

ARNEL P. MISOLAS, PETITIONER, VS. HON. BENJAMIN V. PANGA, AS JUDGE OF RTC BRANCH 33, CADLAN, PILI, CAMARINES SUR AND PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 83341. January 30, 1990

Ponente: CORTES, J.

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CORTES, J.:

This petition for certiorari ascribes grave abuse of discretion amounting to lack or excess of jurisdiction to the respondent judge who denied petitioner's motion to quash the information filed against him as well as his motion for reconsideration.

The case brings into focus our laws on subversion and subversion-related offenses.

The controversy arose from the following facts:

After receiving information from an unidentified informant that members of the New People's Army (NPA) were resting in a suspected "underground house" in Foster Village, Del Carmen, Pili, Camarines Sur, elements of the Philippine Constabulary (PC) raided said house in the early morning of August 8, 1987. Three persons were inside the house, petitioner and two women known by the aliases "Ka Donna" and "Ka Menchie" but the women were able to escape in the confusion during the raid. The house was searched and the raiders found in a red bag under a pillow allegedly used by petitioner a .20 gauge Remington shotgun and four live rounds of ammunition. Petitioner was arrested and brought to the PC headquarters. On September 4, 1987, an information charging petitioner with illegal possession of firearms and ammunition under Presidential Decree No. 1866 was filed by the provincial fiscal. The information alleged that the firearm and ammunition were used in furtherance of subversion so as to qualify the offense under the third paragraph of Section 1 of P.D. No. 1866, which provides:

If the violation of this Section is in furtherance of, or incident to, or in connection with the crimes of rebellion, insurrection or subversion, the penalty of death shall be imposed.

Upon arraignment, the petitioner, with the assistance of counsel de oficio pleaded "not guilty" to the charge. However, a few days later, the same counsel (also his counsel in this petition) filed a motion to withdraw the plea on the ground that there was basis for the filing of a motion to quash. Respondent judge gave petitioner time to file a motion to quash.

Petitioner filed a motion to quash on the following grounds:

- (1) that the facts charged do not constitute an offense because the information does not charge the proper offense since from the allegations the offense that may be charged is either subversion or rebellion; and
- (2) that the trial court had no jurisdiction over the person of petitioner because of violations of his constitutional rights, i.e, his arrest and the seizure of the firearm and ammunition were illegal.

Respondent judge denied the motion to quash for lack of merit in an order dated January 7, 1988. Petitioner

moved for reconsideration, but such was denied on February 15, 1988.

Hence, this petition.

1. The petition, reiterating the grounds alleged in the motion to quash, centers on the argument that the third paragraph of Section 1 of P.D. No. 1866, which penalizes illegal possession of firearms and ammunition committed in furtherance of, or incident to, or in connection with the crimes of rebellion, insurrection or subversion, should be stricken down as unconstitutional. In the words of petitioner:

Unconstitutional because it is violative of the due process clause, particularly substantive due process against arbitrary laws. Arbitrary because it disregards the overwhelming weight of national as well as international laws and jurisprudence behind the Hernandez (99 Phil. 515) and Geronimo (100 Phil. 90) rulings on the doctrine of absorption of common crimes in rebellion.

If murder is absorbed in rebellion, with more reason should illegal possession of firearms be absorbed in rebellion and for that matter subversion.

While it is true that subversion is an entirely different and distinct crime from rebellion, both are recognized as political offenses. So much so that in the Guidelines for the Grant of Pardon to Political Detainees/Prisoners, the latter are defined as those charged, detained or imprisoned for rebellion or subversion, among others.

The idea of absorption of illegal possession of firearms in subversion is also bolstered by the fact that in Republic Act 1700, as amended, subversion or its penalty is qualified when the subversive "takes up arms against the Government."

It cannot be said that P.D. No. 1866 is an exception to the Hernandez and Geronimo rulings. On the contrary, it is the other way around by virtue of the overwhelming weight of national as well as international laws and jurisprudence which form part of the law and legal system of the land.

