philippines is not a party to the entire proceedings, and as provided for by law the actuations of the City Fiscal have been defended by respondent David.

DISSENTING OPINION

MAKASIAR, J.:

On April 30, 1984, private respondent Clement David, thru counsel Atty. Norberto Quisumbing, filed a motion dated April 28, 1984 for the reconsideration of the decision promulgated on April 4, 1984 granting the petition of herein petitioners and making permanent the temporary restraining order previously issued with costs against private respondent.

I

The Solicitor General, as counsel for public respondent, did not file within the reglementary period any motion for reconsideration of the aforesaid decision of April 4, 1984, which the Solicitor General received on April 6, 1984. Hence, the aforesaid decision, as expressly admitted by the Solicitor General, became final and executory on April 22, 1984 with respect to public respondents.

As expressly stated by the Solicitor General in his manifestation dated August 23, 1984 and filed on August 28, 1984, "x x 2. the office of the Solicitor General received the copy of the aforesaid decision on April 6, 1984, and did not file a motion for reconsideration, hence, the Decision became executory as to the public respondent on April 22, 1984" (p. 418, rec.).

WE ruled in *Singh vs. Liberty Insurance Corp.* (8 SCRA 517, 520 [1963]) that: "as against other parties adversely affected by the decision who did not appeal the decision must be deemed to have become final and executory. A contrary view would lead to indefensible results."

Since the Solicitor General has supervision and control over a criminal action (in this case, herein petitioners were charged with estafa and violation of Section 3 of Central Bank Circular No. 364 and Nos. 343 and 865 on foreign exchange; par. 1 of Section 4, Rule 110, Revised Rules of Court of 1964), the aforesaid decision of April 4, 1984 shall likewise be considered as final and executory with respect to herein private respondent Clement David who cannot adopt a stand inconsistent with that of the Fiscal.

WE held in *Tan Jr. vs. Gallardo* (73 SCRA 306, 311-314 [1976]):

"And in any event, whether an offended party intervenes in the prosecution of a criminal action, his intervention must always be subject to the direction and control of the prosecuting official. As explained in *Herrero vs. Diaz*, supra, the 'intervention of the offended party or his attorney is authorized by section 15 of Rule 106 of the Rules of Court (now section 15, Rule 110), subject to the provisions of section 4 of the same Rule that all criminal actions either commenced by complaint or by inform shall be prosecuted under the direction and control of the Fiscal.'

"Therefore, although the private prosecutors may be permitted to intervene, they are not in control of the case, and their interests are subordinate to those of the People of the Philippines represented by the fiscal. The right which the procedural law reserves to the injured party is that of intervening in the prosecution for the sole purpose of enforcing the civil liability for the criminal action and not of demanding punishment of the accused. As explained in *People vs. Orais*:

"The position occupied by the offended party is subordinate to that of the promoter fiscal because as the promoter fiscal alone is authorized to represent the public prosecution, or the People of the Philippine Islands, in the prosecution of offenders, and to control the proceeding, and as it is discretionary with him to institute and prosecute a criminal proceeding, being at liberty to commence it or not to refrain from prosecuting it or not, depending upon whether or not there is, in his opinion, sufficient evidence to establish the guilt of the accused beyond a reasonable doubt, except when the case is pending in the Court of First Instance, the continuation of the offended party's intervention depends upon the continuation of the proceeding.

Consequently, if the promoter fiscal desists from pressing the charge or asks the competent Court of First Instance in which the case is pending for the dismissal thereof, and said court grants the petition, the intervention of the person injured by the commission of the offense ceases by virtue of the principle that the accessory follows the principal. Consequently, as the offended party is not entitled to represent the People of the Philippine Islands in the prosecution of a public offense, or to control the proceeding once it is commenced, and as his right to intervene there in is subject to the promoter fiscal's right of control, it cannot (sic) be stated that an order of dismissal decreed upon petition of the promoter fiscal himself deprives the offended party of his right to appeal from an order overruling a complaint or information, which right belongs exclusively to the promoter fiscal by virtue of the provisions of section 44 of General Order No. 58. To permit a person injured by the commission of an offense to appeal from an order dismissing a criminal case issued by a Court of First Instance upon petition of the promoter fiscal, would be tantamount to giving said offended party of the direction and control of a criminal proceeding in violation of the provisions of the above-cited section 107 of General Order No. 58.'

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"It is evident, therefore, that since the Solicitor General alone is authorize the State or the People of the Philippines, the interest of the private prosecutors is subordinate to that of the State and they cannot be allowed to take a stand inconsistent with that of the Solicitor General, for that would be tantamount to giving the latter the direction and control of the criminal proceedings, contrary to the provisions of law and the settled rules on the matter" (pp. 311-314; underlining supplied).

