

EMILIANO CIMA FRANCA, JR., PETITIONER, VS. SANDIGANBAYAN (SECOND DIVISION) AND PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 94408. February 14, 1991

Ponente: GANCAYCO, J.

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GANCAYCO, J.:

The question addressed by this petition is whether or not an accountable public officer may be criminally liable for malversation of public property when he fails to return or produce the same upon demand, although after the filing of the information and during the trial he returned the property to the government.

The facts as found by the respondent Sandiganbayan in its questioned decision dated June 26, 1990 are as follows:

"The following facts have been sufficiently established: Accused Emiliano Cimafranca, Jr. was the Provincial Fisheries Inspector of the Province of Bohol from 1980 until his services were first terminated on May 2, 1986. He was reappointed as Fishery Aide effective November 25, 1987 and again separated from the service on March 15, 1988. (Record, pp. 52 & 54). As a Fisheries Inspector, he was issued on July 12, 1985, a revolver (Smith and Wesson, Cal. .38, 4" barrel, U.S. make SN 748198), marked as Exhibit K, valued at P350.00. On September 30, 1985, he was also issued a Briggs and Stratton engine, 10 HP with Serial Number 02356, valued at P8,475.00. (Exhibit G).

On May 2, 1986, when his temporary appointment expired, accused was advised by the Provincial Governor of Bohol to return his property accountabilities. On June 18, 1986, Eufronio M. Pizzaras, Officer-In-Charge of the Office of the Treasurer of Tagbilaran, Bohol, also wrote him a follow up letter to return the revolver and engine. Although he received the letter, accused did not comply. (TSN., p. 12, July 20, 1989).

On July 25, 1986, Teresita M. Sanchez, Provincial Auditor of Bohol, issued Office Order No. 86-29 directing Atty. Toribio S. Quiwag, Legal Officer III, and Mrs. Maria C. Longjas, Auditor I, to conduct a property audit on ten government officials and employees whose names were mentioned therein. Included in the list is the accused Emiliano Cimafranca, Jr. (Exhibit A). Pursuant to the office order, Mrs. Longjas and Atty. Quiwag conducted a property audit on July 26, 1986. They found out that accused, although already separated from the service on May 2, 1986, had not yet settled his property accountabilities, despite demands made upon him by the Officer-In-Charge of the City Treasurer's Office. On July 28, 1986, Atty. Quiwag sent a demand letter to the Provincial Treasurer of Bohol, for the production of the properties issued to the aforementioned government officials and employees. (Exhibit C).

For failure of accused to have duly forthcoming the public properties of which he was accountable upon demand by a duly authorized officer, he was charged of Malversation of Public Property, defined and penalized under Article 217 of the Revised Penal Code.[1]

Upon arraignment, petitioner pleaded not guilty to the information after which the trial proceeded, and particularly on July 14, 1989, Mr. Abraham Campos, in-charge of the Record Section of Tagbilaran City, received from the Provincial Treasurer, the revolver and engine which are the subject matter of this of which were returned

by petitioner.

After the trial on the merits, the respondent court rendered a decision on June 26, 1990, convicting the petitioner of the offense charged in this manner:

"WHEREFORE, accused Emiliano Cimafranca, Jr. is hereby found GUILTY beyond reasonable doubt of the crime of Malversation of Public Property defined and penalized under Article 217 of the Revised Penal Code, and appreciating in his favor the mitigating circumstance of voluntary restitution or return of the properties malversed, analogous to voluntary surrender, he is sentenced to an indeterminate penalty ranging from six (6) years, and one (1) day of prision mayor, as minimum, to ten (10) years, and one (1) day of prision mayor, as maximum; to pay a fine of P8,825.00, equivalent to the total value of the properties embezzled; to suffer perpetual special disqualification; to indemnify the Philippine Government in the amount of P8,475.00, representing the value of the Briggs and Stratton engine only, and to pay the costs.

Upon finality of this decision, the Deputy Clerk of Court assigned to the Second Division of this Court is ordered to return the Smith & Wesson .38 Caliber Revolver, with Serial No. 748198, involved in this case, to the Provincial Treasurer of Bohol or his duly authorized representative, after proper identification and receipt.

SO ORDERED."[2]

Hence, this petition for review on certiorari predicated on the following grounds:

I

—

THE RESPONDENT SANDIGANBAYAN ERRED IN CONVICTING THE ACCUSED OF THE CRIME OF MALVERSATION OF PUBLIC PROPERTY UNDER ARTICLE 217 OF THE REVISED PENAL CODE.

II

—

THE RESPONDENT SANDIGANBAYAN ERRED IN NOT HAVING GIVEN CREDENCE TO THE CREDIBILITY OF THE ACCUSED.

III

—

THE RESPONDENT SANDIGANBAYAN ERRED IN NOT ABSOLVING THE ACCUSED."[3]

The petition is devoid of merit.

The main thrust of the defense is that the public property allegedly malversed by petitioner was returned by him during the trial and this entitles him to an acquittal. While he admitted having received the engine and revolver for his use as provincial fisheries inspector while patrolling the high seas against illegal fishing, he testified that after he finished patrolling he placed the engine at the back of the convent but it was stolen so he was not able to return the same upon demand. After a long search he finally found it at the side of the market but it was no longer usable.

Similarly, he alleged that the revolver fell from his waist into the sea while patrolling the high seas. When he received a letter of demand to return said property on May 2, 1987, he hired sea divers to look for the gun. He executed an affidavit of loss on July 6, 1987.[4] After two years of diligent search he found the gun still in good condition. It did not become rusty as it stayed under the seawater and was not exposed to the air. He and his son reblued it.

Under Article 217 of the Revised Penal Code the offense of malversation is defined and penalized as follows:

"ART. 217. Malversation of public funds or property. - 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, or shall otherwise be guilty of the misappropriation or malversation of such funds or property, shall suffer:

1. The penalty of prision correccional in its medium and maximum periods, if the amount involved in the misappropriation or malversation does not exceed two hundred pesos.
2. The penalty of prision mayor in its minimum and medium periods, if the amount involved is more than two hundred pesos but does not exceed six thousand pesos.
3. The penalty of prision mayor in its maximum period to reclusion temporal in its minimum period, if the amount involved is more than six thousand pesos but is less than twelve thousand pesos.
4. The penalty of reclusion temporal in its medium and maximum periods, if the amount involved is more than twelve thousand pesos but is less than twenty-two thousand pesos.

If the amount exceeds the latter, the penalty shall be reclusion temporal in its maximum period to reclusion perpetua.

In all cases, persons guilty of malversation shall also suffer the penalty of perpetual special disqualification and a fine equal to the amount of the funds malversed or equal to the total value of the property embezzled.

The failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, upon demand by any duly authorized officer, shall be prima facie evidence that he has put such missing funds or property to personal uses. (As amended by Rep. Act No. 1060, approved June 12, 1954.)"

The elements of the offense of malversation are -

a)

That the offender be a public officer;

b)

That he had the custody or control of funds or property by reason of the duties of his office;

c)

That those funds or property were public funds or property for which he was accountable;

d)

And, that he appropriated, took, misappropriated or consented or, through abandonment or negligence, permitted another person to take them.

Petitioner admits that the first three elements are present. He, however, contends that the fourth element had not been established as in fact he returned the property during the trial.

The Court is not persuaded.

Under the last paragraph of Article 217 of the Revised Penal Code above reproduced, the failure of a public officer to have duly forthcoming any public funds or property with which he is chargeable, upon demand by any duly authorized officer, shall be prima facie evidence that he has put such missing funds or property to personal uses. The burden is on the accused to overcome this presumption.

In the present case the petitioner failed to overturn this prima facie evidence of his guilt.

Firstly, when his temporary appointment in the government expired on May 2, 1986, he was advised by the Provincial Governor of Bohol to return his property accountabilities but he failed to do so. On June 18, 1986, Mr. Pizarra of the Office of the Treasurer of Tagbilaran wrote a follow-up letter asking him to return the revolver and engine, which he received and yet, he did not comply with the requirement or reply to the letter.

Secondly, on July 28, 1986, Atty. Quiwag of the Provincial Auditor's Office sent a demand letter to the Provincial Treasurer of Bohol to produce said missing property,[5] and the latter made demands on petitioner to return the property but to no avail. In none of these instances did petitioner reveal the alleged loss of the revolver and theft of the engine.

Thirdly, the version of petitioner as to why he was not able to immediately return the property, as correctly observed by the respondent court, is difficult to believe. He failed to report the alleged loss of government property to the proper authorities. While he claimed to have reported the loss of the engine to the police, said matter was not reflected in the police blotter. He presented an affidavit of P/Cpl Crispin Tubayan confirming said report[6] but petitioner did not present Tubayan as a witness as the affidavit in itself is hearsay. And although petitioner also testified that he reported the loss of the revolver to the Provincial Governor, this fact was not even reflected in the affidavit of loss he executed. Moreover, he did not ask nor did he present the Governor to testify in order to confirm his statement.

Fourthly, it took him years to recover the engine and gun, and this delay makes his tale incredible more so as it is uncorroborated.

Since petitioner failed to overturn the prima facie facts evidence of guilt by his non-production of the government property upon previous repeated demands, and as he produced it only much later, that is, after several years, the only logical conclusion is that he actually misappropriated the property and/or otherwise allowed other persons to take and appropriate the same. Worst still, when the engine was returned, it was already scrap and the revolver was rusty and had to be reblued. The crime of malversation had been consummated when the property were belatedly returned.

This Court has made the consistent pronouncement that the return of the funds malversed is not a defense and will not be an exempting circumstance nor a ground for extinguishing the criminal liability of the accused.[7] At best it can be a mitigating circumstance.[8]

The same principle should apply when the subject matter of the malversation is public property. However, when as in this case, it took the petitioner several years before he returned the government property, such circumstance cannot be considered a special mitigating circumstance analogous to voluntary surrender, as the trial court did

credit to the petitioner. Said government property appear to be under the control and possession of petitioner all the time. There was no reason why he could not return the same promptly if not soonest to the government. The much delayed return of the property must be a desperate act and afterthought of petitioner when he realized that all possible hope of exoneration was lost during the trial.

Under Article 217 of the Revised Penal Code the penalty of prision mayor in its maximum period to reclusion temporal in its minimum period is imposed if the amount involved is more than P6,000.00 but is less than P12,000.00. As there are no modifying circumstances attending the commission of the offense and applying the Indeterminate Sentence Law, the penalty that should be imposed on petitioner is imprisonment of six (6) years and one (1) day of prision mayor as minimum; as correctly imposed by respondent court, to eleven (11) years and six (6) months of prision mayor as maximum.

The fine of P8,825.00 imposed is within the range prescribed by Article 217, which is the total value of the property malversed, since the engine returned was no longer in its original good condition, but scrap.

WHEREFORE, with the above modification as to the penalty, the judgment subject of the petition is **AFFIRMED** in all other respects, with costs against petitioner.

SO ORDERED.

Fernan, C.J., Narvasa, Melencio-Herrera, Gutierrez, Jr., Cruz, Paras, Feliciano, Padilla, Bidin, Sarmiento, Griño-Aquino, Medialdea, and Regalado, JJ., concur.
Davide, Jr., J., no part.

[1] Pages 26 to 28, Rollo.

[2] Pages 38 to 39, Rollo.

[3] Pages 8 to 9, Rollo.

[4] Exhibit 3.

[5] Exhibit C.

[6] Exhibit 1.

[7] *Bacsarpa vs. Court of Appeals*, 99 Phil. 112 (1956); *People vs. Miranda*, 2 SCRA 261 (1961); *Office of the Court Administrator vs. Soriano*, 136 SCRA 461-462 (1985).

[8] *People vs. Velasquez*, 72 Phil. 98 (1941).

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