formation as the court shall deem proper or necessary, to be fully advised as to the care, education, maintenance and moral and physical training of the child, as well as to the standing and ability of such institution or individual to care for such child. The court may change the guardianship of such child, if, at any time, it is made to appear to the court such change is to the best interests of the child. If, in the opinion of the court, the causes of the dependency of any child may be removed under such conditions or supervision for its care, protection and maintenance as may be imposed by the court, so long as it shall be for its best interests, the child may be permitted to remain in its own home and under the care and control of its own parent, parents or guardian, subject to the jurisdiction and direction of the court; and when it shall appear to the court that it is no longer to the best interests of such child to remain with such parents or guardian, the court may proceed to a final disposition of the case.

"In case any child is adjudged to be 'dependent' or 'neglected' then such parents or guardian shall thereafter have no right over or to the custody or services of said child except upon such conditions in the interest of such child as the court may impose, or where, upon proper proceedings, such child may lawfully be restored to the parents or guardian.

"SEC. 38-D. *Proceedings in other cases.* — In the hearing and disposition of cases other than that covered by the preceding section, the court shall be governed by the Rules of Court and the laws properly applicable in each particular case.

"In cases between husband and wife, and between parent and child, however, the hearings may be held, upon petition of any party, in chamber or with the exclusion of the public. All information obtained at such hearings shall be deemed privileged and confidential and shall not be divulged without approval of the court.

"SEC. 38-E. *Appeal from decision and order of the Court.* — Decisions and orders of the court shall be appealed in the same manner and subject to the same conditions as appeals from the court of first instance.

"SEC. 38-F. *The clerk of court and subordinate employees.* — The Juvenile and Domestic Relations Court shall be a court of record and shall have a clerk of court and such subordinate employees as may be necessary who shall be appointed in the same manner and shall receive the same compensation as similar officials and employees of the court of first instance."

SEC. 2. Upon the organization of the Juvenile and Domestic Relations Court, the Secretary of Justice shall cause all cases and proceedings pending before the municipal court and the court of first instance of Manila properly cognizable by the court herein created to be transferred thereto.

SEC. 3. The sum of seventy-five thousand pesos is hereby appropriated, out of any funds in the National Treasury not otherwise appropriated, for the salary and emoluments of the judge and personnel of this court as well as the rental and other incidental expenses of the court and shall include a similar amount thereafter in the annual general appropriation acts.

SEC. 4. This Act shall take effect upon its approval.

Approved, September 9, 1955.

DOUBLE JEOPARDY IN ONE AND THE SAME CAUSE

*Ricardo G. Nepomuceno, Jr.**

NO rule of law has perhaps a shorter line of precedents in this jurisdiction and no doctrine has been more assailed than that which prevents the Government, on the ground of double jeopardy, from appealing a judgment of the lower court in a criminal case. And understandably so. For the doctrine that there may be more than one jeopardy in one and the same cause is of recent vintage, adopted by the United States Supreme Court only in 1904, in the case of *Kepner v. United States;*[1] and, though the rule has been subsequently followed by our Court, it cannot yet be said to have been firmly established.

Prior to that decision, the principle followed in the Philippines was that the accused was exposed, in a single case, to only one jeopardy, and the protection against double jeopardy applied only to "a trial in a new and independent cause where a man had already been tried once."[2]

That was the prevailing rule under Spanish law, which first introduced into the Islands the legal concept of double jeopardy. Two actions, two accusations were necessary before the accused could utilize the defense.[3] And where there was only one cause, there could be but one jeopardy which terminated when the judgment in the case became final and unalterable.

> Under [Spanish law] . . . a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort . . . . The trial was regarded as one continuous proceeding, and the protection given was against a second conviction after this final trial had been concluded in due form of law.[4]

That, too, was the rule adopted by the Philippine Supreme Court in the early cases of *United States v. Perez,*[5] *United States v. Kepner,*[6] and *United*

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* A.B., Ateneo de Manila, 1953; LL.B., 1956.

1. 11 Phil. 669 (1904).
2. Kepner v. U.S., 11 Phil. 669, 703 (1904) (dissenting).
3. The *Fuero Real* provided that, except in a few specified cases, "after a man accused of any crime has been acquitted by the court, no one can afterwards *accuse* him of the same offense." The *Siete Partidas* contained a similar provision.
4. Kepner v. U.S., 11 Phil. 669, 698 (1904).
5. 1 Phil. 203 (1902).
6. 1 Phil. 396 (1902).

States v. Mendezona.[7]

However, hardly a year had passed since the *Mendezona* case when a closely divided United States Supreme Court decided the leading case of *Kepner v. United States* (the appeal from the Philippine Supreme Court decision in *United States v. Kepner, supra*), which adopted the English and American states rule. It was in that case that the United States Supreme Court first applied the principle of double jeopardy to one and the same cause.

The facts of the case were as follows: Kepner was prosecuted in the Court of First Instance for the crime of *estafa.* After trial, judgment of acquittal was rendered. The Government appealed to the Supreme Court of the Philippines which reversed the judgment and convicted the accused. From this, Kepner appealed to the United States Supreme Court, invoking the rule against double jeopardy.

In reversing the judgment of the Philippine Court and discharging the accused, the United States Supreme Court held that —

> It is true that some of the definitions given by the textbook writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as the decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so, after acquittal. (Coleman v. Tennessee, 97 U.S. 509)[8]
>
> . . . .
>
> It is then the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict and it was founded on a defective indictment. *The protection is not, as the court below held, against the peril of a second punishment, but against being again tried for the same offense.* (Emphasis ours.)[9]

The doctrine in the *Kepner v. United States* case has been faithfully followed by the Philippine Supreme Court in a series of cases — beginning with the case of *United States v. Salvador*[10] in 1904 up to the much publicized Philippine Air Lines hijacking case, *People v. Ang Cho Kio,*[11] decided in 1954. But, notwithstanding the observation made by one writer that the *Kepner* rule has thus been sanctified by practice,[12] the matter cannot be said to have been finally settled. For, as Chief Justice Paras noted

[7] 2 Phil. 353, 380-81 (1903).
[8] 11 Phil. 696.
[9] *Id.* at 698-99.
[10] 4 Phil. 510 (1905).
[11] 50 O.G. 3563 (1954). Some of the intervening cases are: Ramos v. Buyson, 63 Phil. 215, 220 (1936); Grafton v. U.S., 11 Phil. 776, 188-91 (1909); U.S. v. Ballentine, 4 Phil. 672, 674 (1905).
[12] NAVARRO, A TREATISE ON THE LAW OF CRIMINAL PROCEDURE IN THE PHILIPPINES 258 (1952).

(while still in the Court of Appeals), "on the Bench and in the legal profession, here and in the United States, there are many who believe that at least in the Philippines where the jury system and the reason for its institution are unknown, and where the Spanish Criminal Procedural law permitting appeal by the Government . . . has been applied and enforced with success for many generations, [the rule] which sanctions said appeal by the Government should stand."[13]

And, in truth, the Kepner rule has been criticized and attacked. From an armor of defense available to the accused, criticizes the state, the double jeopardy rule has been forged by the *Kepner* case into a chain fettering the arm of the law. And as often as the Court rebuffed attempts of the authorities to correct, on appeal, "manifestly" erroneous decisions of the lower courts, the prosecuting officers renewed their attack against the steadily lengthening chain of precedents with increased zeal and vigor.