* * *

. . . an armed subversive or rebel is to be distinguished from a common criminal illegally possessing a firearm. The former should be charged with subversion or rebellion, absorbing his illegal possession of firearm. His illegal possession of firearm is not the main thing. It is only incidental to his involvement in subversion or rebellion. [Petition, pp. 5-6; Rollo, pp. 5-6.]

Republic Act No. 1700, as amended, provides in Section 4 that "if such member [of the Communist Party of the Philippines and/or its successor or of any subversive association] takes up arms against the Government, he shall be punished by prison mayor to reclusion perpetua with all the accessory penalties provided therefor in the Revised Penal Code." Thus, given the particular facts of the case, petitioner could be charged either under P.D. No. 1866 or R.A. No. 1700. But as bluntly pointed out by petitioner:

. . . It is a matter of public knowledge that the military has even admitted its policy or practice of charging armed subversives or rebels with "qualified" illegal possession of firearms instead of subversion or rebellion for two reasons: (1) the former is easier to prosecute than the latter, and (2) the former has a higher penalty than the latter. [Petition, p. 6; Rollo, p. 6.]

Undeniably, it is easier to prove that a person has unlawfully possessed a firearm and/or ammunition under P.D. No. 1866 than to establish that he had knowingly, wilfully and by overt acts affiliated himself with, became or remained a member of the Communist Party of the Philippines and/or its successor or of any subversive organization under R.A. No. 1700, as conviction under the latter "requires that membership must be knowing or active, with specific intent to further the illegal objectives of the Party" [People v. Ferrer, G.R. Nos. L-32613-14, December 27, 1972, 48 SCRA 382.]

However, that the same act may be penalized under two different statutes with different penalties, even if considered highly advantageous to the prosecution and onerous to the accused, will not necessarily call for the invalidation of the third paragraph of Section 1 of P.D. No. 1866 which provides for the higher penalty.

Neither would the doctrines enunciated by the Court in *Hernandez* and *Geronimo*, and *People v. Rodriguez* [107 Phil. 659] save the day for petitioner.

In *Hernandez*, the accused were charged with the complex crime of rebellion with murder, arson and robbery while in *Geronimo*, the information was for the complex crime of rebellion with murder, robbery and kidnapping. In those two cases the Court held that aforesaid common crimes cannot be complexed with rebellion as these crimes constituted the means of committing the crime of rebellion. These common crimes constituted the acts of "engaging in war" and "committing serious violence" which are essential elements of the crime of rebellion [See Arts. 134-135, Revised Penal Code] and, hence, are deemed absorbed in the crime of rebellion. Consequently, the accused can be held liable only for the single crime of rebellion.

On the other hand, in *Rodriguez*, the Court ruled that since the accused had already been charged with rebellion, he can no longer be charged for illegal possession of firearms for the same act of unauthorized possession of firearm on which the charge of rebellion was based, as said act constituted the very means for the commission of rebellion. Thus, the illegal possession of the firearm was deemed absorbed in the crime of rebellion.

However, in the present case, petitioner is being charged specifically for the qualified offense of illegal possession of firearms and ammunition under P.D. 1866. HE IS NOT BEING CHARGED WITH THE COMPLEX CRIME OF SUBVERSION WITH ILLEGAL POSSESSION OF FIREARMS. NEITHER IS HE BEING SEPARATELY CHARGED FOR SUBVERSION AND FOR ILLEGAL POSSESSION OF FIREARMS. Thus, the rulings of the Court in *Hernandez*, *Geronimo* and *Rodriguez* find no application in this case.

Even the dictum in *Hernandez* that,

. . . national, as well as international, laws and jurisprudence overwhelmingly favor the proposition that common crimes, perpetrated in furtherance of a political offense, are divested of their character as "common" offenses and assume the political complexion of the main crime of which they are mere ingredients, and, consequently, cannot be punished separately from the principal offense, or complexed with the crime, to justify the imposition of the greater penalty. [At 541.]

which petitioner relies on, cannot find application in this case considering that the Legislature had deemed it fit to provide for two distinct offenses: (1) illegal possession of firearms qualified by subversion (P.D. No. 1866) and (2) subversion qualified by the taking up of arms against the Government (R.A. No. 1700), which the Legislature has the power to do. The practical result of this may be harsh or it may pose grave difficulty on an accused in instances similar to those that obtain in the present case, but the wisdom of the Legislature in the lawful exercise of its power to enact laws is something that the Court cannot inquire into as it would be in derogation of the principle of separation of powers. In the words of Chief Justice Fernando:

* * *

6. Nor could such a provision be nullified on the allegation that it constitutes "an insult to the personal integrity and official dignity" of public officials. On its face, it cannot thus be stigmatized. As to its being unnecessary, it is well to remember that this Court, in the language of Justice Laurel, "does not pass upon questions of wisdom, justice or expediency of legislation." As expressed by Justice Tuazon: "It is not the province of the courts to supervise legislation and keep it within the bounds of propriety and common sense. That is primarily and exclusively a legislative concern." There can be no objection then to the observation of Justice Montemayor: "As long as laws do not violate any Constitutional provision, the Courts merely interpret and

apply them regardless of whether or not they are wise or salutary." For they, according to Justice Labrador, "are not supposed to override legitimate policy and x x x never inquire into the wisdom of the law."

It is thus settled, to paraphrase Chief Justice Concepcion in *Gonzales v. Commission on Elections*, that only congressional power or competence, not the wisdom of the action taken, may be the basis for declaring a statute invalid. That is as it ought to be. The principle of separation of powers has in the main wisely allocated the respective authority of each department and confined its jurisdiction to such a sphere. There would then be intrusion not allowable under the Constitution if on a matter left to the discretion of a coordinate branch, the judiciary would substitute its own. If there be adherence to the rule of law, as there ought to be, the last offender should be the courts of justice, to which rightly litigants submit their controversy precisely to maintain unimpaired the supremacy of legal norms and prescriptions. The attack on the validity of the challenged provision likewise insofar as there may be objections, even if valid and cogent, on its wisdom cannot be sustained. [*Morfe v. Mutuc*, G.R. No. L-20387, January 31, 1968, 22 SCRA 424, 450-451.]

Then, that P.D. No. 1866 was enacted by deposed former President Marcos (pursuant to his law-making powers under the 1973 Constitution) is not by itself a legal argument for its invalidation. The 1987 Constitution expressly provides that "[a]ll existing laws, decrees, executive orders, proclamations, letters of instructions, and other executive issuances not inconsistent with this Constitution shall remain operative until amended, repealed, or revoked." [Art. XVIII, Sec. 3.]

The remedy lies with the present Legislature to correct the situation through remedial legislation if it finds a failure of logic and reason in the existing statutes on political offenses.

. . . If remedial measures are deemed necessary, let Congress provide the same. Courts have no authority to grant relief against the evils that may result from the operation of unwise or imperfect legislation, unless its flaw partakes of the nature of a constitutional infirmity . . . [*Nin Bay Mining Co. v. Municipality of Roxas, Palawan*, G.R. No. L-20125, July 20, 1965, 14 SCRA 660, 666.]

