

OSCAR P. PARUNGAO, PETITIONER, VS. SANDIGANBAYAN AND PEOPLE OF THE PHILIPPINES, RESPONDENTS.

G.R. No. 96025. May 15, 1991

Ponente: GUTIERREZ, JR., J.

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GUTIERREZ, JR., J.:

May the Sandiganbayan, after finding that a municipal treasurer charged with malversation of public funds is not guilty thereof, nevertheless convict him, in the same criminal case, for illegal use of public funds?

The petitioner, a former municipal treasurer of Porac, Pampanga, was charged with malversation of public funds allegedly committed as follows:

"That on or about the month of September, 1980, or sometime subsequent thereto, in the Municipality of Porac, Province of Pampanga, Philippines, and within the jurisdiction of this Honorable Court, OSCAR PARUNGAO, Municipal Treasurer of Porac, Pampanga, hence a public officer having been appointed and qualified as such, having custody or control of and accountable for the public funds collected and received by him by reason of the duties of his office, did then and there wilfully, unlawfully, feloniously and with abuse of confidence, take, appropriate and convert to his own personal use and benefit the amount of ONE HUNDRED EIGHTY-FIVE THOUSAND TWO HUNDRED FIFTY PESOS (P185,250.00), Philippine Currency, to the damage and prejudice of the government in the said amount." (Rollo, p. 26)

The petitioner entered a plea of not guilty. During the pre-trial conference, he admitted that on September 29, 1980, as municipal treasurer of Porac, Pampanga, he received from the Ministry of Public Works and Highways the amount of P185,250 known as the fund for construction, rehabilitation, betterment and improvement (CRBI) for the concreting of Barangay Jalung Road located in Porac, Pampanga.

The prosecution presented six witnesses and tried to establish that the petitioner misappropriated the fund for his personal use because while the fund was already completely exhausted, the concreting of Barangay Jalung Road remained unfinished.

In his defense, the petitioner accounted for the P185,250 fund as follows:

1. P126,095.59 was disbursed for materials delivered by the contractor under Voucher Numbers 41-80-12-440 and 41-80-12-441 for P86,582.50 and P39,513.09, respectively.
2. P59,154.41 was used to pay, upon the insistence of the then Porac Mayor Ceferino Lumanlan, the labor payrolls of the different barangays in the municipality.

After hearing, the respondent Sandiganbayan rendered a decision acquitting the petitioner of the crime of malversation of public funds but convicting him of the crime of illegal use of public funds. The relevant parts of the decision are set forth below:

"The Certificate of Settlement (Exh. 5) issued to the accused certified that his money, property and accountable forms as Municipal Treasurer of Porac, Pampanga for the period from February 6, 1980 to December 31, 1980,

have been audited and found correct. It was signed by Auditor 1 Rolando A. Quibote and approved by Provincial Auditor Jose C. de Guzman. Being public officers with official duties to perform in the exercise of the functions of their office, the presumption is in favor of the lawful exercise of their functions and the regular performance of their duties. (Sec. 5, par. m, Rule 131, Rules of Court). And quite apart from that presumption of regularity in the performance of official duty which necessarily extends to the correctness of the said certificate issued in the course of the discharge of such duty, there exists no serious ground to impugn the aforesaid document in the context of the admission of prosecution witnesses Homer Mercado and District Engineer Lacsamana regarding the delivery of materials and the grading thereof on the project site by the contractor, the findings of investigating NBI Agent Azares, that accused Parungao had submitted disbursement vouchers and supporting documents from the CRBI barangay Jalung fund to the Provincial Auditor's Office which were audited and found in order by Auditor Quibote, and the acknowledgments of Emerenciana Tiongco and auditing examiner Jose Valencia that the disbursements of P86,582.50 and P39,513.09 under vouchers 4180-12-440 and 4180-12-441 were duly entered in accused Parungao's Treasurer's Journal of Cash Disbursements and Cashbook. The foregoing considerations, and the presumption of innocence accorded to every accused in a criminal prosecution, would not allow a finding that the accused appropriated the P185,250.00 fund for his personal use and benefit.

But while the accused could be deemed to have fully accounted for the amount in question, the fact sticks out from the evidence like a sore thumb that he allowed the use of part of the funds for a purpose other than what it was intended. The said amount of P185,250.00 was specifically allotted for the concreting of the barangay Jalung road in Porac, Pampanga. Instead of applying it fully to that particular project, he gave P59,154.41 of it to the municipal mayor of Porac to pay the labor payrolls of the different barangays of the municipality, resulting in the non-completion of the project. He thereby violated the following provision of Article 220 of the Revised Penal Code. (Rollo, pp. 48-49)

The petitioner filed a motion for reconsideration which was denied by the Sandiganbayan, hence this petition for review.

The petitioner raises the following issues:

I. RESPONDENT SANDIGANBAYAN GRAVELY ABUSED ITS DISCRETION AMOUNTING TO LACK OF JURISDICTION AND/OR IN EXCESS OF JURISDICTION IN DENYING PETITIONER'S MOTION FOR RECONSIDERATION AND IN AFFIRMING ITS DECISION FINDING PETITIONER GUILTY OF TECHNICAL MALVERSATION.

II. RESPONDENT SANDIGANBAYAN GRAVELY ABUSED ITS DISCRETION AMOUNTING TO LACK OF JURISDICTION AND/OR IN EXCESS OF JURISDICTION IN NOT CONSIDERING IN FAVOR OF THE PETITIONER DOCUMENTS WHICH ARE MUTE BUT ELOQUENT PROOF OF HIS INNOCENCE. (Rollo, p. 14)

The petitioner argues that he cannot be convicted of a crime different and distinct from that charged in the information.

The petitioner is correct. As recommended by the Solicitor General in his manifestation, the Court grants the petition.

The 1987 Constitution mandates that the accused, in all criminal prosecutions, shall enjoy the right to be informed of the nature and cause of accusation against him (Article III, Section 14 [2]) From this fundamental precept proceeds the rule that the accused may be convicted only of the crime with which he is charged.

An exception to this rule, albeit constitutionally permissible, is the rule on variance in Section 4, Rule 120 of the Rules on Criminal Procedure which provides:

Sec. 4. Judgment in case of variance between allegation and proof. - When there is variance between the offense charged in the complaint or information, and that proved or established by the evidence, and the offense as charged is included in or necessarily includes the offense proved, the accused shall be convicted of the offense proved included in that which is charged, or of the offense charged included in that which is proved. (4a)

Section 5 of the same Rule indicates when an offense includes or is included in another:

Sec. 5. When an offense includes or is included in another. - An offense charged necessarily includes that which is proved, when some of the essential elements or ingredients of the former, as this is alleged in the complaint or information, constitute the latter. And an offense charged is necessarily included in the offense proved, when the essential ingredients of the former constitute or form a part of those constituting the latter. (5)

Is the decision of the Sandiganbayan convicting the petitioner of the crime of illegal use of public funds justified by the rule on variance? Does the crime of malversation of public funds include the crime of illegal use of public funds, or is the former included in the latter?

To both questions, the Court answers in the negative.

As gleaned from the information, the petitioner, a public officer, was accused of wilfully, unlawfully, feloniously and with abuse of confidence, taking, appropriating or converting to his own personal use, public funds for which he was accountable. The alleged acts constitute malversation of public funds punishable under Article 217 of the Revised Penal Code, which reads:

ART. 217. Malversation of public funds or property. - Presumption of malversation. - 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: . . .

The essential elements of this crime are:

(a) the offender is a public officer; (b) by reason of his duties he is accountable for public funds and property; and (c) he appropriates, takes, or misappropriates, or permits other persons to take such public funds or property, or otherwise is guilty of misappropriation or malversation of such funds or property.

On the other hand, Article 220 of the Revised Penal Code, for which the petitioner was convicted, reads:

"ART. 220. Illegal use of public funds or property. - Any public officer who shall apply any public fund or property under his administration to any public use other than that for which such fund or property were appropriated by law or ordinance shall suffer the penalty of prision correccional in its minimum period or a fine ranging from one-half to the total of the sum misapplied, if by reason of such misapplication, any damage or embarrassment shall have resulted to the public service. In either case, the offender shall also suffer the penalty of temporary special disqualification."

The essential elements of this crime, more commonly known as technical malversation, are:

(a) the offender is an accountable public officer; (b) he applies public funds or property under his administration to some public use; and (c) the public use for which the public funds or property were applied is different from the purpose for which they were originally appropriated by law or ordinance.

A comparison of the two articles reveals that their elements are entirely distinct and different from the other. In malversation of public funds, the offender misappropriates public funds for his own personal use or allows any other person to take such public funds for the latter's personal use. In technical malversation, the public officer

applies public funds under his administration not for his or another's personal use, but to a public use other than that for which the fund was appropriated by law or ordinance.

Technical malversation is, therefore, not included in nor does it necessarily include the crime of malversation of public funds charged in the information.

Since the acts constituting the crime of technical malversation were not alleged in the information, and since technical malversation does not include, or is not included in the crime of malversation of public funds, he cannot resultantly be convicted of technical malversation.

The Sandiganbayan found that the petitioner had not taken, appropriated nor converted the CRBI fund for his personal use and benefit. It, however, was of the belief that based on the evidence given during trial, the petitioner was guilty of technical malversation. What the respondent court should have done was to follow the procedure laid down in Section 11, Rule 119 of the Rules on Criminal Procedure.

"SEC. 11. When mistake has been made in charging the proper offense. - When it becomes manifest at any time before judgment, that a mistake has been made in charging the proper offense, and the accused cannot be convicted of the offense charged, or of any other offense necessarily included therein, the accused shall not be discharged, if there appears to be good cause to detain him. In such case, the court shall commit the accused to answer for the proper offense and dismiss the original case upon the filing of the proper information. (12a)"

The Sandiganbayan therefore erred in not ordering the filing of the proper information against the petitioner, and in convicting him of technical malversation in the original case for malversation of public funds.

Ordinarily, the Court's recourse would be to acquit the petitioner of the crime of illegal use of public funds without prejudice, but subject to the laws on prescription, to the filing of a new information for such offense.

Considering however that all the evidence given during the trial in the malversation case is the same evidence that will be presented and evaluated to determine his guilt or innocence in the technical malversation case in the event that one is filed and in order to spare the petitioner from the rigors and harshness compounded by another trial, not to mention the unnecessary burden on our overloaded judicial system, the Court deems it best to pass upon the issue of whether or not the petitioner indeed is guilty of illegal use of public funds.

The petitioner alleged that the amount of P59,154.41, which was actually intended for the concreting of the Barangay Jalung Road, was used to defray the labor payrolls of the different barangays of the municipality of Porac and presented documents fully supporting the disbursement. This allegation was rebutted by the prosecution.

The Sandiganbayan found him guilty of technical malversation.

However, Article 220 of the Revised Penal Code provides that for technical malversation to exist it is necessary that public funds or properties had been diverted to any public use other than that provided for by law or ordinance. (Underlining supplied. See *Palma Gil v. People of the Philippines*, 177 SCRA 229 [1989])

The testimony of the prosecution witness Armando Lacsamana, as summarized by the Sandiganbayan, is as follows:

"xxx The Province of Pampanga receives an annual CRBI (Construction, Rehabilitation, Betterment and Improvement) fund. In 1980, Barangay Jalung, Porac, was one of the recipients of the fund in the amount of P185,250.00. CRBI funds are released to the provincial treasurer and withdrawn by the municipal treasurer of the municipality where a project is to be implemented. With regard to the CRBI fund for Barangay Jalung, their office, through Engr. Anselmo Fajardo, conferred with the barangay captain on what project the barangay

wanted to undertake. It was agreed that the fund be utilized for concreting the barangay Jalung road. (TSN May 9, 1989, pp. 3-5). The project to be implemented having been determined, their office prepared a program of work (Exh. 1-10) which included the following supporting documents:

- Chart for an item of work (Exh. I-11);
- Schedule of equipment (Exh. I-12)
- Schedule of equipment and labor (Exhs. I-13, I-14, I-15);
- Working schedule for laborers and technical men (Exh. I-16);
- Schedule of materials (Exh. I-17);
- Schedule of equipment (I-18);
- Summary of the project (Exh. I-19). (TSN May 9, 1989, pp. 6-7). (Rollo, pp. 38-39)

Lacsamana's testimony shows that the CRBI fund is a general fund, and the utilization of this fund specifically for the concreting of the Barangay Jalung Road was merely an internal arrangement between the Department of Public Works and Highways and the barangay captain and was not particularly provided for by law or ordinance. There is no dispute that the money was spent for public purpose - payment of the wages of laborers working on various projects in the municipality. It is pertinent to note the high priority which laborers' wages enjoy as claims against the employers' funds and resources. In the absence of a law or ordinance appropriating the CRBI fund for the concreting of the Barangay Jalung Road, the petitioner cannot be declared guilty of the crime of illegal use of public funds.

WHEREFORE, the petition is hereby GRANTED. The decision of the Sandiganbayan is REVERSED. The petitioner is ACQUITTED of the crime of illegal use of public funds.

SO ORDERED.

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

Feliciano, J., please separate concurring and dissenting opinion.

CONCURRING AND DISSENTING

FELICIANO, J.:

I concur in the result reached in this case, to the extent that the Court is setting aside the decision of the public respondent Sandiganbayan. I agree that the Sandiganbayan cannot legally convict petitioner Parungao for Violation of Article 220 of the Revised Penal Code, considering that the information filed in this case was for violation of Article 217 of the Revised Penal Code. It appears from an examination of the elements of the offenses penalized respectively by Articles 217 and 220 of the Revised Penal Code, that malversation of public funds under Article 217 is not necessarily included in, and does not necessarily include, the illegal use of public funds under Article 220 of the same Code, and vice versa.

At the same time, I have great difficulty with the position taken by Mr. Justice Gutierrez who, instead of setting aside the Sandiganbayan decision without prejudice to the filing of an information under Article 220 of the Revised Penal Code, undertook to determine the merits of the case as if such an information had in fact been filed.

As I understand it, the decision of the Court acquits petitioner Parungao of the crime of illegal use of public funds for the reason that there appears no law or ordinance which dedicates the funds involved in this case to "the concreting of the Barangay Jalung Road;"

"Lacsamana's testimony shows that the CRBI fund is a general fund, and the utilization of this fund specifically for the concreting of the Barangay Jalung Road is merely an internal arrangement between the Department of Public Works and Highways and the Barangay Captain and was not particularly provided for by law or ordinance. x x x In the absence of a law or ordinance appropriating the CRBI fund for the concreting of the -Barangay Jalung Road, the petitioner cannot be declared guilty of the crime of illegal use of public fund."

If there was indeed no law or ordinance appropriating the CRBI fund for the concreting of Barangay Jalung Road, then it appears to me that there was here a violation of the constitutional provision that "[n]o money shall be paid out of the Treasury except in pursuance of an appropriation made by law" (Article VI [29] [1], 1987 Constitution). If there were no appropriation by law or ordinance stating (however generally) that P185,250.00 of the CRBI funds shall or may be devoted to the concreting of the Barangay Jalung Road, then legally no part of the CRBI fund (and not just P59,154.41 [out of the P185,250.00] which was used to defray labor payrolls of different barangays for different projects) could be disbursed for that particular purpose.

I would suggest that the People of the Philippines be given an opportunity, in a new prosecution under an appropriate information for violation of Article 220 of the Revised Penal Code, to prove that there was in fact statutory authority for the disbursement of the CRBI funds indicating, in terms which may be more or less general in character, that such funds may be devoted to the concreting of the Barangay Jalung Road. That possibility appears to be foreclosed by the decision here being reached by the Court.

Examination of our statute books shows that, prima facie, there was a law appropriating the CRBI funds (including the P185,250.00 here involved) for the construction or improvement or repair of barangay roads including the Barangay Jalung Road here involved.

P.D. No. 702, promulgated on 16 May 1975, created the Bureau of Barangay Roads under the Department of Public Highways. The Bureau of Barangay Roads includes --

"the Construction, Rehabilitation, Betterment and Improvement (CRBI) Division which was given the responsibility for exercising technical supervision over all the activities relating to construction, rehabilitation, betterment and improvement of feeder roads and bridges, establish[ing] policy guidelines; extend[ing] consultative services and set[ting] standards and procedures for construction, rehabilitation, betterment and improvement works." (Section 4 [3], P.D. No. 702)

Section 5 of this statute provides as follows:

"SEC. 5. Appropriations. -- All national funds appropriated and programmed by the Department of Public Highways for the construction, rehabilitation, betterment, improvement and maintenance of barangay roads and bridges including the shares of provinces, cities, municipalities and the allocation for the maintenance of farm-to-market or feeder roads and bridges within a barangay area, from the Highway Special Fund, shall be released to the Department of Public Highways which shall then sub-allot them to the barangays but construction and maintenance shall be under the supervision of the Department of Public Highways through the Bureau of Barangay Roads." (Emphases supplied)

It appears that the CRBI fund referred to in the decision of the Court formed part of the "Highway Special Fund" which in turn formed part of the legislative appropriations pertaining to the Department of Public Highways "for the construction, etc. of barangay roads and bridges."

In Batas Pambansa Blg. 40, the General Appropriations Act, January 1-December 31, 1980, there were included

in the appropriations for the then Ministry of Public Highways the following items:

"Current Operating Expenditures

.....

3.0 Maintenance and Repair. For maintenance and repair of national roads and bridges, toll roads, operation of quarries, asphalt and batching plants, aid to provincial, city, and municipal roads and bridges, and barangay roads and bridges P1,250,156,000

.....

3.6 Barangay Roads....P397,232,000

.....

Capital Outlays

5.0 Construction, Rehabilitation and Improvement. For construction, rehabilitation and improvement of national roads and bridges, aid to provincial, city and municipal roads and bridges, barangay roads and bridges P810,467,000

.....

5.4 Barangay Roads and Bridges.....P239,288,000

..... "

(Italics supplied).

The lump-sum of P397,232,000 for maintenance and repair of barangay roads is broken down into sub-sums for each of the several Regions: for Region I (which includes Pampanga), the amount of P55,442,000 was appropriated (General Appropriations Act, CY 1980, p. 366). The lump-sum of P239,288,000 for construction, rehabilitation and improvement of barangay roads and bridges was similarly broken down on a region-to-region basis, Region I being allocated the sum of P1,889,040 (Ibid., p. 368-369).

It appears to me that the CRBI fund for barangay roads referred to in the decision of the Court formed part of the above items of appropriation.

I am aware that the Solicitor General has recommended acquittal of accused Parungao in this case. However, the Solicitor General did not distinguish between setting aside the decision of the Sandiganbayan as insupportable under the information actually filed in this case, on the one hand, and, on the other hand, treating this case as if an information for violation of Article 220 of the Revised Penal Code had in fact been filed and acquitting Parungao thereunder on the merits.

I, therefore, dissent from the majority opinion to the extent that it acquits petitioner Parungao on the merits of an information for violation of Article 220 of the Revised Penal Code, which information has not yet in fact been filed.

In sum, I believe the decision of the Sandiganbayan should be set aside without prejudice to the right of the Government to file another information this time for violation of Article 220 of the Revised Penal Code. As shown above, that there was a violation of Article 220 is clear, at least prima facie, from the record, even though there was no evil intent (understood as conversion of public funds to personal uses) on the part of petitioner Parungao. Such an evil intent is not an element of the offense of illegal use of public funds defined and penalized in Article 220 of the Revised Penal Code.

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