The latest local attempts to change the rule have been made in the cases of *People v. Pomeroy*[14] and *People v. Arinso,*[15] both pending in the Supreme Court for decision. The facts of the two cases are identical. The accused were convicted in the lower court. The state moved for the reconsideration of the judgment with a view to increasing the penalty imposed. The motions were denied by the lower courts on the ground that to so modify the verdicts would be to expose the accused to a second jeopardy. From these denials, the state, through Solicitor General Ambrosio Padilla, appeals. Both cases put in issue the wisdom of the rule restricting the state's right to appeal.[16] "The time has come," boldly suggests Solicitor General Padilla, "for a re-examination and revision of the rule adopted by [the Court] on double jeopardy since the majority decision of the Federal Supreme Court in the case of [Kepner v. United States]."[17] On the other hand, the defendant-appellee in the *Pomeroy* case insists that, on the contrary, the crying need of the hour is not *re-examination* but the *re-affirmation* of our close adherence to old faiths, to recognized and settled rules . . ."[18]

No doubt the Supreme Court will, as it has done in the past, patiently entertain and conscientiously study this present plea by the Government to

[13] People v. Tolentino, (CA) G.R. No. 3298, Sept. 20, 1938, 1938 L.J. 894.
[14] (CFI) Manila Br. 5 Crim. No. 19166, Aug. 28, 1954, *appeal docketed,* No. 8229, S. Ct.
[15] (CFI) Cotabato Crim. No. 1605, July 17, 1953, *appeal docketed,* No. 8990, S. Ct.
[16] The issue may be sidetracked in the *Pomeroy* case. If the last argument of the defendant-appellee in said case that the notice of appeal by the Government was filed out of time, Brief for Appellee, p. 20, People v. Pomeroy, (CFI) Manila Br. 5 Crim. No. 19166, Aug. 28, 1954, *appeal docketed,* No. 8229, S. Ct., is upheld, there will be no occasion to pass on the jeopardy question. However, the question will surely be passed upon in the *Arinso* case.
[17] Brief for Appellant, p. 37, *id.*
[18] Brief for Appellee, p. 19-20, *id.*

throw overboard the rule denying the state the right to appeal from a verdict of the lower court. And with reason. For the *Kepner v. United States* case, the cornerstone of subsequent Philippine decisions, is not invulnerable. There are against the arguments invoked by the majority other arguments equally sound.

For one, the dissenting opinion of Justices Holmes[19] and Brown[20] the legal giants of the deciding tribunal (with whom three other justices concurred) show, as Justice Cardozo — another jurist of unquestioned stature — puts it, "how much [is] to be said in favor of a different ruling.[21]

The Holmes dissent, which challenges the validity of the main premise of the *Kepner* rule, is, in substance, that —

> ...logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause.[22]

Then again, the Philippine Supreme Court decision in *United States v. Kepner* (the very case appealed to the Supreme Court of the United States) could be invoked to justify a reversal of the rule. The unanimous opinion presents a lucid and forceful *ratione cessante, cessat ipsa lex* argument which still remains to be answered.

At the very onset, the court in said case, boldly traces the source of the difficulties met by other courts in deciding similar questions, not to the inherent complexity of the legal issues presented, but rather to the reluctance to deviate from precedents devoid of basis when examined in the light of the times.

> ...[J]ust when a defendant may call [the plea of double jeopardy] to his protection and avail himself of it as a shield against further prosecution on the same charge has presented, particularly to some American courts, difficulties which, by the way, do not arise from any perplexity inherent in the plea itself, but rather from a more or less rigid adherence to a long line of precedents which nobody seems willing to disturb but which nearly all admit have now but little if any sound reason to support them.[23]

Tracing the rule to England, and the reason for it to the judicial abuses there prevalent, the court noted that —

> Formerly, in England, the right to plead jeopardy after an acquittal or conviction was the necessary adjunct, the indispensable auxiliary of the trial by jury, inasmuch as the right of trial by his peers, reluctantly conceded as a remedy for judicial abuses, would have availed the citizen but little if the verdict of the twelve men, good and true, had been left to the mercy of a pliant judiciary who were the mere creatures of the authority or influence which made them.
>
> Hence no appeal was permitted from the verdict of the jury or from the judgment entered in conformity with it. Both were final, and therefore the jeopardy became complete, not because there had been a conviction or an acquittal but because the question of innocence or guilt of punishment or no punishment, had been finally determined beyond all possibility of judicial change or alteration.[24]
>
> . . .
>
> The proposition that a person accused of crime is entitled to have an illegal and improper judgment against him modified, corrected, and set aside and that the State can have no relief against a similar judgment in his favor has neither sound sense nor sound law to support it... At first when judges were the corrupt and willing tools of a tyrannical power, there may have been good reason for not permitting an appeal by either side from a verdict of twelve men duly selected to try the case, but when the courts became good enough to pass on the validity of a verdict of conviction, it would seem that they might safely be entrusted to pass on the legality of a verdict of acquittal. *When the reason for the rule ceased, the rule ought to have ceased with it...*[25] (Emphasis ours.)

And another decision, which weighs heavily in favor of the Government's appeal, is that rendered by Justice Cardozo in *Palko v. Connecticut*,[26] in which case the Solicitor General also evidently finds "a new judicial trend as to the interpretation of the constitutional provision regarding [the] highly controverted doctrine of double jeopardy."[27]

In that case, Palko the accused was indicted in a Connecticut state court of first degree murder, but was found guilty by the jury only of second degree murder. Under a Connecticut statute, the state appealed to the Connecticut superior court which reversed the judgment because of errors in the exclusion of testimony and in the instructions to the jury on the degrees of murder. Palko was then retried and convicted of first degree murder and sentenced to death. Palko appealed, pleading double jeopardy.

After "scrutinizing" the *Kepner* decision and "assuming" the correctness of the rule therein established, the court, in affirming the conviction, asked —

> Is that kind of double jeopardy to which the statute has subjected [the accused] a hardship so acute and shocking that our policy will not endure it? Does it violate those "fundamental principles of liberty and justice which lie at the base of our civil and political institutions?" The answer must be "no." What the answer would have to be if the state were permitted to appeal after a trial free from error, we have no occasion to consider. The state . . . asks no more than this, that the case against him shall go on until there shall be a trial free from corrosion of substantive legal error. . . . If the trial had been infected with error adverse to the accused, there might have been review at his instance, and as often as necessary, to purge the vicious taint. A reciprocal privilege . . . has now been granted to the state. There is here no seismic

[19] 11 Phil. 702.
[20] *Id.* at 705.
[21] Palko v. Connecticut, 302 U.S. 319, 323 (1937).
[22] 11 Phil. 702-03.
[23] 1 Phil. 398.

