

THIRD DIVISION

G.R. No. 249274 — SYRUS J. ALUZAN, JOSE HENRY L. ARELLANO,
AND FERDINAND M. LAVIN, *petitioners*, *versus* EDDIE
FORTUNADO, *respondent*.

Promulgated:

August 30, 2023

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DISSENTING OPINION

CAGUIOA, J.:

This case stemmed from the complaint filed before the Office of the Ombudsman (OMB) by respondent Eddie Fortunado (Fortunado) against petitioners Syrus J. Aluzan (Aluzan), Special Investigator III at the National Bureau of Investigation (NBI) Bacolod City; Jose Henry L. Arellano (Arellano) Special Investigator II at the NBI Bacolod City; and Ferdinand M. Lavin (Lavin), former Chief of the NBI Bacolod City (collectively, petitioners) for Grave Misconduct and for violation of Article 124 of the Revised Penal Code.¹

In his complaint, Fortunado alleged that he was abducted on June 27, 2012 and taken to the NBI Bacolod City, where he was detained for his supposed involvement in the killing of Judge Henry Arles (Judge Arles), the Presiding Judge of the Regional Trial Court (RTC) of Kabankalan² City, Negros Occidental. Fortunado further alleged that during his detention, he was tortured and forced to admit to the murder of Judge Arles in conspiracy with Alejandro Capunong and Jessie Daguia.³

On July 11, 2012, he was transferred from the NBI Bacolod City to the NBI Manila. Fortunado's mother thus filed a petition for a writ of *amparo* before the RTC of Bacolod City, praying for his release and for information on the cause of his detention. However, this petition was dismissed since the circumstances of Fortunado's detention were known, but it was nonetheless acknowledged that there was no legal basis for the continued confinement of Fortunado. Petitioners were therefore directed to release Fortunado.⁴

Petitioners, on the other hand, denied the allegations of Fortunado. They argued that Fortunado sought the protective custody of the NBI Bacolod City due to his involvement in the killing of Judge Arles. They also submitted

¹ *Ponencia*, pp. 1–2.

² Spelled as “Kabangkalan” in some parts of the record.

³ *Ponencia*, pp. 2–3.

⁴ *Id.* at 3, *rollo*, pp. 138–139, Decision of Br. 42, Regional Trial Court of Bacolod City dated December 26, 2012 in Spec. Proc. No. 12-2333 penned by Judge Fernando R. Elumba.

that Fortunado was not subjected to any torture, as he was even examined by a physician from the Commission on Human Rights, who found that he was free from physical injuries.⁵

Thereafter, the OMB found petitioners guilty of Simple Misconduct and meted the penalty of suspension for three (3) months without pay.⁶ On appeal, the Court of Appeals (CA) modified the liability of petitioners from Simple Misconduct to Simple Neglect of Duty.⁷ Petitioners thus filed the present Petition for Review on *Certiorari* (Petition) before the Court in order to assail the CA's decision as to the administrative aspect of the complaint.

The *ponencia* denies the Petition. However, unlike the findings of the the OMB and the CA, the *ponencia* anchors the administrative liability of petitioners on their failure to comply with the 15-day period for the conduct of a preliminary investigation under Section 7, Rule 112 of the Rules of Criminal Procedure.⁸

According to the *ponencia*, petitioners cannot be held liable for the prolonged detention of Fortunado because by voluntarily surrendering to the NBI Bacolod City, Fortunado is deemed to have waived his rights under Article 125 of the Revised Penal Code. The *ponencia* further opines that, in any case, Fortunado's voluntary surrender may constitute an exemption *pro hac vice*, especially in light of the peculiar circumstances of the present case.⁹ Furthermore, considering that Fortunado was transferred from the NBI Bacolod City to the NBI Manila on July 11, 2012, Fortunado was detained by petitioners for only a period of 14 days. This period, the *ponencia* holds, is within the 15-day period for the conduct of the preliminary investigation so that petitioners cannot be held liable for the prolonged detention of Fortunado, especially after they relinquished his custody to the NBI Manila.¹⁰

I agree with the denial of the Petition, but I respectfully take exception to the *ponencia*'s rationale.

The Court should not sanction the prolonged detention of an accused arrested without a warrant beyond the periods provided in Article 125 of the Revised Penal Code. Neither should the waiver of the periods therein be merely implied from the supposed voluntary surrender of the accused, nor should it justify a *pro hac vice* exemption. More importantly, even if there was a valid waiver of Fortunado's rights under Article 125 of the Revised Penal Code, his transfer from one detention facility to another does not suffice to exonerate petitioners from any administrative liability. Quite the opposite, petitioners should be held liable for Gross Neglect of Duty, as their actions

⁵ *Ponencia*, p. 4.

⁶ *Id.*

⁷ *Id.* at 6.

⁸ *Id.* at 10-13.

⁹ *Id.* at 10.

¹⁰ *Id.* at 11-12.



clearly establish their flagrant and palpable breach of duty. I expound on these points below.

I.

There is no express waiver of Fortunado's rights under Article 125 of the Revised Penal Code

As a preliminary matter, the *ponencia* rejects Fortunado's claim that he was abducted by agents of the NBI on June 27, 2012. The allegation of torture was also not given credence in light of the medical certificate issued by the NBI Medico-Legal Division, certifying that Fortunado did not suffer from any injuries resulting from torture. Furthermore, the *ponencia* rules that the timing of Fortunado's recantation in his *Sinumpaang Salaysay* dated January 14, 2013, as well as his mother's filing of a petition for a writ of *amparo* on August 5, 2012, are "highly suspect."¹¹ The *ponencia* thus finds that Fortunado indeed voluntarily surrendered to the NBI Bacolod City in order to seek its protective custody. Such voluntary surrender is also considered a waiver of Fortunado's rights under Article 125 of the Revised Penal Code. Verily, petitioners were not obliged to immediately deliver Fortunado to the proper judicial authorities within the periods provided.¹²

With respect, I cannot fully subscribe to the findings and conclusion of the *ponencia*.

The *ponencia*'s reliance on the timing of the petition for a writ of *amparo* and the recantation of Fortunado is tenuous. It may be gleaned from the records that Fortunado's mother was prompted to file the petition for a writ of *amparo* on August 5, 2012,¹³ after learning that her son was no longer detained at the NBI Bacolod City, as he was transferred to the NBI Manila on July 11, 2012.¹⁴ Thus, she could not have filed the petition earlier than the *ponencia* requires, since prior to the transfer of Fortunado, there is no basis for the *amparo* petition. In the same manner, neither does the mere lapse of time between the extrajudicial confession and the retraction of Fortunado's confession suffice to render doubtful the allegation that Fortunado was abducted and tortured by agents from the NBI Bacolod City. Ultimately, the *ponencia* must rely on the supporting evidence presented by Fortunado — or the lack thereof — to conclusively determine that his claim of abduction and torture are without merit.

At any rate, while there may be insufficient evidence to establish that Fortunado was abducted and tortured by agents of the NBI Bacolod City,

¹¹ *Ponencia*, pp. 8–9.

¹² *Id.* at 9–12.

¹³ *Rollo*, p. 171, Comment of Fortunado dated October 12, 2020.

¹⁴ *Id.* at 39, Decision of the Court of Appeals dated August 2, 2018 in CA-G.R. SP No. 11272 penned by Associate Justice Edward B. Contreras, with Associate Justices Edgardo L. Delos Santos (retired Member of the Court) and Dorothy P. Montejo-Gonzaga concurring.



much less by petitioners themselves, I respectfully disagree that the Court may simply infer the waiver of Fortunado's rights from his alleged voluntary surrender.

It must be emphasized that Article 125 of the Revised Penal Code is intended to safeguard against abuses of law enforcers which may result from the confinement of an accused without a criminal charge and without permitting the accused to post bail.¹⁵ Its application finds particular significance in upholding the constitutional right to liberty which protects persons against being indefinitely held or detained without any charge. Thus, Article 125 enjoins law enforcers to deliver a person detained for some legal ground within the periods provided therein. The continued detention of a person beyond these periods may subject the law enforcer to criminal or administrative liability.

Here, the *ponencia* relies on the voluntary surrender of Fortunado to conclude that he had already waived his rights under Article 125 of the Revised Penal Code. This, however, completely disregards the fact that Fortunado himself has objected to the supposed voluntariness of his surrender to the NBI Bacolod City, claiming instead that he was abducted by NBI agents on June 27, 2012. To my mind, notwithstanding the contrary finding of the *ponencia*, Fortunado's denial of his surrender should, at the very least, caution the Court from adopting the view that he willingly waived his rights under Article 125 of the Revised Penal Code.

Petitioners significantly argue that Article 125 of the Revised Penal Code is inapplicable because Fortunado sought the protective custody of the NBI.¹⁶ The *ponencia* does not reject this argument outright, ruling instead that the surrender of Fortunado should operate as a waiver since there were no criminal charges against him at that time.¹⁷ Associate Justice Maria Filomena D. Singh goes further by opining that Article 125 is inapplicable in this case. According to Justice Singh, Fortunado sought the protective custody of the NBI agents in Bacolod City and there was no restraint of his liberty. She also points out that there were no acts on the part of NBI Bacolod City which indicate that Fortunado was held against his will.¹⁸

I respectfully disagree.

While the fact of Fortunado's abduction and torture is disputed, petitioners do not contest, as they actually allege, the following:

First, that the agents of the NBI Bacolod City took custody of Fortunado on June 27, 2012.¹⁹

¹⁵ See *Integrated Bar of the Philippines Pangasinan Legal Aid v. Department of Justice*, 814 Phil. 440, 455 (2017).

¹⁶ *Rollo*, p. 16, Petition.

¹⁷ *Ponencia*, pp. 9–11.

¹⁸ Separate Concurring Opinion Associate Justice Maria Filomena D. Singh, p. 1.

¹⁹ *Rollo*, p. 6, Petition.



Second, on the day Fortunado sought “protective custody” from the NBI Bacolod City, agents took Fortunado to their office, apprised him of his Constitutional rights, and provided a dedicated security detail 24 hours a day, seven days a week. Lavin, in his Judicial Affidavit for the *amparo* proceeding, even emphasized that Fortunado was apprised of his Miranda rights and his rights under the Anti-Torture Act.²⁰

Third, on the same day that Fortunado was taken into “protective custody,” an affidavit of seizure was executed, attesting to the seizure of firearms and ammunition from Fortunado. The seizing officer also stated that, upon verification with the relevant office of the Philippine National Police (PNP), Fortunado had no license or authority to possess the firearms and ammunition.²¹

By virtue of the execution of the affidavit of seizure, on the same day that Fortunado was allegedly taken into protective custody, petitioners already determined that he was *in flagrante delicto* liable for illegal possession of firearms and ammunition. This is clear from the last paragraph of the affidavit, which states that its purpose is “to attest to the veracity of the foregoing facts **and for purposes of filing appropriate charges against Subject EDDIE FORTUNADO y MAGNO.**”²² Sure enough, this affidavit was attached as supporting evidence in Lavin’s belated request for Preliminary Investigation for illegal possession of firearms and ammunition against Fortunado.²³

Thus, it is incongruous to argue that Fortunado was merely under protective custody and not otherwise deprived of liberty. For all intents and purposes, the protective custody of Fortunado was an arrest without a warrant for illegal possession of firearms and ammunition. **His continued detention and the filing of the criminal charges against him patently belie the claim that petitioners were merely granting him “protection.”** Verily, given the foregoing circumstances, taking “protective custody” over Fortunado does not take his detention outside the purview of the mandatory periods under Article 125 of the Revised Penal Code.

To be sure, persons lawfully arrested without a warrant may waive their right under Article 125 of the Revised Penal Code and opt for the conduct of a preliminary investigation instead. In such instances, law enforcers may detain the accused for a period longer than that provided in the statute. On this point, Section 2(e) of Republic Act (R.A.) No. 7438²⁴ explicitly provides that:

²⁰ *Id.* at 155–159.

²¹ *Id.* at 80, Affidavit of Seizure.

²² *Id.* Emphasis supplied.

²³ *Id.* at 81–82.

²⁴ Titled “AN ACT DEFINING CERTAIN RIGHTS OF PERSON ARRESTED, DETAINED OR UNDER CUSTODIAL INVESTIGATION AS WELL AS THE DUTIES OF THE ARRESTING, DETAINING AND INVESTIGATING

[a]ny waiver by a person arrested or detained under the provisions of Article 125 of the Revised Penal Code, or under custodial investigation, shall be **in writing and signed by such person in the presence of his [or her] counsel; *otherwise the waiver shall be null and void and of no effect.***²⁵ (Emphasis, italics, and underscoring supplied.)

There is no written waiver that has been produced. Fortunado executed two sworn statements several days after his alleged surrender — a *Sinumpaang Salaysay*²⁶ dated July 3, 2012, or five days from the time he was taken into custody of the NBI Bacolod City, and another *Sinumpaang Salaysay*²⁷ dated July 5, 2012, or a week counted from having been taken into custody. Despite acknowledging his right to remain silent and subsequently making admissions as to his participation in the killing of Judge Arles, a careful perusal of these sworn statements would reveal that Fortunado did not explicitly waive the periods under Article 125 of the Revised Penal Code.

Absent an express statement that Fortunado indeed waived the periods under Article 125, petitioners' duty to deliver him to the proper judicial authorities should subsist. At the risk of being repetitive, the duty that Article 125 of the Revised Penal Code creates is clear — it mandates law enforcers to deliver persons lawfully arrested without a warrant to the proper judicial authorities within the prescribed periods.

At this juncture, I respectfully emphasize that despite petitioners' claim of only taking protective custody of Fortunado, they nonetheless treated him as an ordinary accused and justified his detention without a warrant by virtue of the affidavit of seizure of firearms and ammunition. Given the ambiguous circumstances of Fortunado's custody and detention, there is no reason for the *ponencia* to simply presume that a waiver was made.

In all, the question of whether petitioners should comply with the mandatory periods under Article 125 rests on the *ponencia*'s determination of whether Fortunado was taken into custody for an offense without a warrant, or he was simply in protective custody without any restraint on his liberty. In other words, the *ponencia* should either hold that there was an explicit waiver of the periods under Article 125 of the Revised Penal Code, or that the waiver may be dispensed with because there was no detention in the first place. It cannot abdicate this duty by choosing the middle ground and applying a *pro hac vice* exemption. A waiver, as an exception to the positive duty of law enforcers under Article 125, should be duly established, being a derogation of

OFFICERS AND PROVIDING PENALTIES FOR VIOLATIONS THEREOF," or the Rights of Persons Arrested, Detained or Under Custodial Investigation, dated April 27, 1992.

²⁵ See also REVISED RULES ON CRIMINAL PROCEDURE, Rule 112, Sec. 6, as amended by A.M. No. 05-8-26-SC:

Before the complaint or information is filed, the person arrested may ask for a preliminary investigation in accordance with this Rule, but he [or she] must sign a waiver of the provisions of Article 125 of the Revised Penal Code, as amended, in the presence of his [or her] counsel. Notwithstanding the waiver, he [or she] may apply for bail and the investigation must be terminated within fifteen (15) days from its inception.

²⁶ *Rollo*, pp. 92–96.

²⁷ *Id.* at 97–99.



a constitutionally guaranteed right. To emphasize anew, any waiver under Article 125 of the Revised Penal Code must be expressly and unequivocally made by the accused, especially since this extends the period during which he or she is deprived of liberty without knowing the criminal charge against him or her, and consequently, without the ability to post bail. Thus, a waiver cannot simply be inferred, more so under this particular case where the circumstances that led to Fortunado's detention are unclear. **To rule otherwise, even *pro hac vice*, would effectively dilute the purpose behind Article 125 of the Revised Penal Code — that is, to ensure that individuals are not detained indefinitely without a criminal charge.**

II.

It is undisputed that Fortunado was detained for six months without a criminal charge

The following dates are not disputed:

- (1) On **June 27, 2012**, law enforcers obtained custody over the person of Fortunado;
- (2) On **January 7, 2013**, he was charged with illegal possession of firearms and live ammunition, punishable under Presidential Decree No. 1866; and
- (3) On **June 3, 2013**, he was charged for the murder of Judge Arles.

From the foregoing, it is clear that Fortunado was detained for over six months without any criminal charge, until the Information for illegal possession of firearms was filed in court on January 7, 2013.²⁸ This period is evidently beyond the 36-hour period in Article 125 of the Revised Penal Code for offenses punishable by afflictive or capital penalties.

Worse, even if the Court were to assume, as the *ponencia* does, that Fortunado waived his rights under Article 125 of the Revised Penal Code, petitioners also failed to comply with the 15-day period for preliminary investigation under Section 7, Rule 112 of the Revised Rules on Criminal Procedure.²⁹

The *ponencia* aptly cites the Court's ruling in *Integrated Bar of the Philippines Pangasinan Legal Aid v. Department of Justice*,³⁰ to wit:

The waiver of Article 125 of the RPC does not vest upon the DOJ, PPO, BJMP, and PNP the unbridled right to indefinitely incarcerate an

²⁸ *Ponencia*, p. 11.

²⁹ *Id.* at 10–11.

³⁰ *Supra* note 15.



arrested person and subject him [or her] to the whims and caprices of the reviewing prosecutor of the DOJ. The waiver of Article 125 must coincide with the prescribed period for preliminary investigation as mandated by Section 7, Rule 112 of the Rules of Court. Detention beyond this period violates the accused's constitutional right to liberty.

Stated differently, the waiver of the effects of Article 125 of the RPC is not a license to detain a person *ad infinitum*. Waiver of a detainee's right to be delivered to proper judicial authorities as prescribed by Article 125 of the RPC does not trump his [or her] constitutional right in cases where probable cause was initially found wanting by reason of the dismissal of the complaint filed before the prosecutor's office even if such dismissal is on appeal, reconsideration, reinvestigation or on automatic review. **Every person's basic right to liberty is not to be construed as waived by mere operation of Section 7, Rule 112 of the Rules of Court. The fundamental law provides limits and this must be all the more followed especially so that detention is proscribed absent probable cause.**³¹ (Emphasis supplied)

However, the *ponencia* rules that the transfer of Fortunado from the NBI Bacolod City to the NBI Manila is material in determining petitioners' administrative liability for this delay. Since Fortunado's place of detention was transferred on July 11, 2012 to the NBI Manila, the *ponencia* holds that petitioners, being officers assigned in the NBI Bacolod City, no longer had any control over the delay in the filing of criminal charges.³²

In the same breath, however, the *ponencia* holds petitioners liable for Simple Neglect of Duty because they forwarded the request for preliminary investigation for the murder of Judge Arles to the NBI Manila only on July 27, 2012. The request for preliminary investigation for the illegal possession of firearms and live ammunition was also made to the Bacolod City Prosecutor's Office only on August 7, 2012. The *ponencia* explains:

Based on the records, it appears that petitioners only forwarded the request for preliminary investigation to the NBI Manila in relation to the killing of Judge Arles on July 27, 2012, or *30 days after Fortunado's voluntary surrender* to the NBI Bacolod City.

Moreover, when Fortunado was taken into the custody of the NBI Bacolod City, he also surrendered the following items to petitioners: (a) one Colt .45 caliber pistol with Serial No. 526393; (b) six pieces of .45 live ammunition; (c) one .45 caliber pistol magazine; and (d) cash in the total amount of ₱39,000.00. Upon verification, it turned out that Fortunado did not have the license or the authority to possess said firearm and live ammunitions. Despite this, petitioners made the request for preliminary investigation to the Bacolod City Prosecutor's Office only on August 7, 2012, or *41 days after they confiscated the pistol and live ammunitions* from Fortunado.³³ (Italics and underscoring in the original)

³¹ *Id.* at 456.

³² *Ponencia*, p. 12.

³³ *Id.*

Needless to state, both requests were made *after* Fortunado was transferred. Thus, despite handing over the custody of Fortunado to the NBI Manila and purportedly having no control over the delay, petitioners still neglected to comply with their duty to ensure that the requisite periods for the filing of the criminal charge and for the conduct of the preliminary investigation were followed. I therefore disagree with the ruling of the CA finding petitioners liable only for Simple Neglect of Duty. To my mind, the persistent delay in the filing of charges against Fortunado is not mere carelessness or indifference. Petitioners' omission should be deemed a flagrant and palpable breach of duty that should elevate their liability to Gross Neglect of Duty.

To be sure, there was no justification for, much less an attempt to explain, the cause of these delays. Petitioners waited for 40 days since they seized the illegal firearms and ammunition from Fortunado on June 27, 2012,³⁴ before filing the complaint with the prosecutor on August 7, 2012.³⁵ They let this period lapse, despite having already verified with the PNP's Firearms and Explosives Division that Fortunado did not possess the necessary license for the seized items on the same day that these were confiscated.³⁶ Furthermore, since Fortunado's transfer on July 11, 2012, they allowed the period of 16 days to expire before forwarding their request for preliminary investigation for murder to their colleagues in the NBI Manila.

While it may be true that petitioners are not solely to blame, the fact remains that Fortunado was detained for about six months without a criminal charge due to petitioners' belated filing of the criminal complaints with the prosecutor. **Their wanton disregard of the prescribed periods surely contributed to the delay in the indefinite detention of Fortunado, which resulted to no less than the violation of his constitutional right to due process.** The Court should not sanction their futile attempt to excuse their patent infringement of a constitutional right by relying on their inconsistent claim of taking "protective custody" of Fortunado, while nonetheless detaining him for two criminal offenses, the complaints for which they failed to timely initiate. Thus, notwithstanding of Fortunado's transfer to the NBI Manila, the indefinite detention of Fortunado is ultimately attributable to petitioners' own delay in proceeding with the investigation.

Under the Revised Rules on Administrative Cases in the Civil Service,³⁷ Gross Neglect of Duty is a grave offense punishable by dismissal from the service. Accordingly, I respectfully submit that the penalty imposed by the CA should be modified from suspension for two (2) months without pay to dismissal from the service.

³⁴ *Rollo*, p. 78, Inventory of Items Seized/Surrendered.

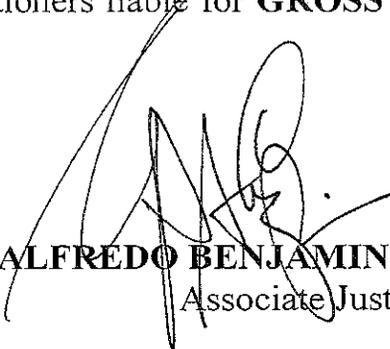
³⁵ *Id.* at 84, Resolution of the Bacolod City Prosecutor's Office dated December 21, 2012 in NPS No. VI-INV-12H-872 penned by Prosecutor II Ma. Theresa B. Ditching, approved by City Prosecutor Armando P. Abanado.

³⁶ *Id.* at 80, Affidavit of Seizure dated July 27, 2012.

³⁷ REVISED RULES ON ADMINISTRATIVE CASES IN THE CIVIL SERVICE, Rule 10, Sec. 46(A)(2).



In all, I **VOTE** to **DENY** the Petition, and to **MODIFY** the ruling of the Court of Appeals to hold petitioners liable for **GROSS NEGLIGENCE OF DUTY**.



ALFREDO BENJAMIN S. CAGUIOA
Associate Justice