That the facts charged comply with the elements of the offense penalized in the third paragraph of Section 1 of P.D. No. 1866 is not disputed. But petitioner asserts that the nature of his alleged acts requires that he be charged with subversion or with rebellion instead of qualified illegal possession of firearms and ammunition, perhaps in view of the lower penalty for subversion and rebellion. Quashal of the information cannot be had on this ground, the matter of what offense to charge the information being within the prosecutor's sound discretion. As the Court stated in the case of *People v. Pineda* [G.R. No. L-26222, July 21, 1967, 20 SCRA 748]:

. . . The question of instituting a criminal charge is one addressed to the sound discretion of the investigating Fiscal. The information he lodges in court must have to be supported by the facts brought about by an inquiry made by him. It stands to reason then to say that in a clash of views between the judge who did not investigate and the fiscal who did, or between the fiscal and the offended party or the defendant, those of the Fiscal's should normally prevail. In this regard, he ordinarily cannot be subject to dictation. . . . [At 756.]

In sum, petitioner's case for the declaration of unconstitutionality of the third paragraph of Section 1 of P.D. No. 1866 is wanting in legal basis.

In his separate opinion, Mr. Justice Sarmiento espouses the view that P.D. No. 1866 should be struck down as unconstitutional for being a bill of attainder.

Initially, it must be pointed out that the petition never challenged P.D. No. 1866 on that ground. As discussed earlier, petitioner objected to P.D. 1866 on the ground of substantive due process. Established rules of constitutional litigation would, therefore, bar an inquiry based on the theory that P.D. No. 1866 constitutes a bill of attainder. It must also be noted that while petitioner challenges only the third paragraph of section 1 of P.D. No. 1866, Mr. Justice Sarmiento would have the other portions of the law invalidated. Again, this is impermissible.

But even if a challenge on the ground that P.D. 1866 is a bill of attainder could be appropriately considered, it will still be met with little success. The Court, in *People v. Ferrer*, supra, defined a bill of attainder as a legislative act which inflicts punishment on individuals or members of a particular group without a judicial trial. Essential to a bill of attainder are a specification of certain individuals or a group of individuals, the imposition of a punishment, penal or otherwise, and the lack of judicial trial. This last element, the total lack of court intervention in the finding of guilt and the determination of the actual penalty to be imposed, is the most essential [Id. at pp. 395-397; 400-401.] P.D. No. 1866 does not possess the elements of a bill of attainder. It does not seek to inflict punishment without a judicial trial. Nowhere in the measure is there a finding of guilt and an imposition of a corresponding punishment. What the decree does is to define the offense and provide for the penalty that may be imposed, specifying the qualifying circumstances that would aggravate the offense. There is no encroachment on the power of the court to determine after due hearing whether the prosecution has proved beyond reasonable doubt that the offense of illegal possession of firearms has been committed and that the qualifying circumstance attached to it has been established also beyond reasonable doubt as the Constitution and judicial precedents require.

The presumption of constitutionality attaches to legislative acts [*Yu Cong Eng v. Trinidad*, 47 Phil. 387 (1925); *Morfe v. Mutuc*, G.R. No. L-20387, January 31, 1968, 22 SCRA 425.] Before a statute or a portion thereof may be declared unconstitutional, "it must be shown that the statute violates the constitution clearly, palpably, plainly, and in such a manner as to leave no doubt or hesitation in the mind of the Court." [SINCO, PHILIPPINE POLITICAL LAW 525 (11th ed., 1960), citing *Sharpless v. Mayor*, 21 Pa. 147; also quoted in *Alba v. Evangelista*, 100 Phil. 683 (1957).] "Thus, to justify the nullification of a law, there must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative implication." [*Peralta v. COMELEC*, G.R. No. L-47771, March 11, 1978, 82 SCRA 30, 55.] Absent a clear showing that the challenged measure ousts the courts from the function of passing upon the question of guilt or innocence of the accused and an unequivocal demonstration that P.D. No. 1866, by legislative fiat, declares the petitioner guilty of a crime and imposes directly the penalty prescribed thereunder, the challenge will have to be rejected.