Again, in the case of *Cabral vs. Puno* (70 SCRA 606-610 [1976]), citing several cases, We ruled that: "While it is true that the offended party, Silvino San Diego, through the private prosecutor, filed a motion for reconsideration within the reglementary fifteen-day period, such move did not stop the running of the period for appeal. He did not have the legal personality to appeal or to file a motion for reconsideration on his behalf. The prosecution in a criminal case through the private prosecutor is under the direction and control of the Fiscal, and only the motion for reconsideration or appeal filed by the Fiscal could have interrupted a period for appeal" (underscoring supplied).

This fact alone by itself suffices to warrant the denial of the motion for reconsideration filed by private respondent Clement David as complainant.

II

And because of the compromise agreement entered into prior to the filing of the criminal information in court, the said compromise agreement or novation converted the original relationship between the parties into ordinary creditor-debtor situation. Such novation or compromise prevents the institution of a criminal prosecution (*Ong vs. CA, et al.*, 124 SCRA 578, 580-81 [1983] penned by Justice Relova, concurred in by Justices Melencio Herrera, Plana, Vasquez and Gutierrez). In said *Ong* case, Mr. Justice Relova quoted Mr. Justice J.B.L. Reyes in *People vs Nery* (10 SCRA 244), thus:

"The novation theory may perhaps apply to the filing of the criminal information in court by the state prosecutors because up to that time the original trust relation may be converted by the parties into an ordinary creditor debtor situation, thereby placing the complainant in estoppel to insist on the original trust. But after the justice authorities have taken cognizance of the crime and instituted action in court, the offended party may no longer divest the prosecution of its power to exact the criminal liability, as distinguished from the civil. The crime being an offense against the state, only the latter can renounce it (*People vs. Gervacio*, 54 Off. Gaz. 2898; *People vs. Velasco*, 42 Phil. 76; *U.S. vs. Montañes*, 8 Phil. 620)" (124 SCRA 578, 580- 581).

Also, in the case of *Gonzales vs. Manila City Fiscal Eulogio Serrano* (25 SCRA 64, Sept. 23, 1968), Mr. Chief Justice Roberto Concepcion, with the concurrence of Associate Justices J.B.L. Reyes, Dizon, Makalintal, Zaldivar, Sanchez, Castro, Angeles and Fernando, ruled that:

"As pointed out in *People vs. Nery*, novation prior to the filing of the criminal information — as in the case at bar — may convert the relation between the parties into an ordinary creditor-debtor relation, and place the complainant in estoppel to insist on the original transaction or 'cast doubt on the true nature' thereof" (25 SCRA 69).

In the oft-cited case of *People vs. Nery* (10 SCRA 244, Feb. 5, 1964), Mr. Justice J.B.L. Reyes, spoke for the Court, with the full concurrence of Chief Justice Cesar Bengzon, Justices Padilla, Bautista Angelo, Labrador, Concepcion, Barrera, Paredes, Dizon, Regala and Makalintal.

III

Moreover, private respondent cannot now intervene in the prosecution of the criminal offense because he has waived his right to the civil action when he filed his answer with counter-claim in Civil Case No. Q-33865 in then Court of First Instance, now Regional Trial Court in Quezon City.

It should be recalled that petitioners Teofisto Guingona Jr., Antonio I. Martin, and Teresita Santos were respectively Director, President and General Manager of the Nation Savings and Loan Association (NSLA) from March, 1978 until October or November, 1980. From March 20, 1979 to March, 1981, private respondent David, an Australian citizen, invested with the NSLA — dealing directly with petitioners Martin and Santos as NSLA President and General Manager — the sum of P1,145,546.20 on time deposits, P13,531.94 on savings account deposits (jointly with his sister Denise Kuhne); US\$10,000.00 on time deposits, US\$15,000.00 under receipts and guarantee of payment and US\$50,000.00 under a receipt dated June 8, 1980 (all jointly with Denise Kuhne); that upon private respondent David's insistence, the aforesaid investments were treated as special accounts with interest above the legal rate, and recorded in separate confidential documents; that only a portion of said deposits or investments were to be reported because respondent David did not want the Australian government to tax his total earnings nor to know his total investments. All transactions with private respondent David were recorded except the sum of US\$15,000.00 which was a personal loan to Santos.

The check of US\$50,000.00 was cleared thru Guingona's dollar account with the Security Bank because NSLA did not have any dollar account.

