

## SECOND DIVISION

[ A.M. No. MTJ-97-1128, April 22, 1998 ]

**FLORENTINO C. BAGUNAS, COMPLAINANT, VS. ACTG. JUDGE  
CONCORDIO L. FABILLAR, RESPONDENT.**

### D E C I S I O N

**PUNO, J.:**

Before us is a verified complaint filed by Florentino C. Bagunas, dated February 27, 1997 charging Acting Judge Concordio L. Fabillar<sup>[1]</sup> with Gross Ignorance of the Law and Grave Abuse of Discretion in finding probable cause in Criminal Case No. 1238 entitled "People of the Philippines v. Florentino Bagunas @ "Tinong" for Illegal Possession of Firearms.

On May 17, 1995, a demand letter was sent by SPO2 Aquilino A. Fabillar of the Giporlos Municipal Police Station, Eastern Samar to complainant Bagunas, to wit:

"S i r:

This has reference with (sic) your signed Memorandum Receipt dated 07 October 1989 in connection with your borrowed caliber .38 (Smith & Wesson) revolver during your term as Municipal Mayor of Giporlos, Eastern Samar.

As accountable officer of this Station, we have your (sic) honor to request your cooperation to turn-over to this office the aforecited firearm for it is very much needed for accounting of firearm nationwide.

In relation above, may we request to hear your side within seventy two (72) hours upon receipt thereof.

Your utmost cooperation on this matter is highly appreciated. I am (sic)

Very truly yours,

(Sgd.) AQUILINO A. FABILLAR

SPO2 PNP

Chief Invest/Supply NCPO."<sup>[2]</sup>

In a letter dated June 7, 1995, Bagunas informed SPO2 Fabillar that the firearm had already been returned, viz.:

"x x x

"S i r:

In connection with your request for turn-over of the .38 Caliber Revolver (Smith & Wesson) personally owned by Col. Alzate, the then Provincial Commander of

Eastern Samar, which revolver he lent me for my protection during my term as the Mayor of Giporlos and for which a memorandum receipt was caused to be prepared by Col. Alzate in your office, I have the honor to inform you that said revolver have (sic) already been taken from my possession sometimes (sic) in the year 1989 or 1990 by two (2) Confidants (sic) of Col. Alzate, one of whom was (sic) a relative of said Col. Alzate, who came to me one afternoon at about 4:30 P. M. and who alleged (sic) that they were ordered by Col. Alzate to get the same revolver from me. I was asking a receipt from said soldiers, but because they were in a hurry to proceed to Lawaan for another mission, so they only promised me to give me a receipt upon their return from Lawaan for they might be nighted (sic). Due to my confidence and trust of the other person who was (sic) said to be the relative of Col. Alzate and because Col. Alzate was my friend, I gave said revolver to them, with my expectation and hope that they will give me the receipt for such revolver upon their return from Lawaan, but until the following day, said two soldiers did not pass anymore by me (sic) in Giporlos.

So, I went to the office of the Chief of Police in Giporlos, informed Rafael Valdemoro, who was then the Chief of Police that time (sic) about the matter and requested him to make the incident that took place appear in his police blotter.<sup>[3]</sup>

X X X

For your information, said Col. Alzate was the sole property owner of said revolver and not the Municipal Government of Giporlos nor of the Provincial Government of Eastern Samar or of the National Government, which information about said firearm was narrated to me by said Col. Alzate before he lend me such arm, and so, you will not be accountable for such property which was not turned to you for responsibility and/or accountability.

X X X.

Very truly yours,

(Sgd.) Florentino C. Bagunas."<sup>[4]</sup>

In spite of said explanation, a complaint signed by SPO2 Sofronio Barsania, the Acting Chief of Police of Giporlos Municipal Police Station, was filed on July 31, 1995 charging Bagunas with illegal possession of firearm, to wit:

"That sometimes (sic) on October 7, 1989, the accused FLORENTINO C. BAGUNAS @ 'Tinong', a resident of Brgy. No. 2, Poblacion Giporlos, Eastern Samar, a former Municipal Mayor of Giporlos, Eastern Samar, within the preliminary jurisdiction of this Honorable Court the abovenamed accused failed to returned (sic) his receipted short firearm Smith and Wesson .38 caliber revolver bearing serial number C14647 from the office of Giporlos police station in spite of the verbal and written demand letter made by SPO2 Aquilino A. Fabillar PNP the supply NCPO of the said station to returned (sic) the said firearm, did there and then the (sic) willfully, unlawfully and criminally kept in his possession and control of the said firearm without proper documents and functional (sic) in Violation (sic) of PD 1866 (ILLEGAL POSSESSION OF FIREARM)."<sup>[5]</sup>

On August 1, 1995, respondent judge Concordio Fabillar, conducted a preliminary investigation during which Atty. Francisco Mirales, counsel of Bagunas, manifested that his client has not received a subpoena and copies of the affidavits of complainant's

witnesses. Respondent judge explained that he was just conducting the "first phase" of the preliminary investigation, hence Bagunas was not yet entitled to a subpoena as well as to copies of the affidavits. According to respondent judge, the first phase of the investigation is intended to determine whether the complaint is meritorious and it is only after finding such merit will the court issue a subpoena. Although Atty. Mirales informed the respondent judge that a preliminary investigation has only one stage, he deferred to judge Fabillar's decision to continue with the so-called "first phase" of the preliminary investigation.<sup>[6]</sup> Thus, the investigation proceeded, with respondent judge commenting:

"x x x.

"COURT:

Now, go back to my first impression of the case, I was asking the Chief of Police if there is a way where we can avoid this case. To make it simpler (sic), to settle in this case without asking concurrence delima (sic). Be it remembered that the respondent in this case is an Ex-mayor of the municipality of Giporlos, a friend of the presiding judge and he is a relative. It is not easy to endure the rigors of setting the case where one is friend of the court. I hope I can share with this period (sic) to some people whom you know well, but that is the game (sic) the wish be grant (sic) and according to the Supreme Court it is mandated that we should follow the law (sic)."<sup>[7]</sup>

After the so-called "first phase" of the investigation, where complainant's witnesses were simply asked whether they prepared their respective affidavits, respondent judge issued an order, to wit:

"Pursuant to paragraph (a) of Section 3, Rule 112 of the New Rules of Court, the court scrutinized the complaint as well as the supporting affidavits and documents. It is found that the complaint as supported by the affidavits and other documents is impressed with merits.

It is therefore ordered that copies of the complaint and supporting affidavits be furnish (sic) the respondent Florentino C. Bagunas requiring him to file his counter affidavit within a period of ten (10) days from receipt thereof, if he so desire, after which this case will be set for the final phase of the preliminary investigation which date must take place on August 14, 1995 at 8:30 o'clock in the morning. x x x." (Underscoring supplied)<sup>[8]</sup>

On August 9, 1995, Bagunas, through counsel, filed his counter-affidavit and the affidavits of his witnesses. He also filed an Urgent Motion for Inhibition and for the Forwarding of the Case to the Provincial Prosecutor for preliminary investigation.<sup>[9]</sup>

In an Order dated August 9, 1995, respondent judge denied the Motion holding that although he is a "friend" of Bagunas and a distant relative of prosecution witness SPO2 Aquilino Fabillar, under Rule 137, he is not mandatorily required to inhibit himself from conducting the preliminary investigation. He also denied Bagunas' request to forward the case to the Office of the Provincial Prosecutor.<sup>[10]</sup>

On August 14, 1995, respondent judge issued an order<sup>[11]</sup> finding probable cause against Bagunas. He forthwith issued a warrant of arrest against Bagunas.

On August 24, 1995, Bagunas, through counsel, filed a Motion to Transmit Resolution/Records of the Case to the Provincial Prosecutor, alleging that:

"x x x.

"2. On August 17, 1995 at about 10:00 A.M., undersigned counsel requested the Clerk of Court of this Court to show him the records of this case for him to examine all other evidence submitted by the complainant, if any, pursuant to paragraph (b) of P.D. No. 911, in relation to paragraph (b), Section 3, Rule 112 of the New Rules on Criminal Procedure, but he was informed that the case folder was brought home by the Honorable Presiding Judge, hence the same could not be available for examination;

3. Respondent is intending to file a motion for reinvestigation of this Case before the Provincial Prosecutor's Office, however, the resolution together with the entire records of this case is, up to this time, with the custody of this court;

x x x."<sup>[12]</sup>

Respondent Judge denied said Motion stating:

"x x x.

