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FIRST DIVISION

[G.R. No. L-45364. August 6, 1979]

PEOPLE OF THE PHILIPPINES and NICOLAS P. SONALAN, *petitioners, vs.* **THE HONORABLE COURT OF APPEALS, HONORABLE MIDPANTAO ADIL, Judge of the Court of First Instance of Iloilo, and ANTONIO CALANZA,** *respondents.*

SYLLABUS

1. **REMEDIAL LAW; CRIMINAL PROCEDURE; APPEAL; ROLE OF THE SOLICITOR GENERAL IN CASE OF APPEAL.**— There should be no question that in a criminal case, when a Decision or Resolution of the Court of Appeals becomes appealable to this Court by the People, it is the Solicitor General who represents the State.

2. **ID.; ID.; NEW TRIAL; THE RULE THAT AN ORDER GRANTING OR DENYING NEW TRIAL IS AN INTERLOCUTORY ORDER *AND CANNOT BE THE SUBJECT OF APPEAL OR A* SPECIAL CIVIL ACTION DOES NOT APPLY IN A CRIMINAL CASE.**— Neither can it be successfully argued that an Order granting or denying new trial is an interlocutory order and cannot be the subject of appeal or of a special civil action. As enunciated in *People vs. Bocar, et al.*, that rule does not apply in a criminal case because in deciding the case anew the trial Court may acquit the defendant and thereafter "the prosecution would have no more opportunity of bringing before the appellate Court the question of the legality or illegality of the order granting a new trial because the defendant acquitted may plead double jeopardy."

3. **ID.; SPECIAL CIVIL ACTIONS; *CERTIORARI* WITH PRELIMINARY INJUNCTION; THE REMEDY OF *CERTIORARI* CANNOT BE USED AS A SUBSTITUTE FOR APPEAL.**— No action having been seasonably taken to seek reconsideration, nor review by a higher Court, before the finality of said Resolution, it has to be held that appeal therefrom has been foreclosed and the present Petitions for *Certiorari*, may not be utilized to obtain review of that Resolution after the time

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of appeal has elapsed. The remedy of *Certiorari* cannot be used as a substitute for appeal. Respondent appellate Court, having acted within its jurisdiction when it issued the Resolution in question, the same cannot be corrected by *Certiorari* but is more properly the subject of appeal.

APPEARANCES OF COUNSEL

Demasu-ay Dolar Sonalan & Sonalan for private petitioner.
Edelmiro A. Amante for private respondent.

D E C I S I O N

MELENCIO-HERRERA, *J.*:

In this Petition for *Certiorari* with Preliminary Injunction, petitioners seek the annulment of the Court of Appeals' Resolution,[1] promulgated on November 19, 1976, granting respondent Antonio Calanza's Motion for New Trial in CA-G.R. No. 19694 entitled "*People vs. Antonio Calanza,*" for *Homicide and Frustrated Homicide*. The Petition also seeks to enjoin respondent Judge Hon. Midpantao Adil of the Court of First Instance of Iloilo, Branch II, to whose Court the records of the case were remanded, from continuing with the new trial proceedings.

The records show that private respondent, Antonio Calanza, was charged on April 22, 1970 with the crime of Homicide and Frustrated Homicide before the Court of First Instance of Iloilo, Branch II. The victim who was shot and killed on April 17, 1970 at the balcony of the Cinema Theatre, Iloilo City, was Ponciano Sonalan, brother of private petitioner and private prosecutor in the Court below, Atty. Nicolas P. Sonalan. Also hurt and wounded in the same incident was one Virginia Sarrol.

On November 10, 1975, the trial Court convicted Calanza in a Decision which dispositively and partly provided:

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[1] Penned by Justice Emilio Gancayco. and concurred in by Justices Mama D. Busran and Samuel F. Reyes.

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"WHEREFORE, premises considered, the Court hereby finds the accused Antonio Calanza guilty beyond reasonable doubt of the complex crime of homicide with frustrated homicide and hereby sentences him to an indeterminate penalty ranging from TWELVE (12) YEARS of *Prision Mayor* Maximum as its minimum to TWENTY (20) YEARS *Reclusion Temporal* Maximum as its maximum, together with all the accessory penalties provided for by law and to pay the costs.

"Further, the accused is ordered to indemnify the heirs of the late Ponciano Sonalan: Twelve Thousand (₱12,000) Pesos as death compensation: x x x"[2]

In arriving at the judgment of conviction, respondent Judge gave full credence to the positive identification of the accused Calanza by Elizabeth Soliven, the deceased's companion, and former paramour of Calanza, and by another eyewitness, David Sustento, and it rejected the defense of alibi proferred by Calanza and his witnesses. The prosecution did not present as a witness Ofelia Ticzon, who was Elizabeth Soliven's companion at the time of the incident.