Thereafter, respondent David, as he himself admitted, received periodic interests on his deposits averaging P5,000.00 a week (pp. 397-398, rec.).

When the NSLA was placed under receivership on March 21, 1981, petitioners Guingona and Martin, upon request of private respondent David, assumed the obligation of the Bank to respondent David and executed on June 17, 1981 a promissory note in favor of David acknowledging indebtedness of P1,336,614.02 and US\$75,000.00 (p. 80, rec.), which amounts were based on the statement of account as of June 30, 1981 prepared by private respondent David himself.

Thereafter, on July 17, 1981, petitioners Guingona and Martin agreed to divide said indebtedness equally, each one assuming an indebtedness of P668,307.01 and US\$37,500.00 in favor of private respondent David (Annex "D", p. 25, rec.). Guingona executed a new promissory note for his one-half share of the assumed indebtedness was secured by second mortgages of two parcels of land (Annex "E", Petition, pp. 26-29, rec.) with stipulation that the mortgage of one parcel should be cancelled upon payment of ½ of his one-half share in their obligation to David. The other half of the indebtedness assumed by petitioner Martin was secured by a 9½ karat diamond ring with a net value of P510,000.00.

On September 15, 1981, Guingona paid P200,000.00 to David who received the same. When he tendered on October 15, 1981 and on October 21, 1981 another P300,000.00, respondent David refused to accept, compelling petitioner Guingona to file Civil Case No. Q-33865 in the CFI of Quezon City on November 19, 1981 (T.

Guingona Jr. vs. Clement David) for specific performance with damages, praying among others, for the release of the mortgage over one of the two parcels of land conveyed to private respondent David as stipulated in the deed of second mortgage.

In said Civil Case No. Q-33865 before the Quezon City RTC, private respondent David filed on December 19, 1981 an answer to the complaint for damages with counter-claim for the remaining balance of petitioner Guingona's indebtedness in the amount of P638,691.36 and US\$49,320.45 plus interests, damages, and attorney's fees (pp. 104-105, rec.).

Because of the filing by petitioner Guingona of Civil Case No. Q-33865, private respondent David filed his affidavit-complaint dated December 23, 1981 in the Office of the City Fiscal of Manila against herein petitioners for estafa and violation of Central Bank Circular No. 364 (Sec. 3) and related regulations on foreign transaction.

It would appear therefore that private respondent David impliedly waived his right to intervene in this criminal case because four days before the criminal complaint was filed with the City Fiscal of Manila, respondent David already filed an answer with counterclaim in Civil Case No. Q-33865 filed in the Quezon City RTC by petitioner Guingona which is akin to an express reservation of his right to file a separate civil action.

Thus, it has been ruled that "an offended party loses his right to intervene in the prosecution of a criminal case not only when he has waived the civil action or expressly reserved his right to institute it, but also when he has actually instituted the civil action even if he has not made the waiver or reservation adverted to" (Gorospe and Gorospe vs. Gatmaitan, et al., 98 Phil. 600, 603 [1956]).

The counterclaim of private respondent David for the remaining balance of the share in the obligation of petitioner Guingona included in his answer in the aforesaid civil case before the Quezon City RTC is in effect a civil action for the enforcement of the civil liability of herein petitioner Guingona.

It should be stressed that after receiving the first payment to him of P200,000.00 from petitioner Guingona, the latter offered him four personal checks covering the amount of P300,000.00 which amount was due on October 15, 1981 as stipulated; but private respondent David requested that the four personal checks be changed to manager's check and extended the period of payment to October 20, 1981. When petitioner Guingona complied with the request by delivering the cashier's check covering the amount of P300,000.00 on October 21, 1981, private respondent David refused to accept the same claiming that petitioner Guingona was already in default and that the entire remaining balance had already become due and payable (p. 57, rec.).

Likewise, it should be emphasized that private respondent David executed on July 17, 1981 an affidavit of desistance wherein he, for himself and in behalf of his sister Denise Kuhne, agreed to desist from any prosecution of petitioner Guingona (p. 46, rec.).

His affidavit of desistance states:

"3. That on or about July 17, 1981, Mr. Teofisto Guingona Jr. executed, in my favor, a Promissory Note dated June 17, 1981 for the amount of P668,307.01 and US\$37,500 with interest at 16% per annum from July 1, 1981, of which P50,000.00 has been paid, and two Second Real Estate Mortgages covering two parcels of land, with buildings and improvements, situated at Quezon City, with Transfer Certificate of Title Nos. 137940 and 137941 of the Registry of Deeds of Quezon City;

"4. That I, therefore, withdraw my claim with the Central Bank only insofar as Mr. Teofisto Guingona Jr. is concerned to the extent of the Promissory Note and the Mortgages in the amounts indicated in the Promissory Note, and undertake to desist from any prosecution against him. This is without prejudice to the balance of my claim against Nation Savings and Loan Association, Inc. and its other officers and employees;

"5. That I execute this affidavit not only for myself but also in behalf of my sister, Denise Kuhne."