[24] Id. at 398-99.
[25] Id. at 400.
[26] 302 U.S. 319 (1937).
[27] People v. Tolentino, (CA) G.R. No. 3298, Sept. 20, 1938, 1938 L.J. 894. Though for vigorous attacks on it. FRANK, CASES AND MATERIALS ON CONSTITUTIONAL LAW 569 (1950).

innovation. The edifice of justice stands, in its symmetry, to many, greater than before.[25]

The *Palko* case, it has been observed, shares and affirms the view in the *United States v. Kepner* case that the rule "granting to one the right to appeal but denying it to the other interested party, the State, would . . . be one sided and unbalanced, if not actually wrong and unjust."[29] And more important, the *Palko* decision establishes the doctrine, by way of exception to the *Kepner* rule,[30] that an appeal by the Government from a judgment, if authorized by statute, does not infringe on the constitutional protection. This view seems to be supported by Cooley[31] and Black.[32]

In the Philippines, the exception has apparently been accepted by the Court in *People v. Cabero,*[33] where it allowed an appeal authorized by Act No. 2886.

> Where the statute authorizes a review of erroneous rulings prior to trial, the statute has always been upheld. In the Kepner case, the majority opinion seems to give weight to the idea that section 44 of General Orders No. 58 has been revoked by subsequent legislation. It is to be noted that Act No. 2886 was passed some time after the Kepner decision.
>
> The proceedings were not terminated as the fiscal took prompt exception to the unauthorized action of the court and the Solicitor General brought this appeal in the manner and within the time authorized by statute.[34]

It may be that the *Palko* and *Cabero* cases may be properly invoked only where there is a statute authorizing an appeal. But at least the principle is admitted — an appeal by the state, if from errors of law, is not *inherently* violative of the constitutional guaranty and may be validly allowed.

A final argument in favor of a reversal of the *Kepner* rule is presented by Solicitor General Padilla in his able brief. Drawing inspiration from Justice Brown's observation, in his dissent to the *Kepner v. United States* case, that the majority rule would "place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals,"[35] the Solicitor General warns that —

[29] People v. Tolentino, (CA) G.R. No. 3298, Sept. 20, 1938, 1938 L.J. 804.

[30] See ROTTSCHAEFFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW § 204 at 815 & n. 20 (1939).

[31] "A writ of error does not lie on behalf of the Commonwealth to reverse an acquittal, *unless expressly given by statute.*" (Emphasis ours) 1 COOLEY, A TREATISE ON CONSTITUTIONAL LIMITATIONS 679 (8th ed. -927).

"But an acquittal, however, erroneous, must be a bar, *unless a remedy by writ of error is given to the State by statute,* as has been done in some states. (State v. Tait, 22 Iowa 140)" COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW.

[32] "The practical effect of the provision against second jeopardy is not only to save a person from being twice tried for the same offense in distinct proceedings, but also to deny to the prosecution, in criminal cases, the right to take an appeal or to move for a new trial, *unless, in the particular state, the constitutional rule has been relaxed so far as to allow this.*" (Emphasis ours) BLACK, AMERICAN CONSTITUTIONAL LAW 703-04 (3d ed. 1910).

[33] 61 Phil. 121 (1934).

[34] *Id.* at 125-126.

> The rule that would bar any review of an order of dismissal or judgment of conviction in a criminal case would place upon the trial court the stamp of infallibility and make of said court the sole arbiter of the guilt or innocence of criminals.
>
> Such a rule which would extend the double jeopardy clause to a review by the appellate court would be against sound public policy for it would lead to arbitrary and perhaps oppressive judgment, may foment decisions motivated by friendship, induced by bribery and actuated by other evil motives, without affording the state the right of appeal or review which is guaranteed to every accused.[36]

All the arguments against the *Kepner* rule are indeed formidable, but the precedents and authorities from which the *Kepner* decision draws its strength are no less so. In defense of the rule may be marshalled an impressive array of leading American decisions and opinions of outstanding Philippine and American authorities. And if, as one writer suggests, the *Kepner* decision has actually given our jeopardy rule a common law content,[37] the Solicitor General has undertaken an almost impossible task. For under common law and American jurisprudence, the rule denying the state the right to appeal from a judgment of the trial court has won overwhelming support and only a very few isolated decisions may be found in support of a different rule.

As Willoughby points out —

> It is established that, in criminal cases, the State has no right of appeal where the accused may fairly be said to have been placed in jeopardy. This, the doctrine of the common law, has repeatedly been accepted by the United States Supreme Court. (See U.S. v. Sanges, 144 U.S. 310, and authorities there cited.) A verdict or judgment in a trial court in favor of the accused is, therefore, as to him final and conclusive.[38]

Bishop in his *New Criminal Law,* drawing from accepted precedents, lays down an identical rule —

> After jeopardy of the constitution has attached to the party, the government can take no step backward. If through the misdirection of the judge on a question of law, or a mistake of the jury or their refusal to obey the instructions of the court, or any other like cause, a verdict of acquittal is improperly rendered, it cannot even afterwards, on application of the prosecution, *in any form of proceeding,* be set aside and a new trial granted.[39] (Emphasis ours.)

And another writer, John Barker Waite, fixes the place which the contrary rule occupies in American law —

> Although the defendant, after conviction, may with somewhat disputed consequences, waive his privileges against double jeopardy by asking for a new

[35] 11 Phil. 704.

[36] Brief for Appellant, p. 56, People v. Pomeroy, (CFI) Manila Br. 5 Crim. No. 19166, Aug. 28, 1954, *appeal docketed,* No. 8229, S. Ct.

[37] NAVARRO, *op. cit. supra* note 12, at 258.

[38] 2 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 708 2d ed. 1929).

[39] 1 BISHOP, NEW CRIMINAL LAW 579 (8th ed. 1892).

trial, it does not follow that the state can successfully ask for a retrial following what it contends was an erroneous acquittal of the defendant. *Only Connecticut has taken the position that the accused has not really been "acquitted" within the meaning of the principle of no retrial after acquittal, until the action of the trial court in rendering judgment of acquittal has been reviewed and affirmed on appeal.*[40] (Emphasis ours.)

And it seems that the view expressed in the Holmes dissent to *Kepner v. United States*, though worthy of consideration, is not shared by any other decision; far from being a poniard reaching the vitals of the majority opinion, it appears to be only a thorn in the side of the *Kepner* rule. "Despite [Justice Holmes'] argument," Willoughby observes, "the weight of authorities, both state and Federal, is overwhelming that . . . a verdict or judgment in a lower court of competent jurisdiction is final and conclusive as to the defendant."[41]

On the local front, the authorities, with equal unanimity, accept the *Kepner* rule. Chief Justice Moran, citing the *Kepner v. United States case*, finds that "as now adjudged both in the jurisprudence of the United States and in the Philippines, the protection afforded by the constitutional prohibition against double jeopardy is effective not only against the peril of a second punishment but also against a second trial for the same offense."[42] Justice Albert supports the doctrine.[43] Dr. Francisco,[44] Professors Tañada and Fernando[45] share the same view. Judge Kapunan, while suggesting certain instances in which the state may appeal from an order of dismissal, admits that the "prosecution, of course, cannot appeal from a judgment of acquittal."[46] And Professor Navarro finds the rule to have been definitely established in this jurisdiction, suggesting that the remedy of the government, if any, must be sought elsewhere, than in the court.[47]

