

**BOGO-MEDELLIN MILLING CO., INC. AND ROBERT HERMOSA,
PETITIONERS, VS. THE HON. JUDGE PEDRO SON, PRESIDING JUDGE
OF REGIONAL TRIAL COURT, BRANCH 11, 7TH JUDICIAL DISTRICT
AND MANO...**

G.R. No. 80268. May 27, 1992

Ponente: FELICIANO, J.

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FELICIANO, J.:

On 27 September 1985, the Office of the Provincial Fiscal of Cebu filed before Branch 11 of the Regional Trial Court of Cebu, then presided over by Judge Valeriano Tomol, Jr., an information charging petitioner Robert Hermosa with the crime of qualified theft, upon a complaint filed by petitioner Bogo-Medellin Milling Company, Inc. ("Bogo-Medellin"), in Criminal Case No. CBU-6172. Bail the amount of P12,000.00 was recommended. At the same time, several other persons including private respondent Manolito Tunacao were charged in a separate information for simple theft in Criminal Case CBU-6173. The acts involved in both informations related to the theft of the same item a large rubber tire.

Five (5) months later, on 11 February 1986, private respondent Manolito Tuñacao was dropped from the information for simple theft in Criminal Case No. CBU-6173 and instead was charged as co-accused of petitioner Hermosa in the case for qualified theft (Criminal Case No. CBU-6172). The amended information in CBU-6172 read as follows:

"That on or about the 24th day of June, 1984, at around 7:00 o'clock in the morning, more or less in the Municipality of Medellin, Province of Cebu, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused being then employee's of the Bogo-Medellin Company, incorporated, conspiring, confederating and mutually helping with Nonillo Dela Cruz, Enrique Caballero, and Melecio Pilonas, the latter three (3) accused having been charged in a separate information for theft, with deliberate intent to gain, and without the knowledge and consent of the owner, and with grave abuse of confidence, did then and there willfully, and unlawfully and feloniously take, steal and carry away one (1) tire marked goodyear with a dimension of 1000 x 20 and sold the same in the amount of Four Thousand Seven Hundred Eighteen (P4,718.00) Pesos, Philippine Currency to the damage and prejudice of the Bogo-Medellin Company Incorporated in the amount aforesaid.

Contrary to law."

After arraignment of the two (2) accused, but before the prosecution could commence presenting its evidence, petitioner Bogo-Medellin filed on 14 April 1986, a manifestation informing the trial court of petitioner Hermosa's desire and willingness to act as state witness and to testify against his co-accused, private respondent Tunacao who, Hermosa claimed, was the most guilty. Bogo-Medellin then prayed for the discharge of petitioner Hermosa from the information in Criminal Case No. CBU-6172.

The application for discharge was opposed by co-accused Tunacao upon the argument that the requirements of

Rule 119 of the Rules of Court had not been satisfied. More specifically, respondent Tuñacao asserted that petitioner Hermosa, judging from the evidence presented during the preliminary investigation, was the most guilty of the several persons accused of stealing the rubber tire.

Initially, Judge Tomol denied the application of petitioner Bogo-Medellin for discharge of Hermosa. On Bogo-Medellin's motion for reconsideration, however, Judge Tomol issued an order reversing himself and discharging petitioner Hermosa from the information for qualified theft. On 2 December 1986, on the initial scheduled date of hearing of the qualified theft case petitioner Hermosa failed to appear before the trial court. The hearing was accordingly rescheduled, first to 20 January 1987 and later to 3 March 1987 by the latter date, respondent Judge Pedro C. Son had become Presiding Judge of Branch 11 of the Regional Trial Court of Cebu. On the 3 March 1987 hearing, counsel for private respondent Tuñacao manifested to the court that he would be moving for reconsideration of the order of Judge Tomol discharging petitioner Hermosa from the qualified theft information. Bogo-Medellin opposed the motion for reconsideration upon the ground that reinstatement of Hermosa as co-accused in Criminal Case No. CBU-6172 would place him in double jeopardy, considering that the order of Judge Tomol discharging Hermosa had resulted in his acquittal of the crime of qualified theft.

On 18 March 1987, respondent Judge Son issued an order reinstating petitioner Hermosa as co-accused in the case for qualified theft. The dispositive portion of this order read as follows:

“In view of all the foregoing, and considering the new provisions in the 1985 Rules on Criminal Procedure the order of August 6, 1986 is hereby reconsidered, and Robert Hermosa is ordered reinstated as accused in the case at bar. Let a warrant issue for his arrest with bond fixed as P12,000.00.

In the meantime cancel the hearing on April 2, 1987, but the hearing on May 19, 1987, as previously set, shall proceed.

SO ORDERED.” [2]

Bogo-Medellin moved for reconsideration of the order of reinstatement, without success.[3]

The sole issue raised in the instant Petition for Certiorari is whether or not the order of former Judge Tomol dated 6 August 1986 discharging petitioner Hermosa as accused in Criminal Case No CBU-6172 had amounted to his acquittal of the crime charged an affirmative answer to this question would lead to the conclusion that the order of respondent Judge Pedro C. Son dated 18 March 1987 reinstating him as one of the accused in Criminal Case No CBU-6172 amounted to subjecting private respondent Tunacao to a second jeopardy for the same criminal offense.

Under Section 9 of Rule 117 of the Rules of Court, the following are the requisites for the defense of double jeopardy:

1. There must be a complaint or information or other formal charge sufficient in form and substance to sustain a conviction;
2. Filed before a court of competent jurisdiction;
3. After the accused had been arraigned and pleaded to the charge;
4. That the accused was convicted or acquitted or the case against him was dismissed or otherwise terminated without his express consent;
5. The second offense charged is the same as the first offense charged, or for an attempt to commit the same or a frustration thereof; or

6. The second offense necessarily includes or is necessarily included in the first offense charged.

Bogo-Medellin and Hermosa argue that the order of Judge Tomol of 6 August 1986 discharging Hermosa from the information for qualified theft had the effect of acquitting Hermosa of that offense.

Upon the other hand, it is contended by respondent Tuñacao that the requisites under Section 9 of Rule 119 of the Rules of Court were not properly complied with. Those requisites for the discharge of an accused from an information in order that he may become a witness for the prosecution, are the following:

- "(1) Two or more persons are charged with commission of a certain offense;
- (2) The application for discharge is filed before the defense has offered its evidence;
- (3) There is absolute necessity for the testimony of the defendant whose discharge is requested;
- (4) There is no other direct evidence available for the proper prosecution of the offense committed;
- (5) The testimony of said defendant can be substantially corroborated in its material points;
- (6) Said defendant does not appear to be the most guilty; and
- (7) Said defendant has not at any time been convicted of any offense involving moral turpitude."

In the case at bar, it does appear that not all of the above requisites had been complied with when petitioner Hermosa was discharged from the qualified theft information. There appeared no absolute necessity for Hermosa's testimony in order to sustain the information against Tuñacao, since there were other witnesses whose testimonies should be sufficient to prove the charge. Thus, during the preliminary investigation, Nonillo dela Cruz, one of the accused in the information for simple theft, testified that it was Hermosa who had driven the truck carrying the alleged stolen tire out of the premises of petitioner Bogo-Medellin[5] and that after the tire had been sold to a certain Soledad Divinagracia, he (dela Cruz) received from Tunacao P100.00 and P200.00 from Hermosa. It, therefore, appears that Hermosa's testimony would merely serve to corroborate and strengthen the testimony of Nonillo dela Cruz and to furnish additional details of the events constituting the offense charged. It may also be noted that during the preliminary investigation, petitioner Hermosa had admitted that it was he who had driven the truck carrying the stolen tire, and that it was he who had brought the same to the vulcanizing shop of Gerry Maluya which shop was under the management of Nonillo dela Cruz. Moreover, since petitioner Hermosa had also testified that respondent Tuñacao and he (Hermosa) had planned the commission of the crimes.[6] Hermosa appeared to be at least as guilty, if not more so, than respondent Tuñacao.

Notwithstanding however the apparent failure to comply with all of the above listed requisites for the discharge of one of several accused to be a witness for the prosecution, the discharge of petitioner Hermosa must be considered as valid for present purposes, that is, for determination of whether a second and prohibited jeopardy would attach upon reinstatement of Hermosa as a co-accused in the qualified theft information. The general rule is that the discharge of an accused in order that he may turn state witness, is expressly left to the discretion of the trial Court.[7] The effect of the discharge of a defendant is specified in Section 10 of Rule 119 in the following manner:

"Sec. 10. Discharge of Accused Operates as Acquittal. ? The order indicated in the preceding section, shall amount to an acquittal of the accused discharged and shall be a bar to future Prosecution for the same offense, unless the accused fails or refuses to testify against his co-accused in accordance with his sworn statement constituting the basis for his discharge."

Respondent Judge Pedro C. Son did read Section 10 of Rule 119 and reached the following construction thereof:

"On the claim of the private prosecutor that the discharge of Robert Hermosa on the basis of the questioned order operated as an acquittal and therefore would constitute double jeopardy if he is reinstated as accused it needs only to state that under Section 10 of Rule 119, the discharge which amounts to an acquittal and therefore a bar to a future prosecution for the same offense, applies only if and after the discharged accused shall have actually testified for the state or his failure to testify is attributable to the prosecution. Thus, where Hermosa has not yet testified the principle of double jeopardy does not yet apply. For even if he is not reinstated as accused and he fails or refuses for some reason to testify against his co-accused then his discharge does not operate as an acquittal and therefore not a bar to future prosecution of the same offense." [8] (Underscoring supplied).

We read Section 10 differently. We consider Section 10 to mean that once the discharge of an accused from the information is effected, the legal consequence of acquittal follows and persists unless the accused so discharged fails or refuses to testify against his co-defendant, in which case the defense of double jeopardy is withdrawn from him and becomes unavailable to him. Until it is shown that the discharged accused has in fact failed or refused to testify against his co-defendant, subsequent proof showing that any or all of the conditions listed in Section 9 of Rule 119 of the Rules of Court had not been actually fulfilled, would not affect the legal consequence of the discharge, i.e., would not wipe away the resulting acquittal. Using an analogy drawn from the civil law, the failure or refusal of the discharged accused to testify against his co-accused constitutes a resolutory condition that results in lifting of the defense of double jeopardy. The actual testimony of the discharged accused against his co-accused is not, contrary to what respondent Judge Son believed, a condition precedent to the availability of the double jeopardy defense.

This Court has held several times in the past that any witting or unwitting error of the prosecution in asking for the discharge of an accused and of the trial court in granting the petition for discharge, so long as no question, of jurisdiction involved, would not deprive the discharged accused of the acquittal that is specified in Section 10 of Rule 119 and of the constitutional guarantee against double jeopardy.[9] It is also relevant to note that the improper or mistaken discharge of an accused like petitioner Hermosa would not affect his competency as a witness or render inadmissible his testimony.[10]

In the case at bar, there is no evidence of record to show that petitioner Hermosa failed or refused to testify against his co-accused, i.e., that he reneged on his covenant with the prosecution.[11] All the record shows is that petitioner Hermosa failed to attend two (2) scheduled hearings, which does not necessarily show that he had violated his undertaking to testify against his co-accused "in accordance with his sworn statement constituting the basis for his discharge." Indeed, respondent Judge Son had noted in his 18 March 1987 order that Hermosa had yet to testify. In his second order postponing the hearing of 19 May 1987 to 7 July 1987, respondent Judge Son stated that the absence of petitioner Hermosa could have been due to the fact that the warrant for his arrest had not been properly served on him as ordered by the trial court in its order of 18 March 1987 reinstating him as co-accused in the qualified theft information. There is thus on record no sufficient basis to withhold the benefits of Section 10 of Rule 119 from petitioner Hermosa. We conclude that, petitioner Hermosa having been acquitted of the charge of qualified theft could not be subsequently reinstated as a co-accused in the same information without a prohibited second jeopardy arising under the circumstances, absent satisfactory proof that he had refused or failed to testify against his co-accused.

WHEREFORE, the Petition for Certiorari is hereby GRANTED DUE COURSE and the Orders of respondent Judge Pedro C. Son dated 18 March 1987 and 3 July 1987 are hereby SET ASIDE and the Order of Judge Valeriano Tomol dated 6 August 1986 is hereby REINSTATED. No pronouncement as to costs.

SO ORDERED.

Gutierrez, Jr., (Chairman), Bidin, Davide, Jr., and Romero, JJ., concur.

[1] Record, pp. 108-109.

[2] Rollo, Annex "B" of Petition; pp. 18-19.

[3] Rollo, Annex "C" of Petition, p. 24.

[4] Mangubat v. Sandiganbayan, 135 SCRA 732 (1985); People v. Aniñon, 158 SCRA 701. (1988).

[5] Record, pp. 54-55.

[6] Id., pp. 26-27.

[7] People v. Ibanez, 92 Phil. 933 (1953).

[8] Rollo, p. 22.

[9] People v. Mendiola, 82 Phil. 740 (1949); People v. Bautista, 106 Phil. 39 (1959); Mangubat v. Sandiganbayan supra; People v. Añinon, supra.

[10] People v. Torre Franca, 151 SCRA 143 (1987); People v. Jamero, 133 Phil. 127 (1968); People v. De Leon. 108 Phil. 800 (1960); People v. Dagundong, 108 Phil. 682 (1960); People v. Castañeda, 63 Phil. 480 (1936).

[11] U.S. v. De Guzman, 30 Phil. 416 (1915).

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