IV

As We stated in the decision sought to be reconsidered, the investments or private respondent David in the NSLA by way of time deposits and savings deposits are loans under the express provisions of Articles 248, 1933, 1953 and 1980 of the New Civil Code and decisions on the matter.

Thus, in the case of *Serrano vs. CB* (96 SCRA 96, 102 [Feb. 14, 1980]), Mr. Justice Hermogenes Concepcion Jr., speaking for the Second Division, and concurred in by Justices Barredo, Antonio, Aquino and Abad Santos stated:

"Bank deposits are in the nature of irregular deposits. They are really loans because they earn interest. All kinds of bank deposits, whether fixed, savings, or current are to be treated as loans and are to be covered by the law on loans (Art. 1980, Civil Code; *Gullas vs. Phil. National Bank*, 62 Phil. 519). Current and savings deposits are loans to a bank because it can use the same. The petitioner here in making time deposits that earn interests with respondent Overseas Bank of Manila was in reality a creditor of the respondent Bank and not a depositor. The respondent Bank was in turn a debtor of petitioner. Failure of the respondent Bank to honor the time deposit is failure to pay its obligation as a debtor and not a breach of trust arising from a depositary's failure to return the subject matter of the deposit" (pp. 102-103).

Again, in the case of *CB vs. Morfe* (63 SCRA 114 [March 12, 1975]), Justice Ramon C. Aquino, speaking for the Second Division, with the concurrence of Chief Justice Makalintal and Justices Fernando, Barredo, and Fernandez, enunciated that:

"It should be noted that fixed, savings, and current deposits of money in banks and similar institutions are not true deposits. They are con-sidered simple loans and, as such, are not preferred credits (Art. 1980, Civil Code; *In re Liquidation of Mercantile Bank of China*; *Tan Tiong Tick vs. American Apothecaries Co.*, 65 Phil. 414; *Pacific Coast Biscuit Co. vs. Chinese Grocers Association*, 65 Phil. 375; *Fletcher American National Bank vs. Ang Cheng Lian*, 65 Phil. 385; *Pacific Commercial Co. vs. American Apothecaries Co.*, 65 Phil. 429; *Gopoco Grocery vs. Pacific Coast Biscuit Co.*, 65 Phil. 443)" [p. 119].

V

In his motion for reconsideration, private respondent contends that the money, amounting to P1,145,546.20; P13,531.93 and US\$75,000.00, to be deposited as time and savings deposit with the Nation Savings and Loan Association, was delivered to petitioners herein in their personal capacity, who in turn had the obligation to deliver the same to the bank. Since they did not deliver or deposit the money with the Nation Savings and Loan Association, they became liable for estafa by misappropriation as the Central Bank discovered that only P305,821.92 were entered in the records of the bank, and that petitioners' assumption of the obligation of the bank to private respondent was an admission that they did not deliver the money to the bank.

But as pointed out by petitioners herein, this constitutes a complete change of private respondent's original theory in the City Fiscal's Office as shown by his affidavit-complaint on December 23, 1981, wherein he stated that from March 20, 1979 to March, 1981, he, together with his sister, Denise Kuhne, invested with the Nation Savings and Loan Association the sum of P1,145,546.20 on time deposits and the sum of P13,531.94 on savings account deposits or a total of P1,159,078.14 (pp. 15-16, rec.). He likewise made investments in the afore-said bank in the amount of US\$75,000.00 (p. 17, rec.). He further stated that when bank was placed under receivership by the Central Bank, he filed his claim for all of his investments and later received a report from the Central Bank that only P305,821.92 of his investments with the bank were entered in its records. So, he filed a complaint for estafa and violation of Section 3 of Central Bank Circular No. 364 and related Central Bank regulations regarding foreign exchange transactions against the Nation Savings and Loan Association and the entire board of directors including the petitioners herein.

