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[G. R. NO. 160188, June 21, 2007]

ARISTOTEL VALENZUELA Y NATIVIDAD, PETITIONER, VS. PEOPLE OF THE PHILIPPINES AND HON. COURT OF APPEALS, RESPONDENTS.

D E C I S I O N

TINGA, J.:

This case aims for prime space in the firmament of our criminal law jurisprudence. Petitioner effectively concedes having performed the felonious acts imputed against him, but instead insists that as a result, he should be adjudged guilty of frustrated theft only, not the felony in its consummated stage of which he was convicted. The proposition rests on a common theory expounded in two well-known decisions[1] rendered decades ago by the Court of Appeals, upholding the existence of frustrated theft of which the accused in both cases were found guilty. However, the rationale behind the rulings has never been affirmed by this Court.

As far as can be told,[2] the last time this Court extensively considered whether an accused was guilty of frustrated or consummated theft was in 1918, in *People v. Adiao.*[3] A more cursory treatment of the question was followed in 1929, in *People v. Sobrevilla,*[4] and in 1984, in *Empelis v. IAC*.[5] This petition now gives occasion for us to finally and fully measure if or how frustrated theft is susceptible to commission under the Revised Penal Code.

I.

The basic facts are no longer disputed before us. The case stems from an Information[6] charging petitioner Aristotel Valenzuela (petitioner) and Jovy Calderon (Calderon) with the crime of theft. On 19 May 1994, at around 4:30 p.m., petitioner and Calderon were sighted outside the Super Sale Club, a supermarket within the ShoeMart (SM) complex along North EDSA, by Lorenzo Lago (Lago), a security guard who was then manning his post at the open parking area of the supermarket. Lago saw petitioner, who was wearing an identification card with the mark "Receiving Dispatching Unit (RDU)," hauling a push cart with cases of detergent of the well-known *"Tide"* brand. Petitioner unloaded these cases in an open parking space, where Calderon was waiting. Petitioner then returned inside the supermarket, and after five (5) minutes, emerged with more cartons of *Tide Ultramatic* and again unloaded these boxes to the same area in the open parking space.[7]

Thereafter, petitioner left the parking area and haled a taxi. He boarded the cab and directed it towards the parking space where Calderon was waiting. Calderon loaded the cartons of *Tide Ultramatic* inside the taxi, then boarded the vehicle. All these

acts were eyed by Lago, who proceeded to stop the taxi as it was leaving the open parking area. When Lago asked petitioner for a receipt of the merchandise, petitioner and Calderon reacted by fleeing on foot, but Lago fired a warning shot to alert his fellow security guards of the incident. Petitioner and Calderon were apprehended at the scene, and the stolen merchandise recovered.[8] The filched items seized from the duo were four (4) cases of *Tide Ultramatic*, one (1) case of *Ultra* 25 grams, and three (3) additional cases of detergent, the goods with an aggregate value of P12,090.00.[9]

Petitioner and Calderon were first brought to the SM security office before they were transferred on the same day to the Baler Station II of the Philippine National Police, Quezon City, for investigation. It appears from the police investigation records that apart from petitioner and Calderon, four (4) other persons were apprehended by the security guards at the scene and delivered to police custody at the Baler PNP Station in connection with the incident. However, after the matter was referred to the Office of the Quezon City Prosecutor, only petitioner and Calderon were charged with theft by the Assistant City Prosecutor, in Informations prepared on 20 May 1994, the day after the incident.[10]

After pleading not guilty on arraignment, at the trial, petitioner and Calderon both claimed having been innocent bystanders within the vicinity of the Super Sale Club on the afternoon of 19 May 1994 when they were haled by Lago and his fellow security guards after a commotion and brought to the Baler PNP Station. Calderon alleged that on the afternoon of the incident, he was at the Super Sale Club to withdraw from his ATM account, accompanied by his neighbor, Leoncio Rosulada.[11] As the queue for the ATM was long, Calderon and Rosulada decided to buy snacks inside the supermarket. It was while they were eating that they heard the gunshot fired by Lago, leading them to head out of the building to check what was transpiring. As they were outside, they were suddenly "grabbed" by a security guard, thus commencing their detention.[12] Meanwhile, petitioner testified during trial that he and his cousin, a Gregorio Valenzuela,[13] had been at the parking lot, walking beside the nearby BLISS complex and headed to ride a tricycle going to Pag-asa, when they saw the security guard Lago fire a shot. The gunshot caused him and the other people at the scene to start running, at which point he was apprehended by Lago and brought to the security office. Petitioner claimed he was detained at the security office until around 9:00 p.m., at which time he and the others were brought to the Baler Police Station. At the station, petitioner denied having stolen the cartons of detergent, but he was detained overnight, and eventually brought to the prosecutor's office where he was charged with theft.[14] During petitioner's cross-examination, he admitted that he had been employed as a "bundler" of GMS Marketing, "assigned at the supermarket" though not at SM.[15]

In a Decision[16] promulgated on 1 February 2000, the Regional Trial Court (RTC) of Quezon City, Branch 90, convicted both petitioner and Calderon of the crime of consummated theft. They were sentenced to an indeterminate prison term of two (2) years of *prision correccional* as minimum to seven (7) years of *prision mayor* as maximum.[17] The RTC found credible the testimonies of the prosecution witnesses and established the convictions on the positive identification of the accused as perpetrators of the crime.

Both accused filed their respective Notices of Appeal,[18] but only petitioner filed a brief[19] with the Court of Appeals, causing the appellate court to deem Calderon's appeal as abandoned and consequently dismissed. Before the Court of Appeals, petitioner argued that he should only be convicted of frustrated theft since at the time he was apprehended, he was never placed in a position to freely dispose of the articles stolen.[20] However, in its Decision dated 19 June 2003,[21] the Court of Appeals rejected this contention and affirmed petitioner's conviction.[22] Hence the present Petition for Review,[23] which expressly seeks that petitioner's conviction "be modified to only of Frustrated Theft."[24]

Even in his appeal before the Court of Appeals, petitioner effectively conceded both his felonious intent and his actual participation in the theft of several cases of detergent with a total value of P12,090.00 of which he was charged.[25] As such, there is no cause for the Court to consider a factual scenario other than that presented by the prosecution, as affirmed by the RTC and the Court of Appeals. The only question to consider is whether under the given facts, the theft should be deemed as consummated or merely frustrated.

II.

In arguing that he should only be convicted of frustrated theft, petitioner cites[26] two decisions rendered many years ago by the Court of Appeals: *People v. Diño*[27] and *People v. Flores.*[28] Both decisions elicit the interest of this Court, as they modified trial court convictions from consummated to frustrated theft and involve a factual milieu that bears similarity to the present case. Petitioner invoked the same rulings in his appeal to the Court of Appeals, yet the appellate court did not expressly consider the import of the rulings when it affirmed the conviction.

It is not necessary to fault the Court of Appeals for giving short shrift to the *Diño* and *Flores* rulings since they have not yet been expressly adopted as precedents by this Court. For whatever reasons, the occasion to define or debunk the crime of frustrated theft has not come to pass before us. Yet despite the silence on our part, *Diño* and *Flores* have attained a level of renown reached by very few other appellate court rulings. They are comprehensively discussed in the most popular of our criminal law annotations,[29] and studied in criminal law classes as textbook examples of frustrated crimes or even as definitive of frustrated theft.

More critically, the factual milieu in those cases is hardly akin to the fanciful scenarios that populate criminal law exams more than they actually occur in real life. Indeed, if we finally say that *Diño* and *Flores* are doctrinal, such conclusion could profoundly influence a multitude of routine theft prosecutions, including commonplace shoplifting. Any scenario that involves the thief having to exit with the stolen property through a supervised egress, such as a supermarket checkout counter or a parking area pay booth, may easily call for the application of *Diño* and *Flores*. The fact that lower courts have not hesitated to lay down convictions for frustrated theft further validates that *Diño* and *Flores* and the theories offered therein on frustrated theft have borne some weight in our jurisprudential system. The time is thus ripe for us to examine whether those theories are correct and should continue to influence prosecutors and judges in the future.

III.

To delve into any extended analysis of *Diño* and *Flores,* as well as the specific issues relative to "frustrated theft," it is necessary to first refer to the basic rules on the three stages of crimes under our Revised Penal Code.[30]

Article 6 defines those three stages, namely the consummated, frustrated and attempted felonies. A felony is consummated "when all the elements necessary for its execution and accomplishment are present." It is frustrated "when the offender performs all the acts of execution which would produce the felony as a consequence but which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator." Finally, it is attempted "when the offender commences the commission of a felony directly by overt acts, and does not perform all the acts of execution which should produce the felony by reason of some cause or accident other than his own spontaneous desistance."

Each felony under the Revised Penal Code has a "subjective phase," or that portion of the acts constituting the crime included between the act which begins the commission of the crime and the last act performed by the offender which, with prior acts, should result in the consummated crime.[31] After that point has been breached, the subjective phase ends and the objective phase begins.[32] It has been held that if the offender never passes the subjective phase of the offense, the crime is merely attempted.[33] On the other hand, the subjective phase is completely passed in case of frustrated crimes, for in such instances, "[s]ubjectively the crime is complete."[34]

Truly, an easy distinction lies between consummated and frustrated felonies on one hand, and attempted felonies on the other. So long as the offender fails to complete all the acts of execution despite commencing the commission of a felony, the crime is undoubtedly in the attempted stage. Since the specific acts of execution that define each crime under the Revised Penal Code are generally enumerated in the code itself, the task of ascertaining whether a crime is attempted only would need to compare the acts actually performed by the accused as against the acts that constitute the felony under the Revised Penal Code.

In contrast, the determination of whether a crime is frustrated or consummated necessitates an initial concession that all of the acts of execution have been performed by the offender. The critical distinction instead is whether the felony itself was actually produced by the acts of execution. The determination of whether the felony was "produced" after all the acts of execution had been performed hinges on the particular statutory definition of the felony. It is the statutory definition that generally furnishes the elements of each crime under the Revised Penal Code, while the elements in turn unravel the particular requisite acts of execution and accompanying criminal intent.

The long-standing Latin maxim *"actus non facit reum, nisi mens sit rea"* supplies an important characteristic of a crime, that "ordinarily, evil intent must unite with an unlawful act for there to be a crime," and accordingly, there can be no crime when the criminal mind is wanting.[35] Accepted in this jurisdiction as material in crimes *mala in se*,[36] *mens rea* has been defined before as "a guilty mind, a guilty or

wrongful purpose or criminal intent,"[37] and "essential for criminal liability."[38] It follows that the statutory definition of our *mala in se* crimes must be able to supply what the *mens rea* of the crime is, and indeed the U.S. Supreme Court has comfortably held that "a criminal law that contains no *mens rea* requirement infringes on constitutionally protected rights."[39] The criminal statute must also provide for the overt acts that constitute the crime. For a crime to exist in our legal law, it is not enough that *mens rea* be shown; there must also be an *actus reus*.[40]

It is from the *actus reus* and the *mens rea*, as they find expression in the criminal statute, that the felony is produced. As a postulate in the craftsmanship of constitutionally sound laws, it is extremely preferable that the language of the law expressly provide when the felony is produced. Without such provision, disputes would inevitably ensue on the elemental question whether or not a crime was committed, thereby presaging the undesirable and legally dubious set-up under which the judiciary is assigned the legislative role of defining crimes. Fortunately, our Revised Penal Code does not suffer from such infirmity. From the statutory definition of any felony, a decisive passage or term is embedded which attests when the felony is produced by the acts of execution. For example, the statutory definition of murder or homicide expressly uses the phrase "shall kill another," thus making it clear that the felony is produced by the death of the victim, and conversely, it is not produced if the victim survives.

We next turn to the statutory definition of theft. Under Article 308 of the Revised Penal Code, its elements are spelled out as follows:

> Art. 308. *Who are liable for theft.–;* Theft is committed by any person who, with intent to gain but without violence against or intimidation of persons nor force upon things, shall take personal property of another without the latter's consent.
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> Theft is likewise committed by:
>
> 1. Any person who, having found lost property, shall fail to deliver the same to the local authorities or to its owner;
>
> 2. Any person who, after having maliciously damaged the property of another, shall remove or make use of the fruits or object of the damage caused by him; and
>
> 3. Any person who shall enter an inclosed estate or a field where trespass is forbidden or which belongs to another and without the consent of its owner, shall hunt or fish upon the same or shall gather cereals, or other forest or farm products.

Article 308 provides for a general definition of theft, and three alternative and highly idiosyncratic means by which theft may be committed.[41] In the present discussion, we need to concern ourselves only with the general definition since it was under it that the prosecution of the accused was undertaken and sustained. On the face of the definition, there is only one operative act of execution by the actor involved in theft â”€ the taking of personal property of another. It is also clear from the provision that in order that such taking may be qualified as theft, there must further be present the descriptive circumstances that the taking was with intent to gain;