And another hurdle that any attempt to revise the *Kepner* rule will have to clear is the opinion of Professors Tañada and Fernando that the constitutional convention passed the double jeopardy provision in our Constitution in the sense in which it was interpreted by *Kepner v. United States* — an opinion which, if correct, would render futile any attempt to reverse the rule. "It was announced," they believe, "to be the intention of the framers of the Constitution to follow the principle in the Kepner [v. United States] case as shown by the failure of the Constitutional Convention to adopt an amendment adding to the first part of the provision the words: 'upon which a final judgment has been rendered.' "[48]

[40] WAITE, THE CRIMINAL LAW AND ITS ENFORCEMENT 841 (3d ed. 1947).
[41] 2 WILLOUGHBY, *op. cit. supra* note 38, at 709.
[42] 2 MORAN, COMMENTS ON THE RULES OF COURT 800 (Rev. ed. 1952).
[43] ALBERT, CRIMINAL PROCEDURE 182 (1927).
[44] 2 FRANCISCO, CRIMINAL PROCEDURE AND FORMS 299 (1951).
[45] 1 TAÑADA & FERNANDO, CONSTITUTION OF THE PHILIPPINES 618 (4th ed. 1952).
[46] KAPUNAN, CRIMINAL PROCEDURE ANNOTATED 306-07 (1950).
[47] NAVARRO, *op. cit. supra* note 12, at 258.

The *Kepner* rule cannot be easily dislodged; it has weathered numerous attempts. But the interpretation of the double jeopardy provision may be changed as it has been changed in the past. Solicitor General Padilla has made out the most powerful case, so far, for the Government but his appeal may prove to be just another valiant attempt. The defendants have in their favor an arsenal of authorities, both American and Philippine,[49] and prece-

[48] 1 TAÑADA & FERNANDO, *op. cit. supra* note 45. On this score, Professor Aruego has this to say:
"An amendment was proposed by Delegate Barrion to modify the meaning of the world, *jeopardy*, in such a way that, before the judgment of the lower court became final, an appeal to the higher court could be permitted. The provision as amended by Delegate Barrion would then read as follows:
'No person shall be twice put in jeopardy of punishment for an offense *upon which a final judgment has been rendered.*'
"In explaining his amendment, Delegate Barrion stated that he was reaffirming the doctrine of jeopardy, only that he was suggesting that the Convention should give its own meaning of the term, jeopardy, so that the government, like the accused, should be given an opportunity to appeal a case from the decision of the trial court before the sentence would become final.
" . . . .
"Without any speech against it, the proposed amendment was defeated when put to a vote. The Convention consequently brought to the Constitution the meaning which the jeopardy provision had under the Jones law." 1 ARUEGO, THE FRAMING OF THE PHILIPPINE CONSTITUTION 191 (1936).

[49] The defendants have in their favor, the recent case of *People v. Ang Cho Kio*, 50 O.G., 3563 (1945), decided on closely identical facts. In fact, the defendant-appellee in the *Pomeroy* case relies heavily on the decision, claiming that the ruling therein definitely settles "whatever doubt or confusion there might have been before among members of the Bench and Bar on this all-embracing question of whether or not the government can appeal from a judgment of conviction or acquittal..." Brief for Appellee, p. 14, People v. Pomeroy, (CFI) Manila Br. 5 Crim. No. 19166, Aug. 28, 1954, *appeal docketed*, No. 6990, Sup. Ct.
In the *Ang Cho Kio* case, the accused was sentenced, under an information for murder, to imprisonment of 12 to 20 years, and, under another information for grave coercion with murder, to life imprisonment. The prosecution moved for reconsideration with a view to raising the penalty to life imprisonment and death respectively. Admitting that it was faced with a novel legal question, the Court held that to increase the penalty would be to place the accused in double jeopardy, consisting in the danger of being sentenced to a graver penalty after having been sentenced by the lower court to a lesser one. People v. Ang Cho Kio, *supra* at 3567.
On the other hand, the Government has also in its favor the case of *People v. Tamayo*, 47 O.G. 6150 (1950), which, while decided on facts not as close to the case at bar as that of the *Ang Cho Kio* case, impairs to some extent the force of the *Ang Cho Kio* decision, holding as it does that a judgment of conviction may be modified so as to increase the penalty if the Government presents a motion in due time.
The facts of the case were as follows: The accused pleaded guilty to an information for illegal possession of firearms and was fined by the court eight days after judgment, the fiscal moved to reconsider the decision on the ground that the penalty properly applicable was that provided in R.A. No. 4, passed during the pendency of the action. The court, despite of the objection of the accused, amended the decision, and sentenced him to 5 years imprisonment. On appeal by the accused, the Supreme Court held —
"One other objection to a modification at any time of a judgment prejudicial to the accused is — so it is contended — that the accused would be put twice in jeopardy. *Our answer is that the doctrine of double jeopardy does not attach until after the period for appeal has expired.* The

dents which our Supreme Court is loathe to disturb. The Government's appeal faces the prospect of being "ignored or dismissed with a wave of the hand by merely pointing a dogmatic finger to the Kepner case."[50]

[PEOPLE v. POMEROY][51]

BRIEF FOR APPELLANT

III

THE COURT *A QUO* ERRED IN DENYING THE PROSECUTION'S "MOTION FOR RECONSIDERATION" OF THE DECISION IMPOSING ON THE DEFENDANT A PENALTY OF 12 YEARS OF *PRISION MAYOR* ON THE ERRONEOUS BELIEF THAT ANY INCREASE OF THE PENALTY WOULD CONSTITUTE DOUBLE JEOPARDY.

Rule 116, Sec. 7 of the Rules of Court, entitled "Modification of Judgment" provides that:

> "A judgment of conviction may be modified or set aside by the Court rendering it before the judgment has become final or appeal has been perfected."

In the case of People v. Tamayo, 47 O.G. 6150, this Honorable Supreme Court held:

> "Judgment in a criminal case may be revised or modified only within the period to appeal, or fifteen days from the date of its promulgation. We see no reason why the Government may not make a motion for reconsideration as distinct from a motion for new trial, before the judgment becomes executory, but such motion cannot operate to suspend or extend the above period; the court must act before that period terminates if the revision, alteration, or modification is to be valid. Only a motion by the defendant can interrupt the running of the period at the expiration of which the judgment becomes final."

It is clear from the above decision that either the prosecution or the defense may move for the reconsideration of a judgment in criminal cases within the 15 day period to appeal.

In the case of People v. Romero, G.R. No. L-4517-20 (July 31, 1951), this Honorable Supreme Court held:

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principle of jeopardy in this respect has not been changed by law or the Constitution.... The rule is the same now as when the *Vayson* case was decided; the same rule prevails under the Constitution of the United States and the constitutions of the various states on which the decisions cited in the *Vayson* case are predicated. *The matter relative to the time when jeopardy attaches is largely statutory and section 7 of rule 116, in express and plain language, fixes such time at the expiration of 15 days.* (Emphasis ours.) People v. Tamayo, *supra* at 6153-54.

