

**PABLO BERNARDO, PETITIONER, VS. THE HONORABLE JUDGE,  
CECILIO F. BALAGOT, REGIONAL TRIAL COURT, BRANCH 35, GAPAN,  
NUEVA ECIJA, RESPONDENT.**

*G.R. No. 86561. November 10, 1992*

Ponente: CRUZ, J.

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**CRUZ, J.:**

The petitioner contends he is entitled to probation although he had previously appealed his conviction, because these alternative remedies were allowed under the law then in force. The People disagree, arguing that his application for probation is governed by the amendment to the said law and he could elect thereunder only either of the two remedies and not both.

Pablo Bernardo, the herein petitioner, was convicted of estafa in the Municipal Trial Court of San Antonio, Nueva Ecija, and sentenced on September 5, 1984 to 1 year, 8 months and 21 days of prision correccional as minimum to 2 years, 11 months and 10 days of prision correccional medium as maximum, with the accessory and other penalties.

He appealed to the Regional Trial Court of Nueva Ecija, which affirmed the decision with modifications. On April 25, 1985, he filed a petition for review with the Court of Appeals, which on December 24, 1985, sustained the appealed decision with modifications. On January 17, 1986, the petitioner filed a motion for new trial and/or reconsideration, but this was not granted. Bernardo then filed a petition for review with this Court on November 16, 1986, which we also denied.

While his motion for new trial and/or reconsideration was pending in the Court of Appeals, Bernardo filed an application for probation. The application was dated February 3, 1986. It was referred to the Probation Officer of Nueva Ecija, who subsequently recommended its approval. On October 11, 1987, however, Municipal Judge Francisco R. Andres denied it.<sup>[1]</sup> The denial was based on Section 4 of P.D. 968 as amended by P.D. 1990, prohibiting the grant of probation to an applicant who has appealed his conviction, and also on Bernardo's unsatisfactory conduct.

On February 1, 1988, Bernardo elevated the matter to the Regional Trial Court in a petition for certiorari with prayer for restraining order. The petition was denied on August 17, 1988, as so was a motion for reconsideration, on January 9, 1989. The petitioner then came to this Court for reversal of the respondent judge.

It is stressed at the outset that the petitioner is not among the disqualified offenders listed in Section 9 of P.D. 968 as follows:

Sec. 9. Disqualified Offenders. - The benefits of this Decree shall not be extended to those:

- (a) Sentenced to serve a maximum term of imprisonment of more than six years;
- (b) Convicted of subversion or any crime against the national security or the public order;

- (c) Who have previously been convicted by final judgment of an offense punished by imprisonment of not less than one month and one day and/or a fine of not less than Two Hundred Pesos;
- (d) Who have been once on probation under the provisions of this Decree; and
- (e) Who are already serving sentence at the time the substantive provisions of this Decree became applicable pursuant to Section 33 hereof. (As amended by BP Blg. 76, and PD 1990, Oct. 5, 1985)

Section 4 of the said decree, which was promulgated on July 24, 1976, provided as follows:

Sec. 4. Grant of Probation. - Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant and upon application at any time of said defendant, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal.

An order granting or denying probation shall not be appealable.

On December 1, 1977, that section was amended by P.D. 1257 thus:

Sec. 4. Grant of Probation. - Subject to the provisions of this Decree, the court may, after it shall have convicted and sentenced a defendant but before he begins to serve his sentence and upon his application, suspend the execution of said sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best.

The prosecuting officer concerned shall be notified by the court of the filing of the application for probation and he may submit his comment on such application within ten days from receipt of the notification.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine with subsidiary imprisonment in case of insolvency. An application for probation shall be filed with the trial court, with notice to the appellate court if an appeal has been taken from the sentence of conviction. The filing of the application shall be deemed a waiver of the right to appeal, or the automatic withdrawal of a pending appeal. In the latter case, however, if the application is filed on or after the date of the judgment of the appellate court, said application shall be acted upon by the trial court on the basis of the judgment of the appellate court.

An order granting or denying probation shall not be appealable.

This was the prevailing law on probation at the time the petitioner was convicted in 1984.

On October 5, 1985, Section 4 was again amended, this time by P.D. 1990, and now provides:

Sec. 4. Grant of Probation. - Subject to the provisions of this Decree, the trial court may, after it shall have convicted and sentenced a defendant, and upon application by said defendant within the period for perfecting an appeal, suspend the execution of the sentence and place the defendant on probation for such period and upon such terms and conditions as it may deem best; Provided, that no application for probation shall be entertained or granted if the defendant has perfected the appeal from the judgment of conviction.

Probation may be granted whether the sentence imposes a term of imprisonment or a fine only. An application for probation shall be filed with the trial court. The filing of the application shall be deemed a waiver of the right to appeal.

An order granting or denying probation shall not be appealable.

This was the law in force at the time the petitioner filed his application for probation.

The petitioner contends that this last amendment cannot apply to him because at the time of his conviction in 1984, he was allowed to appeal without forfeiting his right to apply for probation. As he had no fore-knowledge that P.D. 968 would be amended, he should not now be prejudiced for having sought, before such amendment, a reversal of his conviction.

In refutation, the Solicitor General avers that at the time Bernardo applied for probation on February 3, 1986, P.D. 968 had already been amended by P.D. 1990. The purpose of the amendment was, precisely, to prohibit an application for probation if the accused has perfected an appeal from the judgment of conviction.

Section 3 of the later decree clearly states:

The provisions of Section 4 of Presidential Decree No. 968, as above amended, shall not apply to those who have already filed their respective applications for probation at the time of the effectivity of this Decree.

P.D. 1990 was promulgated on October 5, 1985, and published in the Official Gazette on December 30, 1985. It took effect on January 15, 1986, after fifteen days from the date of its publication. The petitioner's application for probation was filed on February 3, 1986, after P.D. 1990 had already become effective. Consequently, the petitioner cannot invoke the original Section 4 of P.D. 968, as he is not among "those who have already filed their respective applications for probation at the time of the effectivity of P.D. 1990."

P.D. No. 1990 was issued when it was observed that even if a person's conviction was finally affirmed after he had exhausted the appeal process (usually up to this Court), he nevertheless could still apply for probation and thus in effect undo such affirmance. To prevent loss of time, money, and effort on the part of the State in this wasteful exercise, the law was amended to make appeal and probation mutually exclusive remedies.

The present case falls squarely within the objectives of P.D. 1990. Bernardo appealed his case all the way to this Court, which sustained the courts below and denied his petition. He filed his Application for probation after his conviction was affirmed by both the Regional Trial Court and the Court of Appeals. It was only while his motion for new trial and/or reconsideration was pending with the latter court that it occurred to him to apply for probation. It was already too late then because P.D. 1990 was already in effect.

The petitioner also contends that his conviction is not yet final, having been brought up on appeal, and that the filing of his application for probation had the effect of withdrawing said appeal. It is a clever theory but unacceptable. Acceptance thereof would render the amendment in P.D. 1990 completely inutile and defeat the very purpose for which the original rule was modified and through the act itself that is prohibited by the amendment.

The petitioner also imputes grave abuse of discretion to the respondent judge for denying his application on the ground of betrayal of trust, thus:

Considering the provisions of PD 968 as amended by PD 1990, this Court agrees with the Municipal Trial Court that x x x the grant or denial of an application for probation under PD 968 and PD 1990 was within his discretion. Respondent Judge felt that since the petitioner was charged with Estafa, where betrayal of trust is concerned; petitioner misled him by alleging that an application for probation was filed with Respondent Court when the records did not show it and, the appeals/petition taken by the petitioner after his conviction, were enough basis for him to deny the petitioner's application for probation.

Bernardo argues that this is not a legal or justifiable ground for the denial of probation because he is not among the disqualified offenders listed in the decree. In support of this stand, he cites Santos To v. Paño,[2] where this Court held:

x x x In expressly enumerating offenders not qualified to enjoy the benefits of probation, the clear intent is to allow said benefits to those not included in the enumeration. x x x

Probation is a mere privilege and its grant rests upon the discretion of the court. Even if a convicted person is not included in the list of offenders disqualified from the benefits of the decree, the grant of probation is nevertheless not automatic or ministerial. The court should, before granting probation, consider the potentiality of the offender to reform, together with the demands of justice and public interest, along with other relevant circumstances. In the case at bar, as the municipal judge noted, the petitioner represented that he had earlier filed his application for probation when he had not done so in fact.

At any rate, even if it be assumed that the respondent judge did gravely abuse his discretion, the petition was still correctly dismissed because of the amended Section 4 of P.D. 1990.

It remains to observe that the favorable recommendation of the probation officer is at best merely persuasive upon the courts in the consideration of the application for probation. Both the law and jurisprudence are clear on this point.[3] As for the fact that the petitioner is a first offender, this does not necessarily entitle him to the approval of his application, although it is a factor to be taken into account by the court. Finally, the policy of liberality he invokes cannot prevail against the categorical provisions of the law, which clearly call for the denial of his application.

WHEREFORE, the petition is DENIED, with costs against the petitioner. It is so ordered.

Padilla, Griño-Aquino, and Bellosillo, JJ., concur.

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[1] Rollo, p. 31; Petition, Annex "F."

**[2] 120 SCRA 8 (1983).**

[3] Sec. 5, P.D. 968; *Amandy vs. People*, 161 SCRA 436 (1988); *Tolentino vs. Alconcel*, 121 SCRA 92 (1983).

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