

FELIX H. CABELLO, PETITIONER, VS. SANDIGANBAYAN AND THE PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 93885. May 14, 1991

Ponente: REGALADO, J.

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REGALADO, J.:

In this petition for review on certiorari, petitioner argues for the reversal of respondent court's decision[1] in Criminal Case No. 12244, dated June 28, 1990, convicting him of the crime of malversation of public funds penalized under Article 217 of the Revised Penal Code.

As found by respondent court, petitioner, in his official capacity as postmaster of San Juan, Southern Leyte, was audited of his cash and accounts for the period from August 29, 1984 to May 28, 1985. The audit examination disclosed that petitioner incurred a shortage of P160,905.63. Required to produce immediately the missing funds and to explain in writing within seventy-two (72) hours the fact of shortage, petitioner neither restituted the missing sum nor made any written explanation.[2]

As a consequence, petitioner was charged with malversation of public funds before respondent Sandiganbayan, allegedly committed as follows:

"That on or about May 28, 1985, and for sometime prior thereto, in the Municipality of San Juan, Province of Southern Leyte, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, as Postmaster of said municipality, and as such accountable for the public funds collected and received by reason of his position, in the way of fees, charges and stamps, wilfully, unlawfully and feloniously and with grave abuse of confidence did then and there misappropriate, misapply, embezzle and convert to his own personal use and benefit from said funds in the total amount of P160,905.63, Philippine Currency, to the damage and prejudice of public interest."[3]

Arraigned on May 4, 1989, with the assistance of counsel, petitioner pleaded not guilty to the crime charged. After trial, however, respondent Sandiganbayan rendered a judgment of conviction, the decretal portion of which reads:

"WHEREFORE, in view of the foregoing, judgment is hereby rendered finding the accused Felix H. Cabello GUILTY as principal of the crime of malversation of public funds defined and penalized under Article 217 of the Revised Penal Code. Absent any mitigating or aggravating circumstances, and applying the Indeterminate Sentence Law, he is hereby sentenced to an indeterminate penalty ranging from TEN (10) YEARS and ONE (1) DAY of prision mayor, as minimum, to EIGHTEEN (18) YEARS, EIGHT (8) MONTHS and ONE (1) DAY of reclusion temporal, as maximum, to suffer perpetual special disqualification, to pay a fine of P160,905.63 and to indemnify the Government in the said aforesaid sum of P160,905.63. Costs against the accused." [4]

Petitioner has now come before us with the postulate that he cannot be convicted of intentional malversation since there is no evidence showing that he appropriated the funds for his personal use. While the failure of an accountable public officer to have duly forthcoming any public fund or property with which he is chargeable upon

demand by any duly authorized officer is prima facie evidence that the former has put such fund or property to his personal use, petitioner contends that he has sufficiently overthrown said presumption by his account of the items for which the funds were supposedly expended, to wit:

1. Personal "vales" of postal employees

128,182.77

2. "Vales" for food, drinks, office supplies and other miscellaneous items

8,725.30

3. Unremitted collections for the use of Postage Meter Machine

19,295.76

4. Unreimbursed travel allowance

2,325.19

5. Stale checks

2,364.07

T O T A L

P160,893.07

Corollarily, petitioner argues that he can neither be convicted of malversation through negligence since the information does not charge such mode of commission, hence "(o)f that mode of committing malversation, he was not legally informed." He theorizes that an accused charged with intentional malversation cannot be convicted of malversation through negligence.[5]

We find petitioner's contentions devoid of merit. His present recourse must fail.

Article 217 of the Revised Penal Code provides that any public officer who, by reason of the duties of his office, is accountable for public funds or property, shall appropriate the same, or shall take or misappropriate or shall consent, or through abandonment or negligence, shall permit any other person to take such public funds or property, wholly or partially, shall be guilty of the misappropriation or malversation of such funds or property. It

further declares that the failure of that public officer to have duly forthcoming said public funds or property, upon demand by any duly authorized officer, shall be prima facie evidence that he has put the same to personal use.

Malversation may thus be committed either through a positive act of misappropriation of public funds or property or passively through negligence by allowing another to commit such misappropriation. Nonetheless, all that is necessary to prove in both acts are the following: (a) that the defendant received in his possession public funds or property (b) that he could not account for them and did not have them in his possession when audited: and (c) that he could not give a satisfactory or reasonable excuse for the disappearance of said funds or property. An accountable officer may thus be convicted of malversation even if there is no direct evidence of misappropriation and the only evidence is that there is a shortage in the officer's accounts which he has not been able to explain satisfactorily.[6]

There is no dispute that the presumption of malversation under said Article 217 of the Code is merely prima facie and rebuttable; and, in line with the cases of *Villacorta vs. People of the Philippines, et al.*[7] and *Quizo vs. Sandiganbayan, et al.*,[8] the presumption is deemed overthrown if the accountable public officer satisfactorily proves that not a single centavo of the missing funds was used by him for his personal interest but that the funds were extended as cash advances to co-employees in good faith, in the belief that they were for legitimate purposes, with no intent to gain and out of goodwill considering that it was a practice tolerated in the office.

It must be borne in mind, however, that the circumstances obtaining in the said cases do not obtain in the one at bar as to warrant the application of the doctrine therein laid down. As pointed out by respondent court, in the aforesaid two cases there was full restitution made within a reasonable time while in the instant case there was none, a distinguishing feature we also took into consideration in *Mahinay vs. Sandiganbayan, et al.*[9] in convicting the accused therein.

Thus, in *Villacorta* this Court found that the cash in the possession of the accused therein was found short because of the disallowance by the audit team. The items comprising the shortage were paid to government personnel either as wages, travelling expenses, salaries, living allowances, commutations of leave, terminal leaves and for supplies. The accused therein did not put the missing funds to personal use; in fact, when he demanded payment from said personnel, they redeemed their chits and made restitution. Furthermore, at the time of the audit, the accused had an actual balance deposit with the provincial treasurer in the sum of P64,661.75.

In *Quizo*, the therein accused incurred a shortage in the total sum of P17,421.74 because the audit team disallowed P16,720.00 in cash advances he granted to some employees, P700.00 representing accommodated private checks, and an actual cash shortage of P1.74. On the same day when the audit was conducted, P406.18 was reimbursed by the accused, P10,515.56 three days thereafter and the balance of P6,500.00 another three days later. This Court, in a spirit of leniency, held that the accused had successfully overthrown the presumption of guilt. None of the funds was used by him for his personal interest. The reported shortage represented cash advances given in good faith and out of goodwill to co-employees, the itemized list of which cash advances was verified to be correct by the audit examiner. There was no negligence, malice or intent to defraud: and the actual cash shortage was only P1.74 which, together with the disallowed items, was fully restituted within a reasonable time.

While we do not wish it to appear that the mere fact of restitution suffices to exculpate an accountable public officer, as each case should be decided on the basis of the facts thereof, it appears that the Court was of the persuasion that the confluence of the circumstances in the *Villacorta* and *Quizo* cases destroyed the prima facie presumption of peculation and criminal intent provided for in said Article 217. In the case at bar, petitioner has failed to prove good and valid reasons for his failure to justify how the amount of P160,905.63 was spent, aside

from the fact that the same remains unpaid. He cannot exculpate himself on the bare asseveration that most of the missing funds were "vales" to postal personnel since he was thoroughly aware that the giving of such "vales" was violative of post office rules and regulations. Indeed, that a stringent application of such proscription be imposed on accountable public officers is indicated and the rule extending favorable consideration whenever restitution is made should be reassessed.

