**SUPREME COURT**
**FIRST DIVISION**

**ALEJANDRO JONAS P. MAGTOTO,**
***Petitioner*,**

***-versus-***

**G.R. No. L-63370**
**November 18, 1985**

**NATIONAL LABOR RELATIONS COMMISSION and WYETH-SUACO LABORATORIES, INC.,**
***Respondents*.**
**x----------x**

**D E C I S I O N**

**GUTIERREZ, JR., *J.*:**

May seven (7) months detention by military authorities on rebellion charges later found without basis justify the act of an employer who had earlier dismissed a worker on the ground of prolonged absence resulting in business exigency?

This is the issue in this petition for certiorari to set aside the decision of the respondent National Labor Relations Commission (NLRC). The dispositive portion of the decision reads:

> "WHEREFORE, the Decision appealed from is hereby MODIFIED as indicated above. Consequently, the termination

> of complainant's employment status is hereby declared valid but the respondent is ordered to pay him separation pay equivalent to one month salary for every year of service, a fraction of at least six months being considered as one whole year."

The facts are undisputed.

Petitioner Alejandro Jonas P. Magtoto started working with private respondent Wyeth-Suaco Laboratories, Inc. since April 18, 1974. At the time of his separation from employment with the private respondent, the petitioner was employed as a sales administrative clerk.

On September 3, 1980, the petitioner was arrested by virtue of an Arrest, Search and Seizure Order (ASSO) dated September 1, 1980 issued by the Minister of National Defense. He was subsequently charged with violation of Article 136 (Conspiracy and Proposal to Commit Rebellion) and Article 138 (Inciting to Rebellion or Insurrection) of the Revised Penal Code before the City Fiscal of Manila. He was then detained at Camp Bagong Diwa, Taguig, Metro Manila, but was later transferred to the Bilibid Prison, Muntinlupa, Metro Manila.

On September 7, 1980, the petitioner informed the private respondent about his detention and requested that the company consider him on leave "until such time when the concerned authorities decide in favor of my release" (Annex "A" of Petition, Rollo, p. 40).

On September 19, 1980, the private respondent denied the petitioner's request for an indefinite leave of absence stating that there was no company rule or regulation allowing an employee to be considered on leave during a period of detention. Magtoto was given five (5) days from receipt of the letter within which to secure his release and to report for work.

The petitioner failed to report for work as required. The private respondent took corresponding action and considered him resigned as of September 25, 1980 or twenty-two (22) days after his arrest.

On October 23, 1980 the private respondent informed the petitioner of its action and its having filed a report of termination with the Ministry of Labor and Employment (Annex "C" of Petition, Rollo, p. 45).

On November 3, 1980, the petitioner filed an opposition to the private respondent's report to the Ministry of Labor and Employment with the request "that all action to be undertaken by your good office on the said report be held in abeyance until after my release from the military custody" (Annex "D" of Petition, p. 48).

Since the petitioner was under indefinite detention, the private respondent was constrained to hire a replacement.

On April 10, 1981, or about seven (7) months after the petitioner was arrested the City Fiscal of Manila dismissed the criminal charges against him for lack of evidence and ordered his release from custody (Annex "E" of Petition, Rollo, p. 49).

On the very date he was released, the petitioner informed the private respondent that he was now released and "will start working with the company in my old position as Sales Administrative Clerk in Marketing Department effective Monday afternoon, April 13, 1981 (Annex "F" of Petition, Rollo, p. 53).

On April 13, 1981, the private respondent reminded the petitioner that the report on "Resigned Employees" which it had submitted and which the petitioner opposed was still pending before the Ministry of Labor and Employment. The employer stated that the request to work was, therefore, still inappropriate (Annex "G" of Petition, Rollo, p. 56.).

On July 30, 1981, Labor Arbiter Tito F. Genilo rendered a decision in NCR Case No. AB-11-9086-80 in favor of the petitioner and ordered the private respondent to "Reinstate complainant to a job substantially equivalent to his former position with full backwages computed on the basis of his latest basic monthly salary starting from the date he was refused work on April 13, 1981 until actually reinstated without loss of seniority rights and other privileges."

On December 28, 1982, the respondent National Labor Relations Commission modified the decision of the Labor Arbiter as earlier indicated and affirmed the termination of employment as valid.

This lead the petitioner to file the present petition for certiorari.

On September 21, 1983, after due consideration of the allegations, issues and arguments adduced in the petition for certiorari and the separate comments thereon of the respondent National Labor Relations Commission and private respondent Wyeth-Suaco Laboratories, Inc., we resolved to dismiss the petition for lack of merit.