Private respondent's new theory in his motion for reconsideration has no factual basis. The following facts and circumstances on record indisputably show that private respondent Clement David invested his money on time and savings deposits with the Nation Savings and Loan Association directly and not with herein petitioners as private individuals:

1. Private respondent himself categorically stated in his affidavit-complaint that he invested with the Nation Savings and Loan Association the sum of P1,145,546.20 on time deposits and the sum of P13,531.94 on savings account deposits or a total of P1,159,078.14, as well as the amount of US\$75,000.00 (p. 17, rec.). Mrs. Yu Donato, the Deputy Receiver of the Central Bank, testified under oath before the Assistant City Fiscal that one of the recognized ways of recording transactions is to keep on file the duplicate original of the accounting forms used in the transactions (pp. 126, 406, rec.). It appears that the original instruments of indebtedness were given to private respondent, while the duplicate original of said instruments were on file in the Nation Savings and Loan Association.
2. The promissory notes executed by petitioners Guingona and Martin wherein they assumed the obligation of the Nation and Savings Loan Association to private respondent, upon the latter's request, stated that the same were executed as a result of deposits made by Clement David and Denise Kuhne with the Nation Savings and Loan Association (pp. 25, 80, rec.).
3. Private respondent testified under oath before the Assistant City Fiscal of Manila that he made the deposits in the principal office of the Nation Savings and Loan Association during office hours, before authorized officers of the bank, and properly receipted for in bank forms (pp. 397-398, rec.).
4. In his verified answer to the complaint of petitioner Guingona in Civil Case Q-33865 for specific performance with damages, private respondent admitted that he was a depositor of the Nation Savings and Loan Association (p. 101, rec.).
5. Private respondent further admitted under oath that he received periodic interests on his deposits at an average of P5,000.00 a week (pp. 397-398, rec.). The bank would not have paid him such substantial interest weekly if he were not a depositor of said NSLA.
6. The report dated June 23, 1981 of Director Consolacion Odra of the Central Bank Department for Rural Banks and Savings and Loan Associations, stated that private respondent David and Denise Kuhne could be allowed payment of their recorded deposits up to P15,000.00 each, or a total of P30,000.00 under the Philippine Deposit Insurance Corporation Law (p. 240, rec.). It is undisputed that private respondent had already filed and received his claim and that of his sister in the total amount of P30,000.00 from the PDIC. Under the law, only deposits of distressed banks are entitled to such payment from the PDIC.
7. Private respondent's investments were treated as special accounts with special rates upon his insistence and because Nation Savings and Loan Association was urgently in need of funds. The investments were recorded in separate confidential documents, and only a portion of which was to be reported because he did not want the Australian government to tax his total earnings, nor to know his total investments (p. 21, rec.).
8. Private respondent's pleadings, particularly his comment dated April 21, 1982 and memorandum dated December 21, 1982, and documents, such as the statement of account (re: time and savings deposits) as of June 30, 1981 prepared by private respondent and his affidavit of desistance, filed before this Court show that he deposited his money with the Nation Savings and Loan Association.

Furthermore, private respondent cannot be permitted, at this stage of the proceedings, to adopt a theory which is different from that which he sustained in the City Fiscal's Office, especially after We ruled in Our main decision sought to be reconsidered that bank deposits are in the nature of simple loans, and the failure of the bank to return the deposits will not constitute estafa through misappropriation, but it will only give rise to civil liability. It is improper to change theory on appeal and more so in a motion for reconsideration. It would be unfair and unjust to

the other party litigant as it violates petitioners' constitutional right to due process. It could also unduly prolong litigations because a party can always change postures to suit his own advantage.

Thus, in *People vs. Archilla* (1 SCRA 698, 701 [1961] , citing several cases), this Court said:

"It is well-settled that parties to a judicial proceeding may not, on appeal, adopt a theory inconsistent with that which they sustained in the lower court. Consequently, appellee is now estopped from invoking the idea of double jeopardy upon the theory that she could still be convicted under an information which she branded to be insufficient in the lower court."

Again, in the case of *Velasco vs. Manila Electric Company* (42 SCRA 556, 560 [1971]), We held that:

"But as pointed out, this issue was not raised, nor was the inverse condemnation doctrine invoked in the trial court, so that it would be improper proper to consider it on appeal, and worse still, on a motion for reconsideration of the decision on its merits" (underlining supplied).

And, in the recent case of *Dosch vs. National Labor Relations Commission* (123 SCRA 296, 310 [1983]), We said:

"Realizing that its 'resignation' theory was weak and flimsy, Northwest abandoned it and contended for the first time that petitioner was guilty of insubordination when he refused to comply with the transfer order. This change of theory appeal is improper; it is offensive to the basic rules of fair play and justice and violative of petitioner's constitutional right to due process of law. Appellate courts may not entertain question of law or fact not raised in the lower courts (Sec. 18, Rule 46, Revised Rules of Court), for that would constitute a change of theory not permissible on appeal (*Toribio vs. Decasa*, 55 Phil. 461).