See also 2 FRANCISCO, *op. cit. supra* note 44, at 299.

[50] People v. Tolentino, (CA) G.R. No. 3298, Sept. 20, 1938, 1938 L.J. 894.

[51] The briefs for the appellant and appellee are faithfully reproduced. No attempt has been made to change the form of the citations.

> "Motion for reconsideration filed by the fiscal in criminal cases on the ground of error of law in judgment for grave abuse of discretion is equivalent to a motion for new trial and interrupts the time of appeal."

Similarly, in the case of People v. Enriquez, G.R. No. L-4934 (November 28, 1951), this Honorable Court allowed a motion for reconsideration filed by the fiscal in a criminal case on the ground of error of law (See also People v. Harsonis, 47 O.G. 5089). Notwithstanding the above decisions, the trial court in this case denied the motion for reconsideration filed by the prosecution on the ground that:

> "Having the same effect as an appeal by the prosecution from the decision of this court for the purpose of increasing the penalty imposed by the defendant, it subjects the latter to another jeopardy as held by our Supreme Court in People v. Ang Cho Kio, G.R. No. L-6687-8, July 29, 1954." (pp. 306-307, rec.).

We fully realize the legal import of the decision of this Honorable Supreme Court in the case of People v. Ang Cho Kio, *supra*, cited by Judge Gregorio Narvasa, which held:

> "¿Puede el ministerio fiscal apelar?
> "El articulo 2 de la Regla 118 dice asi:
>
> "'QUIEN PUEDE APELAR. — El Pueblo de Filipinas, sin embargo, no podra apelar cuando el acusado se viese expuesto a doble *Jeopardy*. En todos los demas casos, cualquiera de las partes podra apelar de una sentencia definitiva o de auto dictado despues de la sentencia que afecto los derechos esenciales del apelante.'
>
> "Este articulo es reproducion de los articulos 43 y 44 de la Orden General No. 58 tal como fue enmendada por el articulo 4 de la Ley No. 2886. La Orden General No. 58 es de origen americano y, por eso, los precedentes anglo-americanos deben tenerse muy en cuenta.
>
> "En una larga lista de decisiones despues de decidida en casacion la causa de Kepner contra Estados Unidos, 195 U.S. 100, 11 Jur. Fil. 689, se ha establecido invariablemente por este Tribunal la doctrina de que la acusacion no puede apelar contra una sentencia en que se absuelve al acusado, por la razon en que por segunda vez se le pone en peligro de ser castigado por el mismo delito. 'El derecho comun americano prohibia tambien un segundo juicio por el mismo delito hubiera el acusado sufrido o no algun castigo, o sido absuelto o condenado en una causa anterior.'
> "En la causa de Estados Unidos contra Sanges, citada en la de Kepner, se dijo: 'Desde la epoca del Lord Hale hasta la fecha del caso de Chadwick que acabamos de citar, los libros de texto, con raras excepciones, o dan por supuesto o afirman que el acusado, (o su representante); es el unico que puede obtener un nuevo juicio o recurrir en casacion en causa criminal, y una sentencia en su favor es definitiva y concluyente. (Veanse 2 Hawk., c. 47, sec. 12; c. 50, secciones 10 y siguientes; Bac. Ab. Trial. L. 9; Error, B; 1 Chit. Crim. Law, 657, 747, Stark, Crim. Pl. [Segunda Edicion], 357, 367, 371; Arch. Crim. Pl.; [Doudecima Edicion inglesa y Edicion sexta americano] 177; 199.)'
>
> "...'No se ha dado ningun caso de recurso de casacion contra una sentencia en favor del acusado, despues de absuelto.' (Archold Cr. Pl. & Pr. Pomeroy's Ed., 199).

"No error, however flagrant, committed by the court against the state, can be reserved by it for decision by the supreme court when the defendant has once been placed in jeopardy and discharged, even though the discharge was the result of the error committed. State v. Rook, 49 L.R.A. 186, 61 Kan. 382, 59 Pac. 653." (1 L.R.A. 242).

We believe however and so respectfully submit, that the time has come for a re-examination and revision of the rule adopted by this Honorable Court on double jeopardy since the majority decision of the Federal Supreme Court in the case of U.S. v. Kepner, 11 Phil. 669; 195 U.S. 100.

There is no provision in the Constitution nor in the Rules of Court or in any statute which directly prohibits the state from appealing from a judgment in a criminal case. The provision of double jeopardy simply reads:

"No person shall be put twice in jeopardy for the same offense." (Art. 3, Sec. 1, No. 20, Constitution)

The decision in People v. Ang Cho Kio, *supra*, however, begs the question for it assumes that any appeal or motion on the part of the state to review a decision of the trial court to make the same conformable with the facts and the law would constitute double jeopardy. Rule 118, Sec. 2, of the Rules of Court, provides:

"*Who may appeal.* — The People of the Philippines cannot appeal if the defendant would be placed thereby in double jeopardy. In all other cases either party may appeal from a final judgment or ruling or from an order made after judgment affecting the substantial rights of the appellant."

Previous laws permitting appeal by the State even in case of acquittal in criminal case; the Spanish law of criminal procedure expressly allowed a review by the Audiencia (Supreme Court) even if the trial court had acquitted the accused:

General Orders No. 58, Secs. 43, 44, etc., permitted an appeal to be taken either by the Attorney General or the accused. In the case of U.S. v. Kepner, 1 Phil. 397, this Honorable Supreme Court held in a unanimous decision that:

"1. CRIMINAL LAW; JEOPARDY. — A defendant has not been in jeopardy until the question of his guilt or innocence has been determined by a final judgment, and an appeal from a judgment of acquittal does not therefore constitute a second jeopardy."

This Honorable Court in reviewing the laws in force before and after the change of sovereignty held that an appeal by the State does not constitute double jeopardy.

"Before the change of sovereignty there never was in the Philippine Islands any finality to the judgment of the trial court in felony cases until it had been ratified and confirmed by the court of last resort. Such a judgment was merely advisory to the appellate tribunal, and might be modified, set aside, or changed, or a review of the record, either to the benefit or prejudice of the defendant, with or without an appeal. Whether the Court of First Instance acquitted the defendant or convicted him, he could not be placed at liberty in the one case or receive the punishment adjudged in the other until the reviewing authority had finally affirmed the judicial determination of the lower court. More than that, if the trial court acquitted the accused, the Audiencia (Supreme Court) might convict him, and if he was convicted it might raise or lower his punishment or even acquit him altogether.

"This was the law of the land when the change of sovereignty took place, and it has only been modified since to the extent of making the judgments of Courts of First Instance in felony cases (except those for capital offenses) final unless an appeal has been taken either by the Attorney-General or the accused. So then, so now: Once a criminal cause is before the court, whether on appeal or on review, the judgment may be changed, altered, or reversed as to the appellate tribunal may seem proper.

"Not being inconsistent with the act of Congress this law cannot be construed to have been repealed by implication, and it must be held to be now in full force for the purposes it was designed to effect.