On motion for reconsideration filed by the petitioner, we reconsidered our resolution dated September 21, 1983 and gave due course to the petition for certiorari. In our resolution dated May 7, 1984, the parties were required to submit their respective memoranda.

The petitioner argues that his detention was a special case, the cause of which was found non-existent, and, therefore, the dismissal based on that cause is illegal.

The petitioner is correct.

The findings of Assistant Fiscal Ricardo D. Conjares, approved by City Fiscal Jose B. Flaminiano, clearly show that the evidence against the petitioner was insufficient for even a prima facie case. In the twin charges of Conspiracy and Proposal to Commit Rebellion and Inciting to Rebellion or Insurrection filed against the petitioner, the government miserably failed to prove its charges.

Assistant Fiscal Conjares ruled that:

> "The complaint cannot prosper for the reason that the acts complained of as specified in the charge sheet are devoid of evidentiary support. There are two crimes defined and penalized in this article: Conspiracy and proposal to commit rebellion. There is conspiracy to commit rebellion when two or

> more persons come to an agreement to rise publicly and take arms against the government for any of the purposes of rebellion and decide to commit it. There is proposal to commit rebellion when the person who has decided to rise publicly and take arms against the government for any of the purposes of rebellion proposes its execution to some other person or persons. None of the elements of the above crimes have been shown to exist even prima facie in this case. The propaganda materials seized by complainant and submitted in this case do not prove the alleged conspiracy to commit nor incite to rebellion. They do not show even prima facie respondents' common design, or unity of purpose to commit the crime charged."

The employer tries to distance itself from the detention by stressing that the petitioner was dismissed due to prolonged absence. However, Mr. Magtoto could not report for work because he was in a prison cell. The detention cannot be divorced from prolonged absence. One caused the other. Since the causes for the detention, which in turn gave the employer a ground to dismiss the petitioner, proved to be non-existent, we rule that the termination was illegal and reinstatement is warranted. A non-existent cause for dismissal was explained in Pepito vs. Secretary of Labor (96 SCRA 454).

x x x

> "A distinction, however, should be made between a dismissal without cause and a dismissal for a false or non-existent cause. In the former, it is the intention of the employer to dismiss his employee for no cause whatsoever, in which case the Termination Pay Law would apply. In the latter case, the employer does not intend to dismiss the employee but for a specific cause which turns out to be false or none non-existent. Hence, absent the reason which gave rise to his separation from employment, there is no intention on the part of the employer to dismiss the employee concerned. Consequently, reinstatement is in order. And this is the situation here. Petitioner was separated because of his alleged involvement in the pilferage in question. However, he was absolved from any responsibility therefor by the court. The cause for his dismissal

> having been proved non-existent or false, his reinstatement is warranted. It would be unjust and unreasonable for the Company to dismiss petitioner after the latter had proven himself innocent of the cause for which he was dismissed."

It is obvious from the reactions of the employer to the petitioner's arrest and its subsequent change of theory after the case was appealed to the respondent Commission, that it was not in the least bit reluctant to let Mr. Magtoto leave the company. There was no love lost for the detained vice-president and secretary of the labor union.

Twelve days after learning of the petitioner's arrest on an ASSO, the employer gave him five (5) days to secure his release from military detention. Considering the charges of conspiracy to commit rebellion and inciting to rebellion or insurrection during a period of martial law, the 5-day deadline was tantamount to no period of grace at all.

Only 25 days from his arrest, the petitioner was dismissed from his job. When the petitioner tried to return to work immediately after his release, the employer gave him the same excuse that its report to the Ministry of Labor and Employment was pending action and, therefore, reinstatement was "inappropriate."

The absence of a definite date for the petitioner's release because at the time when he was considered resigned, no criminal complaint had been filed against him nor were any legal proceedings forthcoming, cannot strengthen the private respondent's position. The petitioner proved to be innocent of the charges against him. The charges were found "devoid of evidentiary support." No element of the alleged offenses was found to exist even prima facie. Moreover, it was beyond the petitioner's power to limit the duration of his unfounded detention. It was a matter purely within the discretion of the military authorities. It was then the contention of the military that not even the courts of justice should inquire into the causes and the duration of detentions for rebellion-related offenses. How could the detainee secure his release within the five-day period given by his employer?

Equitable considerations favor the petitioner. While the respondent employer may have shed no tears over the arrest of one of its employees, there is likewise no showing that it had any role in the

arrest and detention of Mr. Magtoto. But neither was the petitioner at fault. The charges which led to his detention were later found without basis. The employer is a stable company with a large work force. Hirings, promotions, resignations, retirements, and other personnel actions must be frequent or common. The petitioner is a mere clerk. It should not be difficult to find another item for him. As between the employee and the employer, the latter is in a singularly better position to shoulder the unfortunate consequences of the unfounded detention.