"It is undoubtedly the law, that, where a cause has been tried upon the theory that the pleadings are at issue, or that a particular issue is made by the pleadings, or where an issue is tacitly accepted by all parties as properly presented for trial and as the only issue, the appellate court will proceed upon the same theory (*Lizarraga Hermanos vs. Yap Tico*, 24 Phil. Rep. 504; *Molina vs. Somes*, 24 Phil. Rep. 45). It would be unjust and oppressive for the appellate court to adopt a theory at variance with that on which the case was presented to and tried by the lower court. It would surprise the parties, to take them unaware and off their guard, and would in effect, deprive them of their day in court (*Limpangco Sons vs. Yangco Steamship Co.*, 34 Phil. 597, 605-609)" [Underscoring supplied].

VI

To deprive petitioners herein of the foregoing defenses that

- (1) failure to file a motion for reconsideration of a decision inevitably renders such decision final and executory;
- (2) a compromise executed before the institution of the criminal action in court precludes the filing of such criminal action;
- (3) the filing of a civil action, which includes interposing a counterclaim in an answer, before the institution in court of a criminal action estops or bars the complainant from intervening in the criminal action;
- (4) all bank deposits — whether savings, current or time deposits — are in the nature of loans, under which the depositor is the creditor of the bank, which thereby becomes the debtor of the depositor, and gives rise only to a civil obligation; and
- (5) the extraordinary writs of injunction are available for the orderly administration of justice, to prevent the use of the strong arm of the law in an oppressive and vindictive manner, to avoid multiplicity of actions and to afford adequate protection to constitutional rights —

which defenses were already existing long before the filing on December 23, 1981 by respondent David of his

affidavit-complaint before the City Fiscal would be akin to a violation of petitioners' right against ex post facto laws.

As held in the 1970 case of *Kay Villegas Kami* (35 SCRA 429, 431) citing the case of *Mekin vs. Wolfe* (2 Phil. 74), one of the six kinds of ex post facto law is that which "deprives a person accused of a crime of some lawful protection to which he has become entitled, such as the protection of a former conviction or acquittal, or a proclamation or amnesty."

The aforecited defenses were already available to herein petitioners and afford them legal protection already secured to them prior to the filing of the complaint with the City Fiscal — even before any criminal information has been filed in court.

Additionally, the compromise and affidavit of desistance have the effect of an amnesty — complete absolution from any criminal liability.

Decisions of the Supreme Court are part of the law of the land. Article 8 of the New Civil Code of 1950 directs that "judicial decisions applying or interpreting the laws or the Constitution shall form part of the legal system of the Philippines" (*People vs. Licera*, 65 SCRA 270 [1975]).

Judicial decisions of the Supreme Court assume the same authority as the statute itself (*Caltex vs. Palomar*, 18 SCRA 247; 124 Phil. 763).

Consequently, any modification or revocation of the previous doctrines aforequoted cannot be given retroactive effect in the instant criminal prosecution.

Insistence on the criminal prosecution of herein petitioners, who already acquired' vested right in the aforesaid defenses against such prosecution, would therefore be clearly ex post facto.

To continue with the prosecution of herein petitioners, in spite of the foregoing legal constitutional defenses, would subvert the orderly administration of justice, deny them their constitutional rights, expose the petitioners to undue and oppressive harassment and aggravate their anguish and expenses, in much the same way that such unnecessary prosecution exposes the State to useless and expensive trials (*Trocio vs. Manta*, 118 SCRA 241 [1982]; *Hashim vs. Boncan*, 71 Phil. 216 [1941] ; see also *Mercado vs. Court*, etc., 116 SCRA 93 [1982]).

VII

There is no need of prior exhaustion of administrative remedies; because the instant case is an exception to the principle of exhaustion as only constitutional and legal questions are involved herein (*Limoico vs. Board*, etc., L-40244, Oct. 31, 1984, per Justice Melencio Herrera; *Del Mar vs. PVA*, 51 SCRA 340 [1973]; *Teoxon vs. Members*, etc., 33 SCRA 585 [1970] ; *Begosa vs. Chairman*, etc., 32 SCRA 466 [1970]; *Gonzales vs. Hechanova*, 9 SCRA 230 [1963]; *Tapales vs. President*, etc., et al., L-17523, March 30, 1963, 7 SCRA 553; *Pascual vs. Provincial Board*, etc., L-11959, Oct. 31, 1959, 106 Phil. 466, 470) and because of the urgency of the relief demanded by petitioners (*Guerrero vs. Carbonell*, L-7180, March 15, 1955, unpublished).

Appealing to the appropriate administrative authorities concerned from the action of the City Fiscal then to the Regional Trial Court and finally back to this Supreme Tribunal, would render the remedy inadequate and not speedy enough to save herein petitioners from so much harassment, anguish and expenses or irreparable damage.

Exhaustion of administrative remedies is not required where the action of the administrative officer is clearly and obviously devoid of any legality or authority (*Mangubat vs. Osmeña*, L-12837, April 30, 1959, 105 Phil. 1308-1309; *Palamine vs. Zagado*, L-6901, March 5, 1954; *Manuel vs. de la Fuente*, 48 Off. Gaz., 4829; *F. Jose vs. Lacson*, L-10477, May 17, 1957; *Festijo vs. Mun. Mayor of Nabua*, 51 Off. Gaz. 121; *Covacha vs. Amante*,

L-8358, May 25, 1956; Carmona vs. Amante, 52 Off. Gaz. 5109; Senarillos vs. Hermosissima, L-10662, December 14, 1956; and Briones vs. Osmeña Jr., L-12536, Sept. 24, 1958), or where the challenged action will create irreparable damage (De Lara, et al. vs. Cloribel, et al., L-21653, May 31, 1965, 14 SCRA 269, 272-273).

Hence, the motion for reconsideration of private respondent should be denied.

Concurring Opinion

RELOVA, J.:

I vote to grant the motion for reconsideration and to dismiss the petition for prohibition. To justify the issuance of the writ the following requisites are necessary, to wit: (1) it must be directed against the tribunal, corporation, board, or person exercising functions judicial or ministerial; (2) the tribunal, corporation, board or person has acted without or in excess of its or his jurisdiction, or with grave abuse of discretion; and, (3) there is no appeal or any other plain, speedy and adequate remedy in the ordinary course of the law. In the case at bar, it cannot be said that respondent City Fiscal did act without or in excess of his jurisdiction, or with grave abuse of discretion. On the contrary, he has jurisdiction over the case and should have been allowed to terminate the preliminary investigation and to render his resolution thereon. Thereafter, the aggrieved party may appeal to the Minister of Justice.

The contention of petitioner that the resolution of the Court granting the petition for prohibition has become final because the Solicitor General, representing the City Fiscal, did not file a motion for reconsideration, is without merit. The rule is clear that when a petition for prohibition is filed, the petitioner shall join as parties defendant the person or persons interested in sustaining the proceedings in the court; and it should be the duty of such person or persons to appear and defend, both in his or their own behalf and in behalf of the court or judge affected by the proceedings in the court. It must be for this reason that the Solicitor General did not file a motion for reconsideration on the resolution of this Court granting the petition because it was incumbent upon the private respondent to appear and defend the act of the respondent City Fiscal.

DISSENTING OPINION

TEEHANKEE, J.:

I concur with the extended dissenting opinion of Mr. Justice Felix V. Makasiar, whose original ponencia in the Courts (Second Division's) original decision of April 4, 1984[1] (with the concurrence of Messrs. Justices Concepcion, Jr., Guerrero, Abad Santos, de Castro and Escolin,[2] with Mr. Justice Aquino taking no part) would now be overturned by the Resolution at bar.

The original decision of April 4, 1984 granted the petition for prohibition and injunction and made permanent the temporary restraining order issued on March 31, 1982 ordering the respondents, their officers, agents, representatives and/or person or persons acting upon their (respondents') orders or in their place or stead to refrain from proceeding with the preliminary investigation in Case No. 81-31938 of the Office of the City Fiscal of Manila. Said investigation was being conducted as a result of charges for alleged estafa and violation of Central Bank Circular No. 364 and related regulations regarding foreign exchange transactions filed by private respondent Clement David, an Australian national. The Resolution at bar would set aside the decision on the ground of prematurity of the filing of the petition and directs the respondent city fiscal "to finish the preliminary investigation".

Stripped down to essentials, I vote to deny the motion for recon-sideration fore the following reasons:

1. The original decision of April 4, 1984 became final and executory upon the expiration on April 21, 1984 of the 15-day reglementary period from receipt thereof by the Solicitor General on April 6, 1984 without his having filed a motion for reconsideration, and entry of judgment should therefore have been made on April 23, 1984 (April 22nd being a Sunday). Private respondent Clement David and his sister Denise Kuhne who is supposed to be co-owner of the money placements but has not even come to the Philippines nor filed any complaint, have no legal personality nor standing in a criminal case and cannot adopt a stand inconsistent with or contrary to that of the Solicitor General who has supervision and control over all criminal cases. David's filing of a separate motion for reconsideration did not toll the period for finality of the original judgment nor prevent its having become final and executory on April 23, 1984 as expressly admitted by the Solicitor General in his manifestation dated August 23, 1984 and filed on August 28, 1984.[3] (Cabral vs. Puno, 70 SCRA 606.)
2. The record and the Resolution at bar itself as well as the original decision of April 4, 1984 of Mr. Justice Makasias and his present dissenting opinion show beyond peradventure that any obligation or liability incurred by petitioners as to David's and his sister's funds is purely civil in character. Paragraphs 3 to 5 of the Resolution show the respective civil obligations of the petitioners as per their promissory notes as subsequently novated, with mortgages and collaterals placed by them. David had even executed an affidavit of desistance on his own behalf and that of his sister, and therefore they have no standing of personality whatever to file the criminal charge in the fiscal's office. Petitioners' good faith and lack of criminal intent are self-evident in the aforecited pronouncements and acts.
3. It cannot be overemphasized that the issues in this case were joined between petitioners and public and private respondents, and were resolved in the original decision of April 4, 1984 on the question of whether there existed any criminal liability on the part of petitioners that would warrant the continuation of the fiscal's preliminary investigation. This issue of lack of criminal liability was fully discussed by all parties at the hearing and in their extensive memoranda. The Solicitor General accepted the finality on April 23, 1984 of the Court's negative verdict of April 4, 1984. The city fiscal's office remains permanently enjoined by this Court's final judgment, and such finality which is now *res judicata* cannot be set aside under the guise of acting on David's motion for reconsideration which should be regarded as a mere scrap of paper because of his lack of legal personality and standing. Any continuation of the fiscal's preliminary investigation has been rendered moot and academic by this Court's judgment of lack of any criminal liability which became final and executory on April 23, 1984 with the acceptance thereof by public respondents headed by the Solicitor General. If "the instant case is primarily a litigation between David and the petitioners", as stated in the Resolution (at page 6), such litigation is purely civil in nature and has to be pursued and settled in the various pending civil cases of the parties as a private matter between them.
4. The original decision correctly applied here the saving clause to the general rule against enjoining or aborting criminal prosecution, viz, that the extraordinary and equitable writ of injunction may be resorted to and issued "for the orderly administration of justice, to prevent the use of the strong arm of the law in an oppressive and vindictive manner, to avoid multiplicity of actions and to afford adequate protection to constitutional rights —" The injunction proceedings here which have brought out the pertinent facts, have served the purpose of a continuation of the preliminary investigation, "to secure the innocent against hasty, malicious and oppressive prosecution, and to protect him from an open and public accusation of crime, from the trouble, expense and anxiety of a public trial, and also to protect the state from useless and expensive trials. (Trocio v. Manta, 118 SCRA 241; citing Hashim v. Boncan, 71 Phil. 216)."[4] With all due deference, nothing would be gained nor achieved by still directing the fiscal "to finish the preliminary investigation", when the issue of criminal liability or not has been submitted to and resolved by this Court. In no way is the question of jurisdiction of the city fiscal to conduct the preliminary investigation derogated for impaired, as is the thrust of the Resolution and Mr. Justice Relova's separate opinion — particularly, since the majority in adopting the Resolution made it clear in the deliberations that it was in no way passing judgment upon the existence or

non-existence of criminal liability — as resolved and determined negatively in the original judgment of April 4, 1984 — but was only directing the fiscal to continue with and terminate the investigation on the premise that "the filing of this petition is premature." (at page 5) The only point is that the said judgment has long become final and executory on April 23, 1984 and the permanent injunction issued therein against further continuation of the investigation can no longer be set aside.

5. This is in accord with the general policy that the fiscal's office should not be used or abused as a collection agency. We have here the case of a non-resident alien, respondent Clement David, who came here for special treatment for his "investments" as special accounts "and only a portion of which was to be reported because he did not want the Australian government to tax his total earnings, nor to know his total investments." [5] When things went awry, he made sure that he was fully covered with collaterals by petitioners, who executed them in all good faith and he in turn executed an affidavit of desistance. He cannot and should not be allowed to misuse our prosecutorial agencies for collection enforcement of a purely civil liability.

[1] Reported in 128 SCRA 577.

[2] Justices Juvenal K. Guerrero and Pacifico de Castro have since returned from the Court.

[3] Record, at page 418.

[4] Salonga vs. Paño, G.R. No. 59524, February 18, 1985.

[5] Justice Makasiar's dissent, citing p. 21, rec.

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