

## THIRD DIVISION

[ G.R. No. 200630, June 04, 2018 ]

**KIM LIONG, PETITIONER, V. PEOPLE OF THE PHILIPPINES,  
RESPONDENT.**

### DECISION

**LEONEN, J.:**

The right to confront and cross-examine an adverse witness is a basic fundamental constitutional right. However, this is personal to the accused, who can waive the right.

This resolves the Petition for Review on Certiorari<sup>[1]</sup> assailing the October 7, 2011 Decision<sup>[2]</sup> and February 20, 2012 Resolution<sup>[3]</sup> of the Court of Appeals in CA-G.R. SP No. 113152. The Court of Appeals found no grave abuse of discretion in the issuance of the Orders dated August 27, 2009<sup>[4]</sup> and February 9, 2010<sup>[5]</sup> of Branch 44, Regional Trial Court, Manila declaring Kim Liong (Liong) to have waived his right to cross-examine prosecution witness Antonio Dela Rama (Dela Rama).

In an Information<sup>[6]</sup> dated January 28, 2002, Liong was charged with estafa for allegedly failing to return to Equitable PCI Bank, despite demand, a total of US\$50,955.70, which was erroneously deposited in his dollar account. The accusatory portion of this Information read:

That on or about March 16, 2000, and for sometime subsequent thereto, in the City of Manila, Philippines, the said accused did then and there wilfully, unlawfully and feloniously defraud the **EQUITABLE PCI BANK**, Roxas Blvd. Branch, this City, a banking institution duly organized and existing under and by virtue of the Philippine laws, with place of business located at the corner of Padre Faura and Roxas Boulevard, Ermita, this City, represented by its Branch Manager, **ERMELINDA V. CONTRERAS**, in the following manner, to wit: the said accused, being then a depositor of the said bank, with Dollar Savings Account Deposit No. 5265-00761-9, well knowing that a mistake has been inadvertently committed by the said bank in posting and crediting to his said account the following amounts in U.S. dollars, to wit:

\$ 11,989.70  
14,565.30  
8,610.40  
15,790.30

or all in the total amount of **US\$50,955.70** which amount should have been instead credited and posted to the account of **WALLEN** (sic) **MARITIME SERVICES, INC.** under Account No. 5265-00431-8, and by reason of said misposting and crediting of the said amount to the

accused's account, his dollar deposit balance with the said bank had increased by US\$50,955.70 of which, accused is under obligation to inform the said bank as regards to the excess amount unduly posted and/or credited in his said account but instead of doing so, did then and there make and/or cause the series of withdrawals until the full amount of said US\$50,955.70 was withdrawn from the said bank, and once in possession of the same, in serious breach of his legal obligation to return the said amount of US\$50,955.70, failed and refused and still fails and refuses to do so despite repeated demands made upon him, and instead, with intent to defraud, with unfaithfulness and grave abuse of trust and confidence, misappropriated, misapplied and converted the said amount of US\$50,955.70 to his own personal use and benefit, to the damage and prejudice of the said EQUITABLE PCI BANK, Roxas Blvd. Branch, in the aforesaid amount of US\$50,955.70, or its equivalent in Philippine Currency.

Contrary to law.<sup>[7]</sup>

Liong was arraigned on January 20, 2003, pleading not guilty to the charge.<sup>[8]</sup> The pre-trial conference was terminated on July 13, 2004.<sup>[9]</sup>

The initial presentation of the prosecution's evidence was set on December 19, 2005. However, on that day, private prosecutor Atty. Aceray Pacheco (Atty. Pacheco) requested a resetting, which was granted by the trial court. The December 19, 2005 hearing was reset to January 26, 2006.<sup>[10]</sup>

On January 26, 2006, the hearing was again reset to March 30, 2006. The March 30, 2006 hearing was likewise reset, this time, on the instance of a certain Atty. Villaflor, also one of the private prosecutors. The initial presentation of the prosecution's evidence was, thus, moved to June 8, 2006.<sup>[11]</sup>

The first prosecution witness, Antonio Dela Rama (Dela Rama), was finally presented as scheduled on June 8, 2006. His direct examination was terminated on January 25, 2007, and the initial date for his cross-examination was set on March 15, 2007. On March 15, 2007, Atty. Danilo Banares (Atty. Banares) appeared as collaborating counsel of Atty. Jovit Ponon (Atty. Ponon), Liong's counsel of record. Atty. Banares then moved for the resetting of the hearing to April 19, 2007.<sup>[12]</sup>

On April 19, 2007, the hearing was again reset on the instance of Liong because Atty. Ponon was allegedly a fraternity brother of the private prosecutor, Atty. Pacheco. Thus, Liong terminated the services of Atty. Ponon and the hearing was reset to June 28, 2007.<sup>[13]</sup>

On July 31, 2008, the hearing was again reset to October 16, 2008 because Dela Rama had suffered a stroke.<sup>[14]</sup>

On February 5, 2009, Atty. Banares failed to appear in court. Liong subsequently filed a Motion to Suspend Proceedings and, eventually, a Motion to Dismiss.<sup>[15]</sup> The hearing was reset to May 7, 2009, which seems to have been cancelled again.<sup>[16]</sup>

On August 27, 2009, Atty. Banares again failed to appear in court. Thus, private prosecutor Atty. Ma. Julpha Maningas moved that Liong be declared to have waived

his right to cross-examine Dela Rama.<sup>[17]</sup> The Motion was granted by the trial court in its August 27, 2009 Order,<sup>[18]</sup> hereby reproduced below, thus:

#### ORDER

When this case was called for hearing, accused Kim Liong appeared. However, his counsel, Atty. Dan Banares, failed to appear.

Private prosecutor, Atty. Ma. Julpha Maningas, is present in court. She moved that the right of the accused to cross-examine prosecution's witness, Antonio dela Rama, be deemed waived considering that his testimony was given way back November 2006 and up to now he has not yet been cross-examined by the defense. The same is granted.

Meanwhile, set the continuation of the presentation of prosecution's evidence on October 29, 2009 at 8:30 in the morning.

Notify Atty. Banares.

SO ORDERED.<sup>[19]</sup>

Liang, through a new counsel, Atty. Arnold Burigsay, filed an Entry of Appearance with Motion for Reconsideration.<sup>[20]</sup> Liang argued that his former counsel, Atty. Banares, was grossly negligent in handling his case as he repeatedly failed to attend hearings, including the August 27, 2009 hearing where Liang was declared to have waived his right to cross-examine Dela Rama. He did not even file a motion for reconsideration of the August 27, 2009 Order. According to Liang, Del a Rama was a vital witness, and to allow his testimony to remain on record without Liang having to cross-examine him would be extremely damaging to the defense. Thus, Liang prayed that the trial court reconsider its August 27, 2009 Order and grant him another chance to cross-examine Dela Rama.<sup>[21]</sup>

The trial court, however, found that Liang's abuse of his right by changing his counsels repeatedly was a tactic to delay the proceedings. Thus, it denied Liang's Motion for Reconsideration in its February 9, 2010 Order,<sup>[22]</sup> which stated:

#### ORDER

Accused thru his new counsel, Atty. Arnold M. Burigsay filed on October 26, 2009 an Entry of Appearance with Motion for Reconsideration of the order of this court dated August 27, 2009 declaring the accused to have waived his right to cross examine prosecution witness, Antonio dela Rama.

Accused admitted that the failure to cross examine prosecution witness was due to the negligence of his counsel who failed to appear and perform his task as counsel for the accused. Accused should not be punished for the negligence of his counsel.

In opposition to the motion, the private prosecutor thru Atty. Ma. Julpha P. Maningas averred that the cross examination of witness Antonio dela Rama had been reset a number of times due to the fault of the accused who kept on changing his counsel; that accused was given more than

sufficient opportunities to cross examine the said witness but simply delayed the proceedings of this case until it lapsed two (2) years.

The records will show that this case has been filed on February 12, 2002. Accused was arraigned on January 20, 2003. Pre-trial was terminated on July 13, 2004. The first witness for the prosecution in the person of Antonio dela Rama was presented on June 8, 2006, August 3, 2006, November 9, 2006 and January 25, 2007. Because of the lengthy testimony of the witness on direct examination, the cross examination was deferred and reset to March 15, 2007. The cross examination was reset several times upon motion of the accused who engaged the services of the new counsel (March 15, 2007 and April 19, 2007).

On January 31, 2008[,] witness Antonio dela Rama was hospitalized. Accused also got sick on April 17, 2008. On February 5, 2009[,] accused['s] counsel, Atty. Banares[,] failed to appear. Accused likewise filed several motions, Motion to Suspend Proceedings on February 5, 2009 and Motion to Dismiss on July 30, 2009. Again[,] on August 27, 2009[,] counsel for the accused failed to appear. No motion has been filed for his non-appearance, hence, the court upon motion of private prosecutor, Atty. Maningas[,] in conformity of Prosecutor Meneses, declared accused to have waived his right to cross examine the witness Antonio dela Rama.

The direct examination of said witness was concluded on January 25, 2007. The delay in the cross examination of the witness was due to the fault of the accused and counsel. The court has noted the ploy employed by the accused like the tiling of baseless motions and the changing of his counsel to delay the proceedings of this case. More than two (2) years has lapsed and still accused has not started his cross examination. Witness has been coming to court despite his condition (after his hospitalization) only to be reset due to the unpreparedness of accused['s] counsel or his non-appearance. The court has to put end to this unreasonable delay.

WHEREFORE, in view of the foregoing considerations, the Motion for Reconsideration is hereby denied due course.

SO ORDERED.<sup>[23]</sup>

Alleging grave abuse of discretion on the part of Presiding Judge Jose P. Morillos (Presiding Judge Morillos) in declaring him to have waived his right to cross-examine Dela Rama, Liong filed a Petition for Certiorari before the Court of Appeals.<sup>[24]</sup>

The Court of Appeals agreed with the trial court judge and denied Liang's Petition. It held that what is essential is for an accused to be granted the *opportunity* to confront and cross-examine the witnesses against him, not to actually cross-examine them. In other words, when an accused fails to avail himself or herself of this right, he or she is deemed to have waived it.<sup>[25]</sup>

The Court of Appeals found that Liong repeatedly delayed his cross examination of Dela Rama specifically on March 15, 2007, April 19, 2007, February 5, 2009, and August 27, 2009. On those dates, Liong's counsel was either unprepared or absent.

While there were hearings that were reset on the instance of witness Dela Rama, those were caused by his then hospitalization due to stroke. The Court of Appeals likewise said that Liong could not use in his favor the cancelled hearings on June 28, 2007, September 30, 2007, November 22, 2007, and October 16, 2008. The allegations that the hearings on these dates were cancelled due to the absence of the public prosecutor or the trial court judge were not substantiated.<sup>[26]</sup>

On Liong's claim that his former counsel was grossly negligent, the Court of Appeals nevertheless said that the negligence of counsel binds the client and, in this case, Liong was not blameless. The Court of Appeals cited an Order dated October 8, 2003 of the former presiding judge trying the case, Presiding Judge Edelwina Catubig Pastoral (Judge Pastoral), where Liong was admonished because he frequently changed counsels.<sup>[27]</sup>

The dispositive portion of the Court of Appeals October 7, 2011 Decision<sup>[28]</sup> read:

**WHEREFORE**, premises considered, the present petition is **DENIED**. Accordingly, the assailed Orders of the Regional Trial Court dated August 27, 2009 and February 9, 2010 are hereby **AFFIRMED**.

**SO ORDERED.**<sup>[29]</sup>

Liong filed a Motion for Reconsideration, which the Court of Appeals denied in its February 20, 2012 Resolution,<sup>[30]</sup> thus:

An assiduous evaluation of the said Motion for Reconsideration led US to conclude that there exists no compelling and justifiable reason for US to veer away from OUR earlier pronouncement. The arguments presented by petitioner had already been traversed and ruled upon by US. There is no need to belabor the issues one more time.

WHEREFORE, on account of the foregoing, WE deny the said Motion for Reconsideration.

SO ORDERED.<sup>[31]</sup>

On March 26, 2012, Liong tiled his Petition for Review on Certiorari<sup>[32]</sup> before this Court. The Office of the Solicitor General, on behalf of the People of the Philippines, filed a Comment<sup>[33]</sup> to which petitioner filed his Reply.<sup>[34]</sup>

Petitioner alleges that the cross-examination of Dela Rama was reset 13 times. However, out of those 13 resettings, only four (4) are attributable to him while the rest are due to reasons beyond his control, such as witness Dela Rama's stroke and the absence of the public prosecutor.<sup>[35]</sup> He adds that the order of waiver was made in open court and at a time when his counsel was absent; thus, he was not able to oppose the declaration.<sup>[36]</sup> Therefore, he argues that the trial court judge, Presiding Judge Morillos, gravely abused his discretion in depriving him of the rights to confront and cross-examine prosecution witness Dela Rama.<sup>[37]</sup>

Respondent People of the Philippines counters that petitioner raises a question of fact, specifically on which of the resettings are not attributable to him. It contends that questions of facts are not allowed in a Rule 45 Petition, and therefore, this