Realizing, however, that its theory of prolonged absence on account of the petitioner's detention may not justify the petitioner's separation from employment, the respondent company argues that in addition to such prolonged absence, the unsatisfactory performance of the petitioner and its alleged loss of trust and confidence in him justify the action to consider the petitioner as resigned.

According to the private respondent, Mr. Magtoto has an "unsavory employment record, replete with lists of infractions (is) an incorrigible transgressor of company rules a notoriously undesirable employee."

The imputed offenses listed in the private respondent's memorandum would more than justify the petitioner's separation from employment. However, Mr. Magtoto was not dismissed because of habitual tardiness, gross neglect of duties, serious disrespect, or sabotage of company products. He should have been charged with these alleged offenses, given the opportunity to defend himself, and dismissed only after being proved guilty.

On the alleged habitual tardiness, the petitioner points out that in the 1980 collective bargaining agreement there was a specific provision to expunge all entries of tardiness prior to November 16, 1979 from the personnel records of employees. There was a general amnesty. There were other charges either pending or unresolved under the grievance machinery.

This Court will not countenance such acts of sabotage as tampering with a crimper in the packaging section, mixing of calcium chloride with water soluble vitamins, wastage of 18,000 pounds of milk

powder, and worse, the mixing of glass particles in cans of baby milk powder. However, an employee alleged to be guilty of such offenses, especially those that are criminal in nature, must first be charged and tried. Some of the charges now leveled against the petitioner are quite serious and should have been pressed with vigor shortly after the incidents happened. Instead of pursuing established disciplinary procedures, the respondent employer merely waited until the military arrested the petitioner for charges related to rebellion and, when he could not free himself from detention, considered him resigned.

As earlier stated, the sole issue in this petition for certiorari is whether or not the seven (7) months detention of the petitioner by the military authorities on charges later found without basis, justify the respondent's earlier dismissing the petitioner. Indeed, this was the only issue presented at the Labor Arbiter's level. The decision of Labor Arbiter Tito F. Genilo states that:

x x x

> "(T)he issue to be resolved in this case is the question of whether or not complainant's detention by the military authorities and his subsequent failure to obtain his release within the period directed by respondent per its letter dated 19 September 1980 constitute a resignation."

Before the respondent Commission, however, the private respondent changed its theory by stating in its appeal that the issue is:

x x x

> "On the contrary, what is the sole issue to be resolved in this case is whether or not the respondent has, (sic) in the exercise of its inherent management prerogatives, the right to consider complainant resigned or to terminate his services in the light of his prolonged absence, coupled with his previous unsatisfactory performance, and for loss of trust and confidence."

It is clear that the respondent company changed its theory when it appealed to the respondent Commission. In this regard, we have ruled that such a change of theory on appeal is improper, offensive to

the basic rules of fair play and justice, and violative of the petitioner's right to due process of law (Dosch vs. National Labor Relations Commission and Northwest Airlines, Inc., 123 SCRA 296, and other cases cited therein).

Since the private respondent adopted prolonged absence as the particular cause in terminating the employment of the petitioner, it cannot now invoke unsatisfactory employment record and loss of trust and confidence, still waiting to be proved or established, as additional grounds for the discharge.

The Wyeth-Suaco Laboratories, Inc. and Wyeth-Suaco Laboratories Progressive Worker's Union Collective Bargaining Agreement for the years 1980-1983 provides for the establishment of a Termination Review Panel to review all cases of recommended termination of services of any employee. Article XVII of the 1980-1983 Collective Bargaining Agreement provides that:

> "Section 1. The COMPANY agrees to the establishment of a review panel to be composed of (a) two (2) employees who are duly authorized members of the UNION, (b) two (2) Non-Union Employees, and (c) two (2) representatives of the COMPANY.
>
> "Section 2. The above panel will be given an opportunity to review all cases of recommended termination of the services of any employee in the bargaining unit. The purpose of this review is to clarify the reasons for the recommended termination and to ensure that all evidence either for or against such termination are made available to management in making its final decision.

x x x

The records show that this Termination Review Panel was never convened by the respondent company to review the intended termination of the petitioner.