"It must be emphasized that the records of this case can only be elevated to the Office of the Provincial Prosecutor for his proper action, upon the termination of the preliminary investigation in conformity with the provisions of the aforesaid section thus cited. But the preliminary investigation could not be terminated because although the court has already made clarificatory questions upon some witnesses of the case during which the accused deliberately failed to appear despite due notice, pursuant to the provisions of Paragraph (e) of Section (sic) of the same rule, and thus has found the existence of a probable cause, pursuant to the mandate of Paragraph (b) of Section 6, also of the same rule, the accused has not been placed under the jurisdiction of this court and remains at large despite the issuance of a warrant for his apprehension, the Preliminary Investigation therefore cannot be terminated and as a consequence thereof, cannot be elevated to the proper forum of competency.

The court is ready with its resolution of the result of the Preliminary Investigation, but as above intimated, it cannot elevate the records hereof as the accused had not been arrest (sic) nor surrendered to the court or any proper authority. Before then, the preliminary investigation cannot be terminated and the records cannot be elevated.

SO ORDERED."<sup>[13]</sup>

On September 8, 1995, Bagunas, through counsel, filed a Motion for Reinvestigation with the Department of Justice where he raised the following grounds:

"1. THE PRESIDING JUDGE HAS COMMITTED GRAVE AND PATENT ABUSE OF DISCRETION IN NOT FORWARDING THE RECORDS OF THIS CASE TO THE PROVINCIAL PROSECUTOR AND IN THE PRECIPITATE ISSUANCE OF THE WARRANT OF ARREST AGAINST THE RESPONDENT.

2. THE INVESTIGATION CONDUCTED BY THE PRESIDING JUDGE WAS TAINTED WITH PATENT AND GROSS IRREGULARITIES AND NOT IN

ACCORDANCE WITH SECTION 37 OF BATAS PAMBANSA BILANG 129 IN RELATION TO PD 911, AS SUBSTANTIALLY REPRODUCED IN SECTION 3, RULE 112 OF THE NEW RULES ON CRIMINAL PROCEDURE.

3. THE FACTS ALLEGED IN THE COMPLAINT DO NOT CONSTITUTE THE OFFENSE OF ILLEGAL POSSESSION OF FIREARM."<sup>[14]</sup>

On September 15, 1995, Bagunas surrendered to respondent judge and posted a bond for his temporary release.

On September 18, 1995, respondent judge issued another Resolution finding probable cause exists to continue with Criminal Case No. 1238 for Illegal Possession of Firearm against Bagunas.<sup>[15]</sup>

On January 15, 1996, Asst. Provincial Prosecutor Fred O. Japzon, submitted his Reinvestigation Report finding that:

"x x x there is no gun recovered from the respondent, the charge is based only on a Memorandum Receipt, the corpus delicti, the gun, which is the body of the crime was not recovered, so, there is no prima facie case in this instant case that can prosper in filing an information.

That the return of the gun in question a short firearm Smith and Wesson .38 caliber revolver to the two (2) soldiers on September 12, 1990 was witnessed by PO3 Victor Leona, PNP, Giporlos and Sangguniang Bayan Juan Albutra, and was recorded in the next day September 13, 1990 in the Police Blotter, Annex "A", for the defense which the undersigned believed to be truthful and recorded properly.

That the demand letter of SPO3 Aquilino Fabillar dated May 17, 1995 happened only after there was a case filed against prosecution witness Angel Dacuno in the Ombudsman Visayas, and five (5) years after it was recorded in the police blotter on September 13, 1990, that the said firearm was already returned to two (2) soldiers sent by Lt. Col. Alzate.

That the prosecution witness Angel C. Dacuno, is bias (sic) because he became a witness to this case after respondent filed against him nine (9) criminal cases in the Ombudsman, prosecution witness Maximo C. Fabillar is also biased because he is a relative of the incumbent Mayor Rodito Fabillar, who had an election protest filed against him by respondent.

#### C o n c l u s i o n -

In view of the foregoing reasons, let this case of Illegal Possession of Firearms against Florentino C. Bagunas, alias Tinong, be dismissed, as it is hereby ordered DISMISSED."<sup>[16]</sup>

Hence, this administrative complaint before us where Bagunas alleges that respondent judge exhibited gross ignorance of the law and abused his discretion when he: (1) refused to inhibit himself from conducting the preliminary investigation; (2) failed to dismiss Criminal Case No. 1238 for lack of probable cause; and (3) precipitately issued a warrant of arrest.

After investigation, the Court Administrator found that the complaint is meritorious.

We agree.