Briefly, Elizabeth's testimony was to the effect that when they were leaving the theatre, Calanza, accosted them at the aisle, held Elizabeth's hand, and when the deceased inquired for the reason, Calanza struck him with a revolver and ultimately shot him (deceased) as the latter was trying to stand, hitting him near the ear.

Dissatisfied with the trial Court judgment, Calanza appealed to respondent Court of Appeals.

On August 13, 1976, before filing his Brief, Calanza filed a Motion for New Trial on the following grounds:

"I

"NEW and material evidence consisting of an Affidavit by Ofelia Ticzon, Annex "1", attesting, *inter alia*, that accused-appellant Antonio Calanza (hereinafter called APPELLANT) was not the gun-wielder who fired the fatal shot that killed Ponciano Sonalan, for which

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[2] p. 58, CA *Rollo*.

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APPELLANT was convicted, and which evidence APPELLANT could not with reasonable diligence have discovered and produced at the trial, and which if introduced and admitted, would probably change the judgment; and

II

"ERRORS of law or irregularities have been committed during the trial prejudicial to the substantial rights of the APPELLANT."[3]

The Affidavit of Ofelia Ticzon, sought to be admitted and introduced, reads as follows:

"I, Ofelia Ticzon, of legal age, widow, Filipino and a resident of Gen. Hughes St., Iloilo City after having been duly sworn to in accordance with law depose and say:

"That I have been employed as clerk with the Lopez Vito Law Office at Iloilo City, Philippines, since 1957 to the present;

"That I personally know Mr. Antonio Calanza to be a businessman for more than ten (10) years before April 17, 1970 because we often met in the law office when he has some legal consultations and notarization to be done, thus I know him very well;

"That prior to the year 1970, Elizabeth Soliven worked as clerk in the same law office where I was working;

"That on April 17, 1970, after office hours, Elizabeth Soliven and I went out of office together to see a movie at Cinema Theatre, Iloilo City;

"That we were watching the movie at the balcony when a certain Ponciano Sonalan arrived and sat on my extreme right seat next to Elizabeth Soliven and that thereafter, a man whom I do not know suddenly appeared standing facing in front of us that his position naturally obstructed the view of Elizabeth Soliven;

"That on that position, Ponciano Sonalan uttered words in an angry manner and stood up and they immediately grappled with each other;

"That while they were grappling I heard a burst of gunfire and when Ponciano Sonalan was taken aback and fell on the floor and that man fled;

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[3] p. 63, *ibid.*

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"That I was able to see the face of that man before, during and after the grappling because of the bulb dim lights at every step of the stairways so much so that if I could see that man again, I might be able to recognize him; but I am sure that the man is not Antonio Calanza;

"That after the incident when the police authorities were investigating an unidentified person accosted me by threatening that if ever I will testify in Court for the accused, the members of my family and I will be liquidated which threat were many times carried over thru telephone calls;

"That it was only when I learned that Antonio Calanza was convicted that I decided to come out in the open and execute this affidavit because my conscience cannot keep me at peace that a man who was not the assailant of Ponciano Sonalan will go to jail for a crime he did not commit because of my failure to testify.

"IN WITNESS WHEREOF, I have hereunto affixed my signature this 29th day of May, 1976 in the City of Iloilo, Philippines.

(SGD) OFELIA TICZON
Affiant"

The errors of law or irregularities claimed by Calanza to have been committed by the trial Court refer to its having given credence to the testimony of Elizabeth Soliven, an allegedly scorned paramour of Calanza, and to the so-called fabricated testimony of David Sustento, specially considering that respondent Judge did not himself hear the evidence and was unable to observe their demeanor on the stand.

Required by the appellate Court to file a Comment on the Motion for New Trial, the Solicitor General averred that the Affidavit of Ofelia Ticzon aims merely to impeach the testimonies of Elizabeth Soliven and David Sustento, and the settled rule is that "evidence which merely seeks to impeach the evidence upon which conviction was based would not constitute a ground for new trial;"[4] that even if the testimony of Ofelia Ticzon were to be introduced or admitted, the same would not probably

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[4] *People vs. Curiano*, L-15256-57, Oct. 31, 1963, and others.

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alter the decision as it comes from a person "whose credibility is subject to suspicion having maintained her silence for an incredibly long period of six (6) years; that if threats on her life were really made, it is surprising that Ofelia did not report them to the authorities; and finally, the record does not show that diligent efforts were exerted to produce said witness or even to secure her appearance by compulsory process.

In private respondent's Reply to Comment he maintains that Ofelia's Affidavit is not merely to impeach but is of independent probative value showing as it does a state of facts different from that presented by prosecution witnesses, Elizabeth Soliven and David Sustento, and which would probably alter the judgment appealed from; that despite diligent search, Ofelia Ticzon could not be traced as she went into hiding for fear of her life and that of her family; that "in the highest interest of justice" she must be heard, and the question of her credibility left to the discretion of the trial Court.

On September 28, 1976, respondent appellate Court promulgated a Resolution quoted hereunder:

"Before Us is a motion for new trial on the ground of newly discovered evidence to which the Solicitor General filed an opposition stating that the proposed testimony of Ofelia Ticzon is not newly discovered evidence and that it merely tend to impeach or discredit prosecution witnesses.

"Considering that the motion can only be properly and adequately determined after all the transcripts of the proceedings are on hand and the briefs duly filed, let the resolution thereof be held in abeyance and the motion be referred to the division to which the case may ultimately be raffled for decision."

To the aforequoted Resolution, Calanza filed a Motion for Reconsideration contending that there is no necessity for submission of Briefs to resolve the Motion for New Trial based on new evidence of independent probative value and showing facts different from what prosecution witnesses presented. Respondent also sought a liberal interpretation of the legal provisions on new trial.

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Acting thereon, on November 19, 1976, respondent Court of Appeals set aside its previous Resolution and allowed new trial in this wise:

"It is not denied and in fact it was submitted by the prosecution, more particularly Elizabeth Soliven, "the star witness" for the prosecution that on April 17, 1970 at 5:30 p.m., she was with Ofelia Ticzon inside the Cinema Theatre at Plazoleta Gay, Iloilo City, watching the movie "John and Mary" when the shooting incident happened. It is apparent therefore, that Elizabeth Soliven and Ofelia Ticzon are the possible witnesses to the shooting incident in question. However, it appears, as sufficiently established by appellant that Ofelia Ticzon could not be located to testify during the trial despite reasonable diligence to that effect because she went into hiding due to threats on her life and that of her family from an unidentified person.

"While it is true that the new trial will not be granted upon ground of newly discovered evidence when it appears that such new evidence can have no other effect than to contradict the testimony of a witness at the original trial, we believe however, that the materiality of the evidence sought to be presented for the defense may probably give the appellant a chance to gain an acquittal, and if he is not given that chance to adduce the same in court, his conviction stands.

"A case in point is CA-G.R. No. 17088-CR, *People vs. Morando.* Without waiting for the records of the case to be forwarded to the Court of Appeals, this Court outrightly resolved to remand the case for new trial in a resolution dated 16 April 1976.

"Thus, in the interest of justice, our Resolution of September 28, 1976 is SET ASIDE and appellant's motion for New Trial is hereby granted."

Copies of the Resolution were served on counsel for private respondent on November 22, 1976 and on the Solicitor General on November 23, 1976, but not on the private prosecutor, petitioner Sonalan, nor on the City Fiscal of Iloilo.[5] The latter two-mentioned came to know of the aforesaid Resolution only when they received copies of the Entry of Judgment thereof on January 3 and 4, 1977, respectively, accompanied by copy of a letter of transmittal

[5] p. 113, CA *Rollo.*

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of the records from the Court of Appeals to the Court below. On December 9, 1976, the aforequoted Resolution became final and executory.[6] Private respondent then filed before the trial Court an Urgent Motion to Set the Case for Hearing originally on January 18, 1977, and subsequently advanced to January 12 and 13, 1977.

The lower Court, presided by respondent Judge, and over the objection of private petitioner, conducted hearings on the said dates wherein Ofelia Ticzon testified and was cross-examined. The continuation of new trial was set for January 24, 1977 for the presentation of rebuttal evidence but was cancelled due to the Restraining Order issued by this Court.

In the meantime, on January 11, 1977, private petitioner, Atty. Nicolas P. Sonalan, filed with this Court this special civil action for *Certiorari* with Preliminary Injunction with a request for permission to file the same without prior conformity of the Solicitor General or of the City Fiscal of Iloilo on the ground that said officials respectively believed that the other should file the same[7] and there was not much material time left for him to secure said conformity. On January 18, 1977, the City Fiscal of Iloilo also filed a separate Petition for *Certiorari* with Preliminary Injunction after then Chief State Prosecutor Rodolfo A. Nocon (now a Court of Appeals Associate Justice) called attention "to the view expressed by Solicitor Farolan that the conformity of the Solicitor General's Office is not proper owing to the fact that the case has been remanded for new trial to the Iloilo CFI in view of which, he believes that the proper party to file the petition for *certiorari* should be the City Fiscal of Iloilo City who represented the State in the trial court."[8]

On January 19, 1977, this Court resolved to consolidate the two Petitions. In the same Resolution and without giving due course thereto, we required the Solicitor General and the private

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[6] p. 87, *ibid.*

[7] p. 2, *Rollo.*

[8] p. 105, *ibid.*

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respondent to submit their Comment. We likewise ordered the issuance of a Restraining Order enjoining respondent Judge from proceeding with the new trial.[9]

On March 30, 1977, this Court resolved to give due course to the consolidated Petitions and required the parties to submit their respective Memoranda in lieu of Briefs.[10]

On July 18, 1977, we considered the case submitted for decision.[11]

The principal issue to resolve is whether or not respondent appellate Court acted with grave abuse of discretion in granting the Motion for New Trial on the ground of newly discovered evidence based on Ofelia Ticzon's Affidavit.

Prescinding from this substantive issue to consider the purely procedural aspect, we are constrained to find that the herein Petitions for *Certiorari* were filed out of time.

There should be no question that in a criminal case, when a Decision or Resolution of the Court of Appeals becomes appealable to this Court by the People, it is the Solicitor General who represents the State.[12] And where the period of appeal has expired, neither a private prosecutor (on the assumption that he has the authority) nor a City Fiscal can file a petition for review on *certiorari* since the Office of the Solicitor General itself could not have done so.

In the instant case, the Resolution of the Court of Appeals granting new trial was served on the Solicitor General on November 23, 1976.[13] The Resolution became final on December 9, 1976.[14] No action having been seasonably taken to seek

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[9] p. 38, *ibid.*

[10] p. 135, *ibid.*

[11] p. 319, *ibid.*

[12] See par. (a) Sec. 1, P.D. 478; see also par. (b) sec. 1661, Revised Administrative Code.

[13] p. 113, CA *Rollo*.

[14] p. 119, *ibid.*

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reconsideration, nor review by a higher Court, before the finality of said Resolution, it has to be held that appeal therefrom has been foreclosed and the present Petitions for *Certiorari*, may not be utilized to obtain review of that Resolution after the time of appeal has elapsed.[15] The remedy of *Certiorari* cannot be used as a substitute for appeal.[16] Respondent appellate Court, having acted within its jurisdiction when it issued the Resolution in question, the same cannot be corrected by *Certiorari* but is more properly the subject of appeal.[17]

It will also have to be noted that when the Petition for *Certiorari* was filed by the private prosecutor on January 11, 1977 and by the City Fiscal or January 18, 1977, new trial had already commenced on January 12 and 13, 1977 in the Court of First Instance of Iloilo and at the time our Restraining Order was issued only the prosecution had to present rebuttal evidence.

Neither can it be successfully argued that an Order granting or denying new trial is an interlocutory order and cannot be the subject of appeal or of a special civil action. As enunciated in *People vs. Bocar, et al.*,[18] that rule does not apply in a criminal case because in deciding the case anew the trial Court may acquit the defendant and thereafter "the prosecution would have no more opportunity of bringing before the appellate Court the question of the legality or illegality of the order granting a new trial because the defendant acquitted may plead double jeopardy."

Considering all the foregoing facts, dismissal is called for. The ends of justice will not be subverted by the re-opening for if the newly discovered evidence consisting of the testimony of Ofelia Ticzon is, as contended by the Solicitor General, merely impeaching and not persuasive enough to secure a reversal of the judgment, the accused will still stand convicted and his appeal

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[15] *City of Manila vs. Macadaeg*, 3 SCRA 484 (1961).

[16] *Francisco vs. Caluag*, 3 SCRA 694 (1961).

[17] *Villa Rey Transit, Inc. vs. Bello*, 7 SCRA 735 (1963); *Associated Labor Union vs. Ramolete*, 13 SCRA 582 (1965).

[18] 97 Phil. 414 (1955).

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will take its course. But if the trial Court should find that the testimony of this witness is sufficient to overthrow the evidence submitted during the trial, then the accused would be entitled to an acquittal.

WHEREFORE, the consolidated Petitions for *Certiorari* are hereby dismissed and the Restraining Order heretofore issued ordered lifted.

SO ORDERED.

Teehankee (Chairman), Makasiar, Fernandez, Guerrero, and *De Castro, JJ.*, concur.

FIRST DIVISION

[G.R. No. L-31748. August 26, 1979]

REPUBLIC OF THE PHILIPPINES, *petitioner, vs.* **THE COURT OF FIRST INSTANCE OF DAVAO ORIENTAL and SAMUEL YU,** *respondents.*

SYLLABUS

1. REMEDIAL LAW; SPECIAL PROCEEDINGS; CANCELLATION OR CORRECTION OF ENTRIES IN CIVIL REGISTRY; DOES NOT INCLUDE CHANGE OF CITIZENSHIP OR STATUS.— The rule that changes in the citizenship of a person or in his status from legitimate to illegitimate are substantial as well as controversial and may not therefore be changed pursuant to Article 412 of the New Civil Code nor affected under Rule 108 of the Revised Rules of Court which prescribes the judicial procedure on the matter and which, moreover, limits the entries subject to cancellation or correction to those enumerated in Section 2 thereof.