Respondent court categorically found that petitioner knew that his granting of "chits" and "vales" which constituted the bulk of the shortage, as earlier shown in the itemization thereof, was a violation of the postal rules and regulations. This is confirmed by petitioner's own memorandum to his employees exhorting them to pay their cash advances and stressing that the practice indeed constituted such violation. As further pointed out by respondent court, such practice is also prohibited by Memorandum Circular No. 570, dated June 29, 1968, of the General Auditing Office[10] of which fact petitioner could not be unaware. Parenthetically, in the course of the audit, petitioner merely gave the audit team a typewritten list of letter carriers with "vales" and the corresponding amounts thereof, but he did not produce the "vales" and "chits" he claimed to have in his possession.[11]

It is also noteworthy that giving "vales" is proscribed under Presidential Decree No. 1445, otherwise known as the Government Auditing Code of the Philippines, specifically Section 69 thereof, which provides that postmasters are only allowed to use their collections to pay money orders, telegraphic transfers and withdrawals from the proper depository bank whenever their cash advances for the purpose are exhausted. And, as held in *Macarampat vs. Sandiganbayan, et al.*:[12]

"As an accountable officer, the accused cannot profess ignorance of the above-cited rules and regulations for it is required that he must update his knowledge with whatever laws or any memorandum circular that may be issued by the Commission on Audit as he has to deal from time to time with its auditors especially in the audit of his cash and accounts."

We find this disquisition of respondent court on the unaccounted collections for the use of the postage meter machine sufficient to hold petitioner personally liable:

"Regarding the collections for the use of the Postage Meter Machine that were unaccounted for, the accused cannot avoid responsibility therefor on the pretext that the collections were made when he was on official travel and that the designated stamp tellers spent the amounts for their personal needs instead of turning them over to him. As Postmaster and Accountable Officer of the Post Office - 'x x x he was responsible for all the collections made by the [Court]. Any loss or shortage resulting from non-remittance, unlawful deposit or misapplication thereof, whether he has a hand or not, shall be for his account. It is not an excuse that his designated collection clerk was the one who failed to remit the questioned amount on time because it is incumbent upon him to exercise the strictest supervision on the person he designated, otherwise, he would suffer the consequences of the acts of his designated employee through negligence. (Office of the Court Administrator vs. Soriano, Adm. Matter No. 2864- P, May 16, 1985, 136 SCRA 461, 464.)"[13]

As earlier mentioned, petitioner insists that he cannot be convicted of intentional malversation on the basis of the evidence of the prosecution, nor can he be convicted of malversation through negligence as he is not so charged in the information.

Rejoining thereto, the Solicitor General stresses that petitioner was charged with and convicted of intentional malversation, hence any discussion anent the claim that he should not be held liable for malversation through negligence would have no relevance whatsoever to this case.[14] This is correct.

A reading of the information filed in and the decision rendered by respondent court readily reveals that intentional, and not merely culpable, malversation is imputed to petitioner. The information is clear in its

allegation that the accused "wilfully, unlawfully and feloniously and with grave abuse of confidence did then and there misappropriate, embezzle and convert to his own personal use and benefit from said funds in the total amount of P160,905.63, ..."

On the other hand, petitioner contends that the bulk of said amount represented "vales" he granted to the postal employees and the minor portion consisted of unremitted, unreimbursed or uncollected amounts. His very own explanation, therefore, shows that the embezzlement, as claimed by the prosecution, or the expenditures, as posited by him, were not only unauthorized but intentionally and voluntarily made. Under no stretch of legal hermeneutics can it be contended that these funds were lost through abandonment or negligence without petitioner's knowledge as to put the loss within a merely culpable category. From the contention of either party, the misappropriation was intentional and not through negligence.

Besides, even on the putative assumption that the evidence against petitioner yielded a case of malversation by negligence but the information was for intentional malversation, under the circumstances of this case his conviction under the first mode of misappropriation would still be in order. Malversation is committed either intentionally or by negligence. The *dolo* or the *culpa* present in the offense is only a modality in the perpetration of the felony. Even if the mode charged differs from the mode proved, the same offense of malversation is involved and conviction thereof is proper. A possible exception would be when the mode of commission alleged in the particulars of the indictment is so far removed from the ultimate categorization of the crime that it may be said due process was denied by deluding the accused into an erroneous comprehension of the charge against him. That no such prejudice was occasioned on petitioner nor was he beleaguered in his defense is apparent from the records of this case.

In *Samson vs. Court of Appeals, et al.*,^[15] we held that an accused charged with willful or intentional falsification can validly be convicted of falsification through negligence, thus:

"While a criminal negligent act is not a simple modality of a willful crime, as we held in *Quizon vs. Justice of the Peace of Bacolor*, G.R. No. L-6641, July 28, 1955, but a distinct crime in our Penal Code, designated as a quasi offense in our Penal Code, it may however be said that a conviction for the former can be had under an information exclusively charging the commission of a willful offense, upon the theory that the greater includes the lesser offense. This is the situation that obtains in the present case. Appellant was charged with willful falsification but from the evidence submitted by the parties, the Court of Appeals found that in effecting the falsification which made possible the cashing of the checks in question, appellant did not act with criminal intent but merely failed to take proper and adequate means to assure himself of the identity of the real claimants as an ordinary prudent man would do. In other words, the information alleges acts which charge willful falsification but which turned out to be not willful but negligent. This is a case covered by the rule when there is a variance between the allegation and proof, and is similar to some of the cases decided by this Tribunal.

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"Moreover, Section 5, Rule 116, of the Rules of Court does not require that all the essential elements of the offense charged in the information be proved, it being sufficient that some of said essential elements or ingredients thereof be established to constitute the crime proved. . . .

"The fact that the information does not allege that the falsification was committed with imprudence is of no moment for here this deficiency appears supplied by the evidence submitted by appellant himself and the result has proven beneficial to him. Certainly, having alleged that the falsification has been willful, it would be incongruous to allege at the same time that it was committed with imprudence for a charge of criminal intent is incompatible with the concept of negligence."

Subsequently, we ruled in *People vs. Consigna, et. al.*[16] that the aforestated rationale and arguments also apply to the felony of malversation, that is, that an accused charged with willful malversation, in an information containing allegations similar to those involved in the present case, can be validly convicted of the same offense of malversation through negligence where the evidence sustains the latter mode of perpetrating the offense.

Hence, even on the hypothesis of petitioner that there is a divergence between the alternative modes of commission as alleged in the prosecutorial indictment and as found in the judicial adjudication, which variance does not really exist in this case, there would nonetheless be no reversible flaw in the judgment of respondent court. It also bears mention that unlike the other felonies in the Revised Penal Code, wherein a lower penalty is imposed when the offense is committed through negligence, either because it is so specified in the particular provision defining and punishing that felony or by force of Article 365 of the Code, in the crime of malversation the penalty is the same whether the mode of commission is with intent or by negligence. Petitioner, therefore, cannot also fault respondent court on a pretension that there would be a disparity in the resultant sanctions if his submission were to be upheld.

WHEREFORE, the instant petition is DENIED and the judgment of respondent Sandiganbayan is hereby AFFIRMED.

SO ORDERED.

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

[1] Penned by Justice Conrado M. Molina, with Justices Augusto M. Amores and Nathanael M. Grospe concurring.

[2] Rollo, 35-36.

[3] Original Record, 1.

[4] Rollo, 40.

[5] *Ibid.*, 12-14.

[6] *Bacasnot vs. Sandiganbayan, et al.*, 155 SCRA 379 (1987); *De Guzman vs. People, et. al.*, 119 SCRA 337 (1982).

[7] 145 SCRA 425 (1986).

[8] 149 SCRA 108 (1987).

[9] 173 SCRA 237 (1989).

[10] Rollo, 38.

[11] *Ibid.*, 23.

[12] G.R. No. 76826, Resolution En Banc, January 26, 1988.

[13] Rollo, 39.

[14] *Ibid.*, 75.

[15] 103 Phil. 277 (1958).

[16] 122 Phil. 293 (1965).

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