Moreover, the respondent company did not apply for any clearance to terminate the services of the petitioner as required by Section 1 of Rule XIV, Book V of the Revised Rules and Regulations

Implementing the Labor Code. The records show that instead of filing the required clearance to terminate the services of the petitioner, the private respondent filed a report informing the Ministry of Labor and Employment that it had considered the petitioner resigned as of September 25, 1980. While there is nothing in the Labor Code nor in its Implementing Rules and Regulations that requires an employer to first secure a clearance before it can consider an employee as resigned, the report filed by the private respondent is insufficient compliance with the procedural requirements for the validity of the termination of an employee. The private respondent must have filed the report in accordance with Section 11, Rule XIV, Book V of the Revised Rules and Regulations Implementing the Labor Code which provides that:

> "Sec. 11. When reports required. — Every employer shall submit a report to the Regional Office in accordance with the form prescribed by the Department on the following instances of termination of employment, suspension, layoff or shutdown which may be effected by the employer without prior clearance, within five (5) days thereafter:
>
> "(a) All terminations of employment with a definite period if the separation of the employee is effected at the end of the stipulated period;
>
> "(b) All dismissals, suspensions or layoffs of the employees with less than one (1) year of service;
>
> "(c) All shutdowns or cessations of work or operations falling under the exceptional circumstances specified in Section 10 hereof;
>
> "(d) All suspensions or layoffs which have been effected by the employer as a disciplinary measure and which will not ultimately lead to the dismissals or termination of employment of the employees affected thereby;
>
> "(e) All resignations and retirements; and

> "(f) All other termination of employment, suspensions, layoffs, or shutdown not otherwise specified in this and in the immediately preceding sections."

The reliance by the private respondent on the above quoted provision of the Rules and Regulations Implementing the Labor Code is improper. Resignation, in the context of Section 11 is a formal renouncement or relinquishment of an office (Steingruber vs. City of San Antonio, TexCom, App., 220 S.W. 77, 78). It must be made with the intention of relinquishing the office accompanied by an act of relinquishment (Patten vs. Miller, 190 Ga. 123, 8 S.E. 2nd 757, 770; Sadler vs. Jester, D.C. Tex., 46 F. Supp. 737, 740; See also Black's Law Dictionary, Revised Fourth Edition, 1968).

In the case at bar, there is no such intention on the part of the petitioner to relinquish his position. That there was no voluntary resignation on the part of the petitioner is shown by the following findings of the Labor Arbiter:

x x x

> "In this particular case, complainant has not made any formal, muchless informal renouncement or relinquishment of his position. Neither does it appear that complainant has exhibited act or acts tending to show that he was resigning from his job. On the contrary, complainant manifested his avowed intention to cling on to his position when he requested management for a leave of absence during the period of his detention."

Indeed, the petitioner immediately opposed the action of the private respondent eleven (11) days after he learned about it. Moreover, the petitioner manifested his intention to return to work the same day that he was released by the military upon a finding that his detention was without any basis.

Finally, we cannot ignore the undisputed fact that the respondent company has already hired a replacement for the petitioner. Thus, the petitioner's reinstatement to his former position would merely compound the injustice. It would not be justified for the respondent company to terminate the services of the person who was hired to

replace the petitioner just so the latter could assume his former position. Neither should we order the respondent company to create a new position for sales administrative clerk.

Thus, the remedy left for the petitioner is reinstatement to a substantially equivalent position under Section 4 (a) of Rule I, Book VI of the Rules and Regulations Implementing the Labor Code which provides that:

> "Reinstatement to former position. — An employee who is separated from work without just cause shall be reinstated to his former position. Unless such position no longer exists at the time of his reinstatement, in which case, he shall be given a substantially equivalent position in the same establishment without loss of seniority rights."

As earlier stated, the cause for which the petitioner was separated from work was found to be non-existent, and thus, the dismissal of the petitioner was without just cause.

We agree with the submission of the petitioner that since he was a mere sales administrative clerk and considering further that the private respondent has expanded its operations, having hired several clerks after it received the decision of the labor arbiter, the petitioner may be easily reinstated to a substantially equivalent position.

On the matter of backwages, the petitioner is not entitled to any wages during the period of detention. However, after he was released from detention and the company refused, without legal basis, to reinstate him, his entitlement commenced. Following earlier precedents, we award the petitioner fifty percent (50%) backwages from April 13, 1981 up to the date he is reinstated but not to exceed three years. The backwages shall be based on his last salary or compensation as sales administrative clerk. (Capital Garment Corp. vs. Ople, 117 SCRA 473).

**WHEREFORE**, the decision appealed from is **REVERSED** and **SET ASIDE**. The decision of Labor Arbiter Tito G. Genilo is **REINSTATED**. The award of backwages is however, reduced to fifty percent (50%) of the petitioner's latest basic monthly salary to cover

the period from April 13, 1981 to the date of actual reinstatement but not to exceed three years backwages.

**SO ORDERED.**

**Teehankee, *C.J., (Chairman)*, Melencio-Herrera, Plana, De la Fuente and Patajo, *JJ.*, concur.**
**Relova, *J.*, is on leave.**

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