"To be in jeopardy in the legal sense it is not sufficient that the danger should have begun. It must also have ended before the plea can be made effectual. Jeopardy is not the peril of more than one trial, but the peril of more than one punishment, and in the same proceeding there can be no danger of a second punishment until the first has been finally adjudged." (U.S. v. Kepner, 1 Phil. 397, at pp. 401-402.)

We agree with the court that to be in jeopardy in the legal sense, it is not sufficient that the danger should have begun, it must have also ended before the plea can be made effectual. As stated in the case of U.S. v. Laguna, 17 Phil. 532 —

"The purpose of the constitutional provisions with reference to jeopardy is simply to protect the accused from going a second time through the proceedings which constitute the trial under the system of procedure in vogue. In this jurisdiction the proceedings are not terminated, in a case where capital punishment has been inflicted, until the conclusion of the review by the Supreme Court. During that period the proceedings, may, by reason of unforseen circumstances, be suspended and the cause remanded for action *de novo*." (Syl., par. 2 p. 533.)

In the case of U.S. v. Kepner, 1 Phil. 727, this Honorable Court held that:

"Under General Orders No. 58, the Government has the right to appeal from judgments of acquittal in criminal cases."

The pertinent portion of the unanimous decision penned by Justice Arellano reads as follows:

"Under General Orders No. 58, series 1900, which is the law of criminal procedure in force, the Government has the right of appeal from all judgments of acquittal rendered in criminal cases. The letter and spirit of the order itself are the most conclusive argument in support of this right on the part of the Government.

"Its letter, because this right is thus expressly declared in section 43. 'From all final judgments,' it says, 'of the Courts of First Instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals . . . an appeal may be taken to the Supreme Court . . .' If an appeal can be taken against all final judgments, the judgment of acquittal being also final judgment, it is evident that an appeal lies against a judgment of acquittal. This law grants the right of appeal in all cases in which it was formerly allowed by the local 'existing laws,' de-

cleared in force by section 1 of said General Orders No. 58. If prior to this law, the right of appeal in cases of acquittal was allowed, as will be more explicitly shown hereafter, now as then, and after the publication of said order, the right of appeal from judgments of acquittal will continue to be granted.

"Moreover, section 64 is quite plain and reads as follows: 'In case of appeal after judgment, the defendant may be admitted to bail pending action on the appeal: (1) As a matter of right *if the appeal is from acquittal.*' Under the letter of the order, then, the Government has the right of appeal from an acquittal.

"In its spirit, General Orders No. 58, undoubtedly contemplates the allowance of the right of appeal from judgment of acquittal. Such phrases as that contained in section 43, to wit: . . . in all cases in which the law now provides for appeals . . . ' and the provision contained in section 50 to the effect that cases in the Supreme Court 'shall thereafter take the same course as is now provided by law' or as that contained in section 107, 'the privileges now secured by law to the person claiming to be injured by the commission of the crime . . . ' show that the purpose of the legislator in this respect was to bring into the new law some of the provisions previously in force on the subject, and to establish a criminal procedure not entirely new, as are the majority of the provisions of General Orders No. 58, based on principles of American Law, but mixed, preserving part of the local legislation which is the principle upon which sections 50 and 107 are based.

"Therefore the right of the Government to appeal from a judgment of acquittal being well founded, the motion is overruled without costs." (U.S. v. Kepner, 1 Phil. 727-729.)

Likewise, in the case of U.S. v. Mendoza, 2 Phil. 353, the Supreme Court without any dissent held that:

"Appeal by the Government from a judgment of acquittal does not put the defendant twice in jeopardy in the same offense.' (Syl., par. 6, p. 353.)

In said case, this Honorable Court made the observation that:

"Repression and punishment of public offenses such as estafa, is a matter of interest to society and one of public policy."

The Court reiterated the rule in U.S. v. Kepner, 1 Phil. 397:

"Apart from the question as to whether or not an appeal can be taken against a judgment of acquittal rendered by a judge of the Court of First Instance — this question not having been raised or argued either in the first instance or in this court during the perfection of the appeal allowed the Attorney-General from the judgment of acquittal rendered by Judge Rohde — the contention of the accused, together with the principles on which the contention rests, has already been finally passed upon in the case of the United States v. Kepner (1 Off. Gaz. 353), in which a petition similar to that in the present case and based upon identically the same principles was presented. The motion is denied with costs." (at p. 380).

It is true that in the case of Kepner v. U.S. (195 U.S. 100) reported in 1 Phil. 669, in a split 5-4 decision the majority rule is that:

"It follows that Military Order No. 58, as amended by act of the Philippine Commission, No. 194, in so far as it undertakes to permit an appeal by the Government after acquittal, was repealed by the act of Congress of July, 1902, providing immunity from second jeopardy for the same criminal offense." (Kepner v. U.S., 11 Phil. 669, at p. 702).

It should be noted, however, that the decisions cited in said majority opinion upholding the above conclusion, do not expressly refer to a review by the appellate court, but rather to a second or further prosecution for the same offense. The dissenting opinion of Justice Holmes concurred in by Justices White and McKenna and Justice Brown likewise dissenting, held and we believe correctly that:

"Logically and rationally, a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." (pp. 702-703.)

Justice Holmes further stated:

"No additional argument is necessary to show that a statute may authorize an appeal from the Government from a decision by the magistrate to a higher court, as well as an appeal by the prisoner. The latter is everyday practice yet there is no doubt that the prisoner is in jeopardy at the trial before the magistrate, and that a conviction or acquittal not appealed from would be a bar to a second prosecution. That is what was decided, and it is all that was decided or intimated." (11 Phil. pp. 704-705.)

Justice Brown in his dissenting opinion made the correct observation that:

"It seems to me impossible to suppose that Congress intended to place in the hands of a single judge the great and dangerous power of finally acquitting the most notorious criminals." (11 Phil. 706.)

Justice Holmes in his dissenting opinion stated:

"At the present time in this country there is more danger that criminals will escape justice than they will be subjected to tyranny. But I do not stop to consider or to state the consequences in detail, as such considerations are not supposed to be entertained by judges, except as inclining them to one of two interpretations or as a tacit last resort in case of doubt. It is more pertinent to observe that it seems to me that logically and rationally a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause. Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once. But there is no rule that a man may not be tried twice in the same case. It has been decided by this court that he may be tried a second time, even for his life, if the jury disagree . . . " (Kepner v. U.S., 11 Phil. 669, 702-703.)

The above Kepner case which we repeat was a split 5-4 decision was subject to scrutiny in the case of Palko v. State of Connecticut, 302 U.S. 319, where the Federal Supreme Court with only Justice Butler dissenting, held through Justice Cardozo that the due process clause does not bar the state from appealing in a criminal case.

"We do not find it profitable to mark the precise limits of the prohibi-

tion of double jeopardy in federal prosecutions. The subject was much considered in Kepner v. United States, 195 U.S. 100, 49 L. ed. 114, 24 S. Ct. 797, 1 Ann. Cas. 655, decided in 1904 by a closely divided court. The view was there expressed for a majority of the court that the prohibition was not confined to jeopardy in a new independent case. It forbade jeopardy in the same case if the new trial was at the instance of the government and not upon defendant's motion. Cf. Trono v. United States, 199 U.S. 521, 50 L. ed. 292, 26 S. Ct. 121, 4 Ann. Cas. 773. All this may be assumed for the purpose of the case at hand, though the dissenting opinions (195 U.S. 100, 134, 137, 49 L. ed. 114, 126, 127, 24 S. Ct. 797, 1 Ann. Cas. 655) show how much was to be said in favor of a different ruling. Rightminded men, as we learn from those opinions, could reasonably, even if mistakenly, believe that a second trial was lawful in prosecutions subject to the Fifth Amendment, if it was all in the same case. Even more plainly, rightminded men could reasonably believe that in espousing that conclusion they were not favoring a practice repugnant to the conscience of mankind. Is double jeopardy in such circumstances if double jeopardy it must be called, a denial of due process forbidden to the states? The tyranny of labels (Snyder v. Massachusetts, 297 U.S. 97, 114, 78 L. ed. 674, 672, 54 S. Ct. 330, 90 A.L.R. 575) must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other." (pp. 322-323)

The enlightened view expressed in the dissenting opinion of Justice Holmes in the Kepner case and the majority opinion expressed by Justice Cardozo in the Palko case found adequate reflection in the opinion of Justice Montemayor concurred in by now Chief Justice Paras in the case of People v. Tolentino and Lindaya, CA-G.R. No. 3298 (Sept. 20, 1938), which bests reflect our present position and we quote:

"The question now squarely presented before the Court of Appeals is whether or not the Government may or can appeal as it is seeking to do from that order of dismissal which, as already stated, amounts to a judgment of acquittal. In support of its contention the Government points to section 44 of General Orders No. 58 which allows either party to appeal from a final judgment, that is to say, that the accused may appeal from a judgment of conviction and the Government may appeal from a judgment of acquittal. The defense, however, equally points to the leading case of U.S. v. Thomas E. Kepner, cited in the majority opinion wherein it was held that General Orders No. 58, as amended by Act No. 194, insofar as it permits an appeal by the Government from a judgment of acquittal was repealed by the Act of Congress of July 1, 1902, known as the Philippine Bill which provides immunity from second jeopardy on the same criminal offense.

"Ever since the promulgation of that Kepner decision by the Federal Supreme Court in 1904, our Supreme Court has, in an unbroken line of cases, uniformly and implicitly, adhered to the doctrine laid therein, and apparently, all have acquiesced in and accepted the ruling. It was, therefore, somewhat a shock, particularly to the Bench and Bar, this seeming audacity, nay, irreverence of the prosecuting attorney in taking the present appeal from a judgment of acquittal and in boldly challenging and repudiating this established jurisprudence based on a long line of decisions denying to the Government the right of appeal.

"The fiscal, in support of his position, cites the case of Palko v. State of Connecticut (Office Report of the Supreme Court, Vol. 302, No. 2, p. 319), which although not squarely in point still, discusses the doctrine of double jeopardy. In said case the prosecuting attorney claims to read and to see a new judicial trend as to the interpretation of the constitutional provision regarding this highly controverted doctrine of double jeopardy. It should be remembered that in the Kepner case, first decided by our Supreme Court, all the seven members of that High Tribunal were unanimous in the opinion that the Government may appeal from a judgment of acquittal without placing the accused twice in jeopardy of punishment for the same offense. It will further be noted that the decision of the Federal Supreme Court reversing the local tribunal was far from unanimous, for out of the nine Federal Justices four dissented and agreed with our local tribunal that the Government may appeal in criminal cases.

"As was stated by Mr. Justice Smith who penned the majority opinion of our Supreme Court in said Kepner case, there was neither sound sense nor sound law to support 'the proposition that a person accused of a crime is entitled to have an illegal and improper judgment against him modified, corrected, and set aside and that the State can have no relief against a similar judgment in his favor,' and that 'the defendant has no higher right to be protected against an improper conviction than has the body politic to be secured against an unlawful acquittal and miscarriage of justice.'

"This rule, this doctrine of granting to one the right of appeal but denying it to the other interested party, the State, would appear to many to be one sided, unbalanced, if not actually wrong and unjust. And this view would seem to be now shared by the Federal Supreme Court when in the Palko case, through Mr. Justice Cardozo, who delivered the opinion of the majority, it said: 'If the trial had been infected with error adverse to the accused, there might have been review at his instance and as often as necessary to purge the vicious taint. A reciprocal privilege has now been granted to the State,' and then he added that by this change, the edifice of justice has become more symmetrical and better balanced than before.

"It may also be stated that many high-minded and right thinking men cannot be reconciled to the idea that a trial court may innocently or otherwise, definitely acquit a most notorious and dangerous criminal whose guilt has been established beyond all peradventure of doubt, and turn him loose on a law-abiding community with the Government helpless to correct the error and prevent a miscarriage of justice because it is denied the right of appeal. And there are those who believe that the wise observation of Mr. Justice Holmes, that great American jurist, who penned the dissenting opinion in the case of Kepner, 'That at the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny' is becoming and will become more and more applicable to these Islands as the years go by.

"It is these reasons and considerations and others than can be found in the unanimous opinion of the justices of our Supreme Tribunal in the Kepner case and the dissenting opinions of four of the justices of the Federal Supreme Court in the same case, that would warrant and justify a re-examination and a consideration anew of the claim of the Govern-

ment of the Philippines of the right of appeal from a judgment of ac-
quittal.

"As the majority opinion correctly states, the present appeal is not a frivolous one. It is a serious and, presumably, a bona fide attempt on the part of the State to seek a new ruling on this fundamental point so fraught with far reaching consequences, with a view to giving the Gov-ernment an opportunity to appeal in order to correct reversible errors committed by trial courts in criminal cases. It is not an entirely baseless or perfunctory appeal that can and should be ignored or dismissed with a wave of the hand by merely pointing a dogmatic finger to the Kepner case. And, apparently, the prosecuting attorney is not alone in his views. His is far from being a 'voice in the wilderness.' On the Bench and in the legal profession, here and in the United States, there are many who be-lieve that at least in the Philippines where the jury system and the rea-son for its institution are unknown, and where the Spanish Criminal Pro-cedural Law permitting appeal by the Government and the review of deci-sions of inferior courts by appellate tribunal has been applied and en-forced with success for many generations. General Orders No. 58 which sanctions said appeal by the Government should stand. In this very Court of Appeals, there are justices who believe that an appeal by the Govern-ment from a judgment of acquittal does not place an accused person twice in jeopardy of punishment."

The above opinion agrees with the wise observation of Justice Holmes:

" . . . there are those who believe that the wise observations of Mr. Justice Holmes, that great American jurist, who penned the dissenting opinion in the case of Kepner, 'That at the present time in this country there is more danger that criminals will escape justice than they will be subjected to tyranny' is becoming and will become more and more applic-able to these Islands as the years go by." (p. 894, Lawyers' Journal, Oct. 10, 1938.)

and concluded that:

" . . . an appeal by the Government from a judgment of acquittal does not place an accused person twice in jeopardy of punishment."

We respectfully submit that a review by the appellate court of a decision in a criminal case should not be construed as violative of the double jeopardy clause because double jeopardy presupposes a former jeopardy of conviction. Thus Rue 113, Section 5, provides:

"SEC. 5. *Contents of the motion to quash when based on former con-viction or acquittal or former jeopardy.* — If the ground of the motion to quash is former conviction or former jeopardy of conviction or former acquittal of the defendant of the same offense the motion shall state the name under which the defendant was convicted or in jeopardy of con-viction or acquitted, the name of the court in which he was convicted or in jeopardy or acquitted and the date and place of such conviction or jeopardy or acquittal."

In the case of People v. Cabero, 61 Phil. 121, wherein the Solicitor General appealed from the order dismissing the complaint for perjury, this Honorable Court upheld said appeal saying:

"The case of Kepner v. United States (1 Phil. 397, 519, 727; 195 U.S.

100), and People v. Webb (38 Cal. 467), relied upon by appellee in her brief, are entirely different cases from the instant one. In the Webb case there was a verdict by a jury. In the Kepner case there was an acquittal after trial by the Court of First Instance. Erroneous rulings during trial are not subjected to review by the state. Where the statute authorizes a review of erroneous rulings prior to trial, the statute has always been upheld. In the Kepner case, the majority opinion seems to give weight to the idea that section 44 of General Orders No. 58 had been revoked by subsequent legislation. It is to be noted that Act No. 2886 was passed some time after the Kepner decision.

"The proceedings were not terminated as the fiscal took prompt excep-tion to the unauthorized action of the court and the Solicitor-General brought this appeal in the manner and within the time authorized by statute.

"We are therefore constrained to hold that an appeal in such an excep-tional case as this, will lie." (61 Phil. 125-126.)

Rule 113, Section 9, likewise speaks of former conviction or acquittal or former jeopardy —

" . . . shall be a bar to *another prosecution* for the offense charged or for any attempt to commit the same offense or frustration thereof, or for any offense which necessarily includes or is necessarily included in the offense charged in the former complaint or information."

Rule 113, Section 2 (h), provides for a ground of a motion to quash that:

"The defendant has been previously convicted or in jeopardy of being convicted, or acquitted of the offense charged."

The rule that would bar any review of an order of dismissal or judgment of conviction in a criminal case would place upon the trial court the stamp of infallibility and make of said court the sole arbiter of the guilt or innocence of criminals.

Such a rule which would extend the double jeopardy clause to a review by the appellate court would be against sound public policy for it would lead to arbitrary and perhaps oppressive judgment, may foment decisions motivated by friendship induced by bribery, and actuated by other evil motives, without affording the state the right of appeal or review which is guaranteed to every accused.

In the case of People v. Tesoro, CA-G.R. No. 986-R, the Solicitor General's Office filed a motion for reconsideration praying that the penalty of imprison-ment imposed by the Court of Appeals to each of the appellants, 4 months and 1 day of *arresto mayor* to 8 years of *prision mayor*, should be increased to fall within the range provided under Article 294, Case 4, since the crime of robbery with serious physical injuries falling under subdivision 4 of Article 263 is a special complex crime specifically penalized under Article 294, Case 4, which provides the penalty of *prision mayor* in its medium period to *reclusion temporal* in its minimum period (before its amendment by Republic Act No. 18.) The Court of Appeals granted the motion for reconsideration of the Solicitor Gen-eral in its resolution of December 12, 1947, which we quote:

"Considering that the grounds stated by the Solicitor-General in his motion for reconsideration filed in the above two named cases on Nov-

ember 29, 1947, are reasonable, and in view of the fact that, through oversight, we imposed in our decision rendered in those cases the penalty prescribed by subdivision No. 5, instead of that provided in subdivision No. 4 of Article 294 of the Revised Penal Code, we hereby amend page 10 of said decision so that it shall read as follows:

> 'The penalty attached by the law to the crime under consideration (Art. 294, No. 4, Revised Penal Code, before its amendment by Republic Act No. 18), is *prision mayor* in its medium period to *reclusion temporal* in its minimum period, because according to Exhibit B the serious physical injuries which were inflicted by the accused on the offended party required medical care during more than thirty (30) days (R.P.C., Art. 263, par. 4). We agree with the Solicitor General that by applying the Indeterminate Sentence Law, as amended, and considering the attendance of the two above-mentioned aggravating circumstances, each of the appellants shall be sentenced to an indeterminate penalty which shall consist of a minimum of not less than two (2) years, four (4) months and one (1) day of *prision correccional* and a maximum of not more than twelve (12) years and one (1) day of *reclusion temporal*.'

"With such modification, and it being understood that appellants shall indemnify jointly and severally the offended party in the amount of two hundred pesos (₱200.00) without subsidiary imprisonment on account of the nature of the maximum of the indeterminate penalty hereby imposed upon them, the judgment appealed from is otherwise confirmed. The appellants shall pay the costs."

Moreover, where the evidence taken at the trial was completely destroyed by fire, the accused may once again be subjected to a new trial for the purpose of retaking the evidence which was lacking (U.S. v. Quilatan, 4 Phil. 481; U.S. v. Roque, 11 Phil. 422). The same holds true where evidence may, for any reason or another, be missing (U.S. v. Laguna, 17 Phil. 532).

And for the purpose of determining the civil liability of the accused, the case may be remanded to the lower court without the fear that the accused is subjected thereby to double jeopardy (U.S. v. Query, 25 Phil. 600).

Likewise, should the accused if convicted, take an appeal to the higher court, he could be sentenced by the higher court to a penalty for a graver offense in accordance with its appraisal of the evidence without thereby the rule of double jeopardy being violated. (Trono v. U.S., 199 U.S. 521; 11 Phil. 726; U.S. v. Clemente, 24 Phil. 178).

BRIEF FOR APPELLEE

II

ASSUMING WITHOUT CONCEDING, THAT THE COURT *A QUO* ERRED IN IMPOSING THE WRONG PENALTY ON THE APPELLEE, STILL THE INSTANT APPEAL OF THE STATE VIOLATES THE LEGAL INHBITION AGAINST DOUBLE JEOPARDY.

We respectfully submit, in the second place, that the present appeal of the government infringes upon and does violence to the constitutional prohibition

against double jeopardy. (*Vide*, Art. 3, Sec. 1, No. 20, Constitution, in conjunction with Rule 133, (9) and Rule 118, (2), Judicial Rules). This rule has been consistently upheld and maintained by this August Tribunal in a long line of decisions, among which are:

(1) The discharge of the accused and the dismissal of the information, *whether erroneous or not,* constitutes jeopardy as to bar further proceedings upon the case. *Consequently, the appeal of the government from such order of dismissal should be rejected and denied.* (U.S. v. Yam Tung, 21 Phil. 67; Emphasis ours).

(2) Conviction or acquittal of an offense by a court, civil or military, which has jurisdiction over the same, *constitutes a bar to a subsequent prosecution for the same offense in the same court or in another court of the same sovereignty, although errors of law, or of facts, or even of discretion may have been committed.* (Moran's Comments, Vol. II, p. 688, 2nd Rev. Ed., citing U.S. v. Tubig, 3 Phil. