THIRD DIVISION

[G.R. No. 183975, September 20, 2010]

GREGORIO DIMARUCOT Y GARCIA, PETITIONER, VS. PEOPLE OF THE PHILIPPINES, RESPONDENT.

R E S O L U T I O N

VILLARAMA, JR., J.:

For resolution in this petition for review on certiorari under Rule 45 of the 1997 Rules of Civil Procedure, as amended, is the Resolution[1] dated July 23, 2008 of the Court of Appeals (CA) in CA-G.R. CR No. 30466 denying petitioner's omnibus motion to reconsider the August 29, 2007 Resolution dismissing his appeal, to expunge the same from the Book of Entries of Judgment, and to give petitioner a period of thirty (30) days within which to file the appellant's brief.

The antecedents:

Petitioner is the accused in Criminal Case No. 98-M-98 for Frustrated Murder in the Regional Trial Court (RTC) of Malolos, Bulacan, under the following Information:

> That on or about the 18th day of August, 1997, in the municipality of Malolos, province of Bulacan, Philippines, and within the jurisdiction of this Honorable Court, the above-named accused, armed with an iron pipe and with intent to kill one Angelito Rosini y Go, did then and there wilfully, unlawfully and feloniously, with treachery and evident premeditation, attack, assault and hit with the said iron pipe the said Angelito Rosini y Go, hitting him on his head, thereby inflicting upon him physical injuries, which ordinarily would have caused the death of the said Angelito Rosini y Go, thus performing all acts of execution which should have produced the crime of murder as a consequence, but nevertheless did not produce it by reason of causes independent of his will, that is, by the timely and able medical assistance rendered to the said Angelito Rosini y Go which prevented his death.
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> Contrary to law.[2]

After trial, on September 11, 2006, the RTC promulgated its Decision[3] convicting petitioner of frustrated homicide, and sentencing him as follows:

> WHEREFORE, finding accused GREGORIO aka GEORGE DIMARUCOT y GARCIA liable of *(sic)* the lesser offense of Frustrated Homicide, this Court hereby sentences him to an indeterminate penalty of four (4) years

and two (2) months and one (1) day, as minimum, to eight (8) years and one (1) day, as maximum, of imprisonment.

Accused is further directed to pay complainant Angelito Rosini y Go, actual damages broken down as follows: the amount of Nineteen Thousand One Hundred Ten Pesos and Sixty Five Centavos (P19,110.65) for the hospitalization/medical bills and the amount of Thirty Six Thousand Pesos (P36,000.00) as loss of income.

With costs against the accused.

SO ORDERED.[4]

Upon receiving the notice to file appellant's brief, petitioner thru his counsel *de parte* requested and was granted additional period of twenty (20) days within which to file said brief.[5] This was followed by three (3) successive motions for extension which were all granted by the CA.[6] On August 29, 2007, the CA issued a Resolution dismissing the appeal, as follows:

Considering the JRD verification report dated July 24, 2007 that the accused-appellant failed to file his appellant's brief within the reglementary period which expired on June 6, 2007, his appeal is considered ABANDONED and thus DISMISSED, pursuant to Sec. 1 (e), Rule 50, 1997 Revised Rules of Civil Procedure.

SO ORDERED.[7]

Petitioner filed a motion for reconsideration,[8] his counsel admitting that he was at fault in failing to file the appellant's brief due to "personal problems emanating from his [counsel's] wife's recent surgical operation." It was thus prayed that the CA allow petitioner to file his appellant's brief which counsel undertook to submit within seven (7) days or until October 4, 2007. By Resolution[9] dated November 27, 2007, the CA, finding the allegations of petitioner unpersuasive and considering that the intended appellant's brief was not at all filed on October 4, 2007, denied the motion for reconsideration. As per Entry of Judgment, the Resolution of August 29, 2007 became final and executory on January 4, 2008.[10]

On May 8, 2008, petitioner filed an Omnibus Motion (1) To Reconsider August 29, 2007 Resolution, (2) To Expunge The Same From Book Of Entries Of Judgment, and (3) To Give Accused-Appellant A Final Period Of Thirty Days To File Appellant's Brief. Petitioner reiterated that his failure to file the appeal brief was solely the fault of his lawyer who is reportedly suffering from personal problems and depression. He also cited his advanced age (he will turn 76 on May 30, 2008) and medical condition (hypertension with cardiovascular disease and pulmonary emphysema), attaching copies of his birth certificate, medical certificate and certifications from the barangay and church minister.[11]

In the assailed Resolution dated July 23, 2008, the CA denied the omnibus motion

holding that petitioner is bound by the mistakes and negligence of his counsel, such personal problems of a counsel emanating from his wife's surgical operation are not considered mistake and/or negligence contemplated under the law as to warrant reconsideration of the dismissal of petitioner's appeal for failure to file appellant's brief. Thus, when appellant did not file a petition before this Court to assail the validity of the August 29, 2007 and November 27, 2007 resolutions, the August 29, 2007 resolution attained finality and entry of judgment thereof is in order.[12]

The petition has no merit.

Section 8, paragraph 1, Rule 124 of the Revised Rules of Criminal Procedure, as amended, provides:

> SEC. 8. *Dismissal of appeal for abandonment or failure to prosecute.* - The Court of Appeals may, upon motion of the appellee or *motu proprio* and with notice to the appellant in either case, dismiss the appeal if the appellant fails to file his brief within the time prescribed by this Rule, except where the appellant is represented by a counsel *de oficio*.
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It is clear under the foregoing provision that a criminal case may be dismissed by the CA *motu proprio* and with notice to the appellant if the latter fails to file his brief within the prescribed time. The phrase "with notice to the appellant" means that a notice must first be furnished the appellant to show cause why his appeal should not be dismissed.[13]

In the case at bar, there is no showing that petitioner was served with a notice requiring him to show cause why his appeal should not be dismissed for failure to file appellant's brief. The purpose of such a notice is to give an appellant the opportunity to state the reasons, if any, why the appeal should not be dismissed because of such failure, in order that the appellate court may determine whether or not the reasons, if given, are satisfactory.[14]

Notwithstanding such absence of notice to the appellant, no grave abuse of discretion was committed by the CA in considering the appeal abandoned with the failure of petitioner to file his appeal brief despite four (4) extensions granted to him and non-compliance to date. Dismissal of appeal by the appellate court *sans* notice to the accused for failure to prosecute by itself is not an indication of grave abuse. Thus, although it does not appear that the appellate court has given the appellant such notice before dismissing the appeal, if the appellant has filed a motion for reconsideration of, or to set aside, the order dismissing the appeal, in which he stated the reasons why he failed to file his brief on time and the appellate court denied the motion after considering said reasons, the dismissal was held proper. Likewise, where the appeal was dismissed without prior notice, but the appellant took no steps either by himself or through counsel to have the appeal reinstated, such an attitude of indifference and inaction amounts to his abandonment and renunciation of the right granted to him by law to prosecute his appeal.[15]

Here, the Court notes the repeated non-observance by petitioner and his counsel of