

**BERNABE QUE AND AMELIA QUE, SPOUSES, PETITIONERS, VS. HON. RODRIGO V. COSICO, IN HIS CAPACITY AS PRESIDING JUDGE, BRANCH 17, REGIONAL TRIAL COURT, ROXAS CITY AND THE PEOPLE OF T...***G.R. No. 81861. September 08, 1989*

Ponente: GUTIERREZ, JR., J.

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These two petitions were consolidated as they involve substantially the same facts, issues and arguments. Petitioners in G. R. No. 81861 and private respondent in G. R. No. 83114 all stand as the accused in Criminal Case No. C-2152 for estafa thru falsification of commercial documents which case was dismissed but subsequently reinstated. The main issue to be resolved in both petitions is whether or not the reinstatement of the criminal case placed the accused in double jeopardy.

The facts of the case, as narrated in the lower court's order dated November 27, 1987, are as follows:

X X X X X X X X

"The record shows that the information for estafa thru falsification of commercial documents involving the amount of P2,120,511.24 was filed with the Regional Trial Court of Roxas City, Branch XVI, on November 29, 1985. The case was set for arraignment and pre-trial on March 31, 1986. In a motion for postponement dated March 24, 1986, which was received by the court on April 1, 1986, Atty. Lorenzo E. Coloso, counsel for the accused Bernabe Que and Amelia Que, filed a motion to postpone the arraignment and pre-trial set on March 31, 1986. He prayed that the date be reset to May 8, 1986. On March 31, 1986, the accused Gualberto Devera, Bernabe Que, Amelia Que, Warren Machado and Paz L. Martelino were arraigned while the other accused, namely, Antonio Blancaflor, Wilfredo Azarco, Renato Elauria and Amelita Tutica could not be arraigned because they were still at-large. The court then set a separate trial for some of the accused on May 8, 1986. On that date, Judge Enrique Suplico directed the prosecution to file its written stipulation of facts with respect to the U.S. checks with machine copies of the said documents attached thereto, copy furnished all the defense counsel, within thirty (30) days from May 8, 1986. In turn, the defense counsel were given ten (10) days from receipt of the stipulation of facts to file their counter proposal or answer. Upon motion of the City Fiscal, the pre-trial was then reset to June 26, 1986. The setting for June 26, 1986 was, however, postponed to July 22, 1986 due to the motion for postponement filed by Atty. Lorenzo Coloso. On July 22, 1986, the City Fiscal submitted his proposals for admission of facts, which was duly received on the same date by the defense counsel. On the same date, the court again directed the prosecution to furnish machine copies of the 489 U. S. treasury warrants to the accused through counsel within 15 days from the said date, after which the defense counsel shall make their counter proposal within 10 days from receipt thereof. In the meantime, the date was reset to September 17 and 18, 1986. On September 17, 1986, the prosecution submitted supplemental proposals for admission of facts. The hearing of September 18, 1986 was reset to November 10, and 11, 1986 upon request of the prosecution and without objection on the part of the defense counsel as the prosecution witnesses were in Manila. On November 10, 1986, Judge Enrique P. Suplico issued the questioned order."

(Rollo, G. R. No. 81861, pp. 23-24)

Also, the lower court's order dated May 22, 1987 stated:

x x x x x x x x

"It appears that when this case was called for hearing on the morning of November 10, 1986, Atty. Rodriguez Dadivas, counsel for the accused Gualberto Devera and Warren Machado, orally moved for the inhibition of the presiding judge on the ground that he had some doubts as to the impartiality of the judge against whom he and some nineteen (19) other practicing lawyers had filed serious administrative charges with the President of the Philippines, the Chief Justice of the Supreme Court, and the Minister of Justice. Following Atty. Dadivas, Atty. Roberto Barrios, former private prosecutor, also moved for the presiding judge, however, ruled Attys. Dadivas and Barrios out of order and asked the City Fiscal to present the evidence for the prosecution. Thereupon, the City Fiscal manifested that he was authorizing the private prosecutor to actively handle the prosecution of the case. The prosecution was then ready with its principal witness, Mr. Angel Yu, former local branch manager of Republic Planters Bank, who was then present in Court ready to testify. Atty. Roberto Barrios, however, insisted that the presiding judge should first rule on their previous motion for inhibition. Instead of resolving the motion for inhibition, the presiding judge asked the comments of Atty. Lorenzo E. Coloso, counsel for the accused Bernabe Que and Amelia Que, and Atty. Alberto Villarruz, counsel for the accused Paz L. Martelino, who both invoked the constitutional right of their clients to a speedy trial. The presiding judge asked again the prosecution to present its evidence but the private prosecutor insisted that a ruling be made by the presiding judge with regard to the pending motion for inhibition. As a result, the presiding judge issued the order dated November 10, 1986 dismissing this case. x x x" (Rollo, G. R. No. 81861, pp. 18-19)

The order dismissing the case stated, to wit:

After the court has ordered the prosecution thru City Fiscal Sergio Pestaño as well as Private Prosecutor Roberto Barrios to proceed with the presentation of their evidence for three (3) times, still the prosecution refused to present evidence. This case was postponed many times at the instances of the prosecution and today's trial is set for two days.

On oral motion of Atty. Alberto Villarruz and Lorenzo Coloso, counsel for the defense invoking their constitutional rights to speedy trial under the Constitution and the Rules of Court, this court has no alternative but to dismiss this case.

This case is hereby DISMISSED and the bail bonds of all the accused are hereby cancelled.

So ORDERED.

Given in open court, November 10, 1986.

ENRIQUE P. SUPLICO

Judge

On November 21, 1986, the prosecution filed a motion for reconsideration from the order of dismissal. This was opposed by the defense.

In the meantime, the case was re-raffled to Judge Rodrigo Cosico, as the former judge was not reappointed after the reorganization of the judiciary. Judge Cosico in an order dated May 22, 1987, granted the prosecution's motion for reconsideration and caused the case to be reopened. The subsequent motion for reconsideration filed by the defense was denied in an order dated November 27, 1987.

G. R. No. 83114

On December 17, 1987, accused Paz Martelino filed before the Court of Appeals a petition for certiorari praying that the order of Judge Cosico reinstating the case be declared null and void on the ground of double jeopardy.

The Court of Appeals, in its decision dated April 22, 1988, found merit in the petition and set aside Judge Cosico's order "as it amounts to double jeopardy on the part of the petitioner." The decision of the appellate court is based on precedents which discuss the failure of the prosecution to appear for trial, produce its witnesses, or present its evidence. (*Gandicela v. Lutero*, 88 Phil. 299 [1951]; *People v. Diaz*, 94 Phil. 714 [1954]; *People v. Tacneng*, 105 Phil. 1298 [1959]). Furthermore, the respondent Judge was permanently enjoined from proceeding with Criminal Case No. C-2152.

The People of the Philippines filed the present petition docketed as G. R. No. 83114 to review on certiorari the decision of the Court of Appeals.

G. R. No. 81861

Meanwhile, the accused Bernabe Que and Amelia Que filed a petition for certiorari directly with this Court seeking to declare Judge Cosico's orders dated May 22, 1987 and November 27, 1987 as null and void and to prohibit respondent from further proceeding with Criminal Case No. C-2152.

As stated earlier, the common issue of these two petitions is whether or not the reopening of Criminal Case No. C-2152 puts the accused in double jeopardy.

We rule that Criminal Case No. C-2152 may be reinstated as no double jeopardy has attached.

The rule on double jeopardy is found in sec. 21, Article III (Bill of Rights) of the 1987 Constitution which provides that "No person shall be twice put in jeopardy of punishment for the same offense. x x x" This is complemented by Rule 117 of the 1985 Rules on Criminal Procedure, as amended which provides as follows:

"SEC. 7. Former conviction or acquittal; double jeopardy. - When an accused has been convicted or acquitted, or the case against him dismissed or otherwise terminated without his express consent 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 accused had pleaded to the charge, the conviction or acquittal of the accused 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. x x x"

Thus, the requisites that must concur for legal jeopardy to attach are, to wit: 1) a valid complaint or information; 2) a court of competent jurisdiction; 3) the accused has pleaded to the charge and 4) the accused has been convicted or acquitted or the case dismissed or terminated without the express consent of the accused.

The fourth requisite is lacking in the instant case. The case was dismissed upon motion and with the express consent of the accused. The accused Bernabe Que, Amelia Que and Paz Martelino invoked their constitutional right to a speedy trial when the prosecution refused to present evidence until the court had ruled on the motion for inhibition. It was on their oral motion that the lower court ordered the case to be dismissed.

For double jeopardy to attach, the general rule is that the dismissal of the case must be without the express consent of the accused. [*People v. Jardin*, 124 SCRA 167 (1983); *People v. Pilpa*, 79 SCRA 81 (1977); *People v. Cuevo*, 104 SCRA 312 (1981)].

Moreover, as held in the case of *Bermisa v. Court of Appeals*, 92 SCRA 136, 141-143 (1979):

"Our organic and criminal laws expressly guarantee that in all criminal prosecutions, the accused shall enjoy the right to have a speedy trial. A speedy trial "is a trial conducted according to the law of criminal procedure

and the rules and regulations, free from vexatious, capricious, and oppressive delays. (Kalaw vs. Apostol, et al., 64 Phil. 852 [1937]). It can be one which may be had as soon after indictment as the prosecution can with reasonable diligence prepare for trial. And such a trial is denied an accused person where through the vacillation and procrastination of prosecuting officers, the accused is forced to wait many months or years for trial." (Conde vs. Judge, et al., 45 Phil. 173 [1923]).

x x x x x x x x

"In fact, the consent of petitioner to the dismissal constituted a waiver of his constitutional right not to be prosecuted for the same offense.

"xxx where a defendant expressly consents to or moves for the dismissal of the case against him, even if the court or judge states in the order that the dismissal is definite or does not say that the dismissal is without prejudice to the filing of another information, the dismissal will not be a bar to a subsequent prosecution of the defendant for the same offense." (Gandicela vs. Lutero, 88 Phil. 299 [1951]).

"The effect of a discharge (of a person committed on a criminal charge in case of a failure to find an indictment or file an information within a certain time) depends upon the particular statute. Under some statutes, the discharge does not prevent another indictment for the same offense, since it is considered that the effect of the discharge is merely to relieve the accused from imprisonment or from being held to bail, and not to acquit him of the crime. xxx xxx" (27 Am. Jur., pp. 597-598)

There were no oppressive delays on the part of the prosecution. The prosecution's insistence that Judge Suplico rule on the motion to inhibit before further proceedings in the case was not dilatory. There is no reason apparent from the records why Suplico should vacillate or show anger on a matter that affects the subsequent course of the trial. He could have easily granted or denied the motion, giving sound reasons for his ruling. He could have required that the motion be submitted formally. The subsequent behavior of the former Judge, especially his precipitate dismissal of the case shows that his reaction was not mere impetuosity or pique. It bears the earmarks of bias and prejudice. As noted by Judge Cosico in his order dated November 27, 1987:

"xxx A closed scrutiny of the foregoing chronology of facts that transpired at the Regional Trial Court does not show that the prosecution deliberately delayed the prosecution of this case nor does it appear that the prosecution was unprepared to present its evidence. The two (2) postponements requested by the prosecution appear to be reasonable. Moreover, it appears that on November 10, 1986, Mr. Angel Yu, principal witness for the prosecution, was then present and ready to testify. On the other hand, it appears that Atty. Lorenzo Coloso also asked for at least two (2) postponements. In invoking the right of the accused to speedy trial, Atty. Coloso is not therefore coming to this court with clean hands. Considering the two (2) postponements requested by Atty. Coloso, the accused in effect waived their right to speedy trial." (Rollo, G. R. No. 81861, pp. 24-25)

On the contention of the petitioners in G. R. No. 81861 that the oral motion for inhibition is in violation of Rule 137, sec. 2, suffice it to say that among the exceptions that all motions shall be in writing are those made in the course of a hearing or trial (Rule 15, sec. 2, Rules of Court).

Also, as noted by Judge Cosico, "the record shows that a written motion for inhibition was actually filed before the Regional Trial Court, Branch 14, Roxas City, by Atty. Rodriguez D. Dadivas although it was belatedly withdrawn after the issuance of the challenged order."

WHEREFORE, the petition docketed as G. R. No. 81861 is hereby DISMISSED for lack of merit. The petition docketed as G. R. No. 83114 is GRANTED and the questioned orders of Judge Cosico dated May 22, 1987 and November 27, 1987 are AFFIRMED. The decision of the Court of Appeals dated April 22, 1988 is SET ASIDE.

**SO ORDERED.**

Fernan, C.J., (Chairman), Bidin, and Cortes, JJ., concur.

Feliciano, J., on official leave.

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