Neither can the Court strike down P.D. No. 1866 for allowing the possibility of a second jeopardy, as Mr. Justice Sarmiento suggests. It must be pointed out that at the time this petition was filed, there had been no previous conviction, acquittal or dismissal. Hence, the question of a second or double jeopardy does not arise. This is manifest from the Constitution, which provides:

Sec. 21. No person shall be twice put in jeopardy of punishment for the same offense. If an act is punished by a law and an ordinance, conviction or acquittal under either shall constitute a bar to another prosecution for the same act. [Art. III.]

More particularly, Rule 117 of the Rules of Court states:

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.

* * *

The right against double jeopardy is a matter which the accused may raise in a motion to quash [Sec. 3(h), Rule 117.] But, precisely, petitioner's motion to quash filed in the trial court did not raise the issue of double jeopardy because it had not arisen. The Court cannot anticipate that the opportunity for a second jeopardy will still arise if

he is acquitted or convicted as charged under P.D. 1866.

Moreover, even if such a subsequent or second jeopardy does arise, P.D. No. 1866 will not be rendered unconstitutional. That an accused will be exposed to double jeopardy if he is prosecuted under another law is not a ground to nullify that law. Double jeopardy is merely a defense that an accused may raise to defeat a subsequent prosecution or conviction for the same offense.

2. The thrust of petitioner's contention that the trial court had not acquired jurisdiction over his person is that his constitutional rights against unlawful arrest and unreasonable searches and seizures had been violated. He asserts that he was arrested in contravention of the clear provisions on arrests in the Revised Rules of Court. He concludes that since his arrest was unlawful, the search pursuant thereto which yielded the shotgun and the live rounds of ammunition was also illegal.

When the case was assigned to the ponente, she had intended to consider and to resolve this issue, it having been squarely raised in the petition. However, in an unexpected turn of events, petitioner filed a Manifestation dated September 18, 1989, wherein he averred:

1. He has filed a bond in the trial court and the same was approved on September 14, 1989.
2. He is well aware that the filing of a bail bond has the effect of waiving the right to question the irregularity of an arrest (*Callanta vs. Villanueva*, 77 SCRA 377; *Bagcal vs. Villaraza*, 120 SCRA 525).
3. Be that as it may, the irregularity of the arrest was only a secondary issue in the instant Petition. The principal issue is still the unconstitutionality of the third paragraph of Section 1 of P.D. No. 1866 insofar as it penalizes illegal possession of firearms "in furtherance of, or incident to, or in connection with the crimes of rebellion, insurrection or subversion".

The Court takes this to mean that petitioner is submitting the case for decision on the sole issue that P.D. No. 1866 is unconstitutional and is abandoning the issue of the legality of the search and his arrest.

In view thereof, the Court finds it unnecessary to resolve the second issue.

WHEREFORE, in view of petitioner's failure to clearly and unequivocally establish that the third paragraph of Section 1 of P.D. No. 1866 violates the Constitution, the petition is hereby DISMISSED.

SO ORDERED.

Fernan, C.J., Narvasa, Melencio-Herrera, Gutierrez, Jr., Paras, Feliciano, Gancayco, Padilla, Bidin, Griño-Aquino, and Medialdea, JJ., concur.

Cruz and Sarmiento, JJ., see dissent.

Regalado, J., in the result.

DISSENTING OPINION

CRUZ, J.:

I join Justice Sarmiento's dissent, with these additional brief observations. As I submitted in *Guazon v. De Villa*, G.R. No. 80508, we should not unreasonably inhibit ourselves on technical grounds when a constitutional question is presented to us for resolution. An unconstitutional act is illegal per se and must be slain on sight. It should not be reprieved simply because it has not been properly challenged, to be struck down only if and when all the formal requirements are satisfied. If and when. In the meantime, the lawless act continues to corrode the Constitution, and all because we have refused to act.

DISSENTING OPINION**SARMIENTO, J.:**

It perplexes me why this dissent should first of all merit what appears to be repartees from the majority. I am but casting a contrary vote, which, after all, is in performance of a constitutional duty.[1]

I am also concerned at how this case has journeyed from ponente to ponente and opinion to opinion, which, rather than expedited its resolution, has delayed it — at the expense of the accused-petitioner.

I was originally assigned to write the decision in this case, and as early as June, 1989, I was ready. On June 14, 1989, I started circulating a decision granting the petition and declaring Presidential Decree No. 1866, as amended by Presidential Decree No. 1878-A, unconstitutional and of no force and effect. Meanwhile, Madame Justice Irene Cortes disseminated a dissent. By July 18, 1989, my ponencia had been pending in the office of the Chief Justice for promulgation. It carried signatures of concurrence of eight[2] Justices (including mine), a slim majority, but a majority nonetheless. Five Justices, on the other hand, joined Justice Cortes in her dissent. The Chief Justice did not sign the decision on his word that he was filing a dissent of his own.

Subsequently, and as events would soon unfold quickly and dramatically, the Chief Justice returned my decision to the Court en banc, and declared that unless somebody changed his mind, he was promulgating my decision. Justice Edgardo Paras, who was one of the eight who had stamped their imprimatur on my decision, indicated that he did not want to "clip the wings of the military" and that he was changing his mind. This sudden reversement, under the circumstances surrounding its manifestation, took me aback for which I strongly voiced my protest for a case (although the majority is very slim) that I had thought was a settled matter.

I am aware that similar events in the Supreme Court are nothing uncommon. The following are the ringing words of my distinguished colleague, Justice Ameurfina Melencio-Herrera, but they could just as well have been mine, as far as the instant controversy is concerned, and I could not have put it any better:

It has taken all of a year and four months to what, I hope, will see the final disposition of this case, notwithstanding periodic reminders for an earlier resolution. It is this delay that has caused me a great deal of concern. It is, to me, a crying example of justice delayed and is by no means "much ado about nothing."* Nor is the question involved "none too important."** The bone of contention is whether or not a criminal complaint, which is an offense against the State, may be dismissed on the basis of an amicable settlement

between the complainant and the accused, who is a public officer.

As assigned initially, I was to prepare the opinion of the Court. My original "ponencia", annulling the Order of respondent Municipal Judge Eriberto H. Espiritu dismissing the criminal case against respondent Mayor Emiliano Caruncho, granting the petitioner for Certiorari and Mandamus, and ordering respondent Municipal Judge to reinstate and proceed with the trial on the merits of the criminal case against respondent Mayor without further delay, was circulated beginning July 30, 1982.[3]

The following is my dissenting opinion based mainly on my original ponencia.

I hold to be unconstitutional Presidential Decree No. 1866, "CODIFYING THE LAWS ON ILLEGAL/UNLAWFUL POSSESSION, MANUFACTURE, DEALING IN, ACQUISITION OR DISPOSITION, OF FIREARMS, AMMUNITION OR EXPLOSIVES, AND IMPOSING STIFFER PENALTIES FOR CERTAIN VIOLATIONS THEREOF AND FOR RELEVANT PURPOSES," specifically, sections 1 and 3 thereof, thus:

SECTION 1. Unlawful Manufacture, Sale, Acquisition, Disposition or Possession of Firearms or Ammunition or Instruments used or Intended to be Used in the Manufacture of Firearms or Ammunition. — The penalty of reclusion temporal in its maximum period to reclusion perpetua shall be imposed upon any person who shall unlawfully manufacture, deal in, acquire, dispose, or posses any firearm, part of firearm, ammunition or machinery, tool or instrument used or intended to be used in the manufacture of any firearm or ammunition.

If homicide or murder is committed with the use of an unlicensed firearm, the penalty of death shall be imposed.

If the violation of this Section is in furtherance of, or incident to, or in connection with the crimes of rebellion, insurrection or subversion, the penalty of death shall be imposed.

The penalty of reclusion temporal in its maximum period to reclusion perpetua shall be imposed upon the owner, president, manager, director or other responsible officer of any public or private firm, company, corporation or entity, who shall willfully or knowingly allow any of the firearms owned by such firm, company, corporation or entity to be used by any person or persons found guilty of violating the provisions of the preceding paragraphs.

The penalty of prision mayor shall be imposed upon any person who shall carry any licensed firearm outside his residence without legal authority therefor.[4]

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SEC. 3. Unlawful Manufacture, Sale, Acquisition, Disposition or Possession of Explosives. – The penalty of reclusion temporal in its maximum period to reclusion perpetua shall be imposed upon any person who shall unlawfully manufacture, assemble, deal in, acquire, dispose or possess handgrenade(s), rifle grenade(s), and other explosives, including but not limited to "pillbox bombs", "molotov cocktail bomb", "firebombs", or other incendiary devices capable of producing destructive effect on contiguous objects or causing injury or death to any person.

Any person who commits any of the crimes defined in the Revised Penal Code or special laws with the use of the aforementioned explosives, detonation agents or incendiary devices, which results in the death of any person or persons shall be punished with the penalty of death.

If the violation of this Section is in furtherance of, or incident to, or in connection with the crimes of rebellion, insurrection or subversion, the penalty of death shall be imposed.

The penalty of reclusion temporal in its maximum period to reclusion perpetua shall be imposed upon the

owner, president, manager, director or other responsible officer of any public or private firm, company, corporation or entity, who shall willfully or knowingly allow any of the explosives owned by such firm, company, corporation or entity to be used by any person or persons found guilty of violating the provisions of the preceding paragraphs.[5]

I find, first and foremost, the law to be a bill of attainder, the aforequoted provisions specifically, as it has been defined, that is, "a legislative enactment which inflicts punishment without trial." [6] It is a bill of attainder, so I submit, because it presumes the accused, upon conviction, to be guilty — as well — of the crimes (murder and homicide under the second paragraph of Section One, and the rebellion, insurrection, and subversion under the third paragraph of Section Three) that supposedly merely qualify the offense of "illegal possession" (or "illegal manufacture" as the case may be) when the accused has not been tried and found guilty of either crimes in any judicial proceeding. In the case at bar, the fact that the petitioner has been charged with illegal possession of firearms "in furtherance of subversion" means that the petitioner has committed subversion, notwithstanding the fact that he is not standing trial for subversion.

I am aware that this suit has been brought on the theory that the charge of "illegal possession" against the accused supposedly offends the rulings in *People v. Hernandez*, [7] *People v. Geronimo*, [8] and *People v. Rodriguez*, [9] and not, rather, on the constitutionality of Presidential Decree No. 1866 as amended. It is my view, however, that the case is nonetheless ripe for constitutional adjudication albeit the constitutional question has not been asserted. It has indeed been held:

But we must state that the general rule admits of exceptions. Courts, in the exercise of sound discretion, may determine the time when a question affecting the constitutionality of a statute should be presented. (In *Re Woolsey* [1884], 95 N.Y., 135, 144.) Thus, in criminal cases, although there is a very sharp conflict of authorities, it is said that the question may be raised for the first time at any stage of the proceedings, either in the trial court or on appeal. (12 C.J., p. 786.) Even in civil cases, it has been held that is the duty of a court to pass on the constitutional question, though raised for the first time on appeal, if it appears that a determination of the question is necessary to a decision of the case. (*McCabe's Adm'x vs. Maysville & B.S.R. Co.* [1910], 136 Ky., 674; 124 S.W. 892; *Lohmeyer vs. St. Louis Cordage Co.* [1908], 214 Mo., 685; 113 S.W., 1108; *Carmody vs. St. Louis Transit Co.* [1905], 188 Mo., 572; 87 S.W., 913.) [10]

The fact that the accused has not been charged with the complex crime of subversion and illegal possession of firearms (which can not be done) does not, to me, acquit the Decree. The fact that "in the present case, petitioner is being charged specifically for the qualified offense of illegal possession of firearms and ammunition ... " [11] to me, makes a good scrabble game, but it is nothing else. There is no gainsaying the fact that the conviction of the petitioner (assuming that the petitioner is convicted) under the statute, will carry with it the stain of subversion — although he had not been charged with subversion. This, so I submit, does violence to due process and the constitutional guaranty against hazy accusations. [12]

I likewise find the law to be vague and in violation of the double jeopardy clause of the Charter. It is vague because it is unsure which offense to punish: Illegal Possession or Subversion. It states that subversion merely qualifies the primary offense of "illegal possession" yet, if this is so, the accused may still be held guilty of subversion later. However, if the accused has been found liable for illegal possession in furtherance of subversion, it means that he is also guilty of subversion, which would clearly not require a subsequent prosecution.

The very efforts of this Court to make anything out of this strange animal have not been, so I submit, encouraging. In one case, [13] a prosecution for illegal possession of unlicensed firearm used in parricide under the provisions of Presidential Decree No. 9 (which sired Presidential Decree No. 1866), it was held that "[t]he offense of 'Illegal Possession of Unlicensed Firearm used in Parricide' includes the lesser offense of Parricide." [14] If this were so,

then, subversion would have been an ingredient of "illegal possession". So also, conviction thereof should be an abatement of any proceeding for the other, yet, in a subsequent ruling,[15] it was said that "illegal possession" used in the commission of homicide "does not operate to extinguish [any] criminal liability for" homicide. Apparently, as the state of the law stands now, "illegal possession" (or "manufacture") does not stop a later prosecution for subversion (or murder or homicide), (as Tangan tells us) but just as apparently, we would have made possible a prosecution for a crime which constitutes but an element of the "primary offense" (as Lazaro tells us), possible.

Clearly, the statute allows the possibility of double jeopardy. I submit that while double jeopardy is a matter of defense, the fact alone that the law permits such a possibility is sufficient to assail it for breach of due process.

The fact that the accused has posted bail is of no moment. It would not have, for me, rescued the statute from constitutional infirmity, notwithstanding the petitioner's "acceptance" (by posting bail) of the legality of the proceedings against him.

Presidential Decree No. 1866, it has to be noted, was not passed by the regular legislature. It is one of the many presidential issuances which had served the Marcos dictatorship, and served it well, as an instrument of repression during the years of dissent and resistance. Because of it, many courageous freedom fighters perished or languished in various places of detention throughout our country. It is unfortunate that this oppressive Presidential Decree has been allowed to remain in our statute books after the apparatus of dictatorship had been dismantled and supposed freedom attained, and sadly, it is still being used as incessantly as in the previous regime. It is an anachronism in the broad democratic space or what little we have of it today. I am, accordingly, for striking the Decree down.

[1] CONST., art. VIII, sec. 13.

[2] Cruz, I., Paras, E., Gancayco, E., Bidin, A., Sarmiento, A., Griño-Aquino, C., Medialdea, L., and Regalado, F., JJ.

[3] *People v. Caruncho, Jr.*, No. L-57804, January 23, 1984, 127 SCRA 16, 50-51.

[4] Pres. Decree No. 1866, sec. 1.

[5] *Supra*, sec. 3.

[6] *People v. Ferrer*, Nos. L-32613-14, December 27, 1972, 48 SCRA 382, 395-396.

[7] 99 Phil. 515 (1956).

[8] 100 Phil. 90 (1956).

[9] 107 Phil. 659 (1960).

[10] *People v. Vera*, 65 Phil. 56 (1937).

[11] Decision, 7.

[12] See CONST., art. III, sec. 14, par. 2.

[13] *Lazaro v. People*, No. L-37603, March 15, 1982, 112 SCRA 430.

[14] *Supra*, 438.

[15] Tangan v. People, No. L-73963, November 5, 1987, 155 SCRA 435.

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