

## THIRD DIVISION

[ G.R. NO. 168617, February 19, 2007 ]

**BERNADETTE L. ADASA, PETITIONER, VS. CECILLE S. ABALOS,  
RESPONDENT.**

### D E C I S I O N

**CHICO-NAZARIO, J.:**

This Petition for Review under Rule 45 of the Rules of Court, filed by petitioner Bernadette L. Adasa, seeks to nullify and set aside the 21 July 2004 Decision<sup>[1]</sup> and 10 June 2005 Resolution<sup>[2]</sup> of the Court of Appeals in CA-G.R. SP No. 76396 which nullified the Resolutions of the Department of Justice (DOJ). The Resolutions of the DOJ reversed and set aside the Resolution of the Office of the City Prosecutor of Iligan City, which found on reinvestigation probable cause against petitioner, and directed the Office of the City Prosecutor of Iligan City to withdraw the information for Estafa against petitioner.

The instant case emanated from the two complaints-affidavits filed by respondent Cecille S. Abalos on 18 January 2001 before the Office of the City Prosecutor of Iligan City, against petitioner for Estafa.

Respondent alleged in the complaints-affidavits that petitioner, through deceit, received and encashed two checks issued in the name of respondent without respondent's knowledge and consent and that despite repeated demands by the latter, petitioner failed and refused to pay the proceeds of the checks.

On 23 March 2001, petitioner filed a counter-affidavit admitting that she received and encashed the two checks issued in favor of respondent.

In her Supplemental Affidavit filed on 29 March 2001, petitioner, however, recanted and alleged instead that it was a certain Bebie Correa who received the two checks which are the subject matter of the complaints and encashed the same; and that said Bebie Correa left the country after misappropriating the proceeds of the checks.

On 25 April 2001, a resolution was issued by the Office of the City Prosecutor of Iligan City finding probable cause against petitioner and ordering the filing of two separate Informations for Estafa Thru Falsification of Commercial Document by a Private Individual, under Article 315 in relation to Articles 171 and 172 of the Revised Penal Code, as amended.

Consequently, two separate criminal cases were filed against petitioner docketed as Criminal Cases No. 8781 and No. 8782, raffled to Branches 4 and 5, Regional Trial Court of Iligan City, respectively.

This instant petition pertains only to Criminal Case No. 8782.

On 8 June 2001, upon motion of the petitioner, the trial court in Criminal Case No. 8782 issued an order directing the Office of the City Prosecutor of Iligan City to conduct a reinvestigation.

After conducting the reinvestigation, the Office of the City Prosecutor of Iligan City issued a resolution dated 30 August 2001, affirming the finding of probable cause against petitioner.

Meanwhile, during her arraignment on 1 October 2001 in Criminal Case No. 8782, petitioner entered an unconditional plea of not guilty.<sup>[3]</sup>

Dissatisfied with the finding of the Office of the City Prosecutor of Iligan City, petitioner filed a Petition for Review before the DOJ on 15 October 2001.

In a Resolution dated 11 July 2002, the DOJ reversed and set aside the 30 August 2001 resolution of the Office of the City Prosecutor of Iligan City and directed the said office to withdraw the Information for Estafa against petitioner.

The said DOJ resolution prompted the Office of the City Prosecutor of Iligan City to file a "Motion to Withdraw Information" on 25 July 2002.

On 26 July 2002, respondent filed a motion for reconsideration of said resolution of the DOJ arguing that the DOJ should have dismissed outright the petition for review since Section 7 of DOJ Circular No. 70 mandates that when an accused has already been arraigned and the aggrieved party files a petition for review before the DOJ, the Secretary of Justice cannot, and should not take cognizance of the petition, or even give due course thereto, but instead deny it outright. Respondent claimed Section 12 thereof mentions arraignment as one of the grounds for the dismissal of the petition for review before the DOJ.

In a resolution dated 30 January 2003, the DOJ denied the Motion for Reconsideration opining that under Section 12, in relation to Section 7, of DOJ Circular No. 70, the Secretary of Justice is not precluded from entertaining any appeal taken to him even where the accused has already been arraigned in court. This is due to the permissive language "may" utilized in Section 12 whereby the Secretary has the discretion to entertain an appealed resolution notwithstanding the fact that the accused has been arraigned.

Meanwhile, on 27 February 2003, the trial court issued an order granting petitioner's "Motion to Withdraw Information" and dismissing Criminal Case No. 8782. No action was taken by respondent or any party of the case from the said order of dismissal.

Aggrieved by the resolution of the DOJ, respondent filed a Petition for *Certiorari* before the Court of Appeals. Respondent raised the following issues before the appellate court:

1. Whether or not the Department of Justice gravely abused its discretion in giving due course to petitioner's petition for review despite its having been filed after the latter had already been

arraigned;

2. Whether or not there is probable cause that the crime of estafa has been committed and that petitioner is probably guilty thereof;
3. . Whether or not the petition before the Court of Appeals has been rendered moot and academic by the order of the Regional Trial Court dismissing Criminal Case No. 8782.

The Court of Appeals in a Decision dated 21 July 2004 granted respondent's petition and reversed the Resolutions of the DOJ dated 11 July 2002 and 30 January 2003.

In resolving the first issue, the Court of Appeals, relying heavily on Section 7 of DOJ Circular No. 70 which states "[i]f an information has been filed in court pursuant to the appealed resolution, the petition shall not be given due course if the accused had already been arraigned," ruled that since petitioner was arraigned before she filed the petition for review with the DOJ, it was imperative for the DOJ to dismiss such petition. It added that when petitioner pleaded to the charge, she was deemed to have waived her right to reinvestigation and right to question any irregularity that surrounds it.

Anent the second issue, the Court of Appeals declared that the existence of probable cause or the lack of it, cannot be dealt with by it since factual issues are not proper subjects of a Petition for *Certiorari*.

In disposing of the last issue, the Court of Appeals held that the order of the trial court dismissing the subject criminal case pursuant to the assailed resolutions of the DOJ did not render the petition moot and academic. It said that since the trial court's order relied solely on the resolutions of the DOJ, said order is void as it violated the rule which enjoins the trial court to assess the evidence presented before it in a motion to dismiss and not to rely solely on the prosecutor's averment that the Secretary of Justice had recommended the dismissal of the case.

Dissatisfied by the Court of Appeals' ruling, petitioner filed a Motion for Reconsideration setting forth the following grounds:

1. that the over-all language of Sections 7 and 12 of Department Circular No. 70 is permissive and directory such that the Secretary of Justice may entertain an appeal despite the fact that the accused had been arraigned;
2. that the contemporaneous construction by the Secretary of Justice should be given great weight and respect;
3. that Section 7 of the Circular applies only to resolutions rendered pursuant to a preliminary investigation, not on a reinvestigation;
4. that the trial court's order of dismissal of the criminal case has rendered the instant petition moot and academic;
5. that her arraignment was null and void it being conducted despite her protestations; and

6. that despite her being arraigned, the supposed waiver of her right to preliminary investigation has been nullified or recalled by virtue of the trial court's order of reinvestigation.<sup>[4]</sup>

The Court of Appeals stood firm by its decision. This time, however, it tried to construe Section 7 side by side with Section 12 of DOJ Circular No. 70 and attempted to reconcile these two provisions. According to the appellate court, the phrase "shall not" in paragraph two, first sentence of Section 7 of subject circular, to wit:

If an information has been filed in court pursuant to the appealed resolution, the petition shall not be given due course if the accused had already been arraigned. x x x. (Emphasis supplied.)

employed in the circular denotes a positive prohibition. Applying the principle in statutory construction - that when a statute or provision contains words of positive prohibition, such as "shall not," "cannot," or "ought not" or which is couched in negative terms importing that the act shall not be done otherwise than designated, that statute or provision is mandatory, thus rendering the provision mandatory - it opined that the subject provision simply means that the Secretary of Justice has no other course of action but to deny or dismiss a petition before him when arraignment of an accused had already taken place prior to the filing of the petition for review.

On the other hand, reading Section 12 of the same circular which reads:

The Secretary may reverse, affirm or modify the appealed resolution. He may, motu proprio or upon motion, dismiss the petition for review on any of the following grounds:

x x x x

- (e) That the accused had already been arraigned when the appeal was taken; x x x.

the Court of Appeals opined that the permissive word "may" in Section 12 would seem to imply that the Secretary of Justice has discretion to entertain an appeal notwithstanding the fact that the accused has been arraigned. This provision should not be treated separately, but should be read in relation to Section 7. The two provisions, taken together, simply meant that when an accused was already arraigned when the aggrieved party files a petition for review, the Secretary of Justice cannot, and should not take cognizance of the petition, or even give due course thereto, but instead dismiss or deny it outright. The appellate court added that the word "may" in Section 12 should be read as "shall" or "must" since such construction is absolutely necessary to give effect to the apparent intention of the rule as gathered from the context.

As to the contemporaneous construction of the Secretary of Justice, the Court of Appeals stated that the same should not be given weight since it was erroneous.

Anent petitioner's argument that Section 7 of the questioned circular applies only to original resolutions that brought about the filing of the corresponding informations in

court, but not to resolutions rendered pursuant to a motion for reinvestigation, the appellate court simply brushed aside such contention as having no basis in the circular questioned.

It also rejected petitioner's protestation that her arraignment was forced upon her since she failed to present any evidence to substantiate the same.

It is petitioner's contention that despite her being arraigned, the supposed waiver of her right to preliminary investigation has been nullified by virtue of the trial court's order or reinvestigation. On this score, the Court of Appeals rebuffed such argument stating that there was no "supposed waiver of preliminary investigation" to speak of for the reason that petitioner had actually undergone preliminary investigation.

Petitioner remained unconvinced with the explanations of the Court of Appeals.

Hence, the instant petition.

Again, petitioner contends that the DOJ can give due course to an appeal or petition for review despite its having been filed after the accused had already been arraigned. It asserts that the fact of arraignment of an accused before the filing of an appeal or petition for review before the DOJ "is not at all relevant" as the DOJ can still take cognizance of the appeal or Petition for Review before it. In support of this contention, petitioner set her sights on the ruling of this Court in *Crespo v. Mogul*,<sup>[5]</sup> to wit:

The rule therefore in this jurisdiction is that once a complaint or information is filed in Court any disposition of the case as to its dismissal or the conviction or acquittal of the accused rests in the sound discretion of the Court. Although the fiscal retains the direction and control of the prosecution of criminal cases even while the case is already in Court he cannot impose his opinion on the trial court. The Court is the best and sole judge on what to do with the case before it. The determination of the case is within its exclusive jurisdiction and competence. A motion to dismiss the case filed by the fiscal should be addressed to the Court who has the option to grant or deny the same. *It does not matter if this is done before or after the arraignment of the accused or that the motion was filed after a reinvestigation or upon instructions of the Secretary of Justice who reviewed the records of the investigation.* (Emphasis supplied.)

To bolster her position, petitioner cites *Roberts v. Court of Appeals*,<sup>[6]</sup> which stated:

*There is nothing in Crespo vs. Mogul which bars the DOJ from taking cognizance of an appeal, by way of a petition for review, by an accused in a criminal case from an unfavorable ruling of the investigating prosecutor.* It merely advised the DOJ to, "as far as practicable, refrain from entertaining a petition for review or appeal from the action of the fiscal, when the complaint or information has already been filed in Court. x x x. (Emphasis supplied.)

Petitioner likewise invokes *Marcelo v. Court of Appeals*<sup>[7]</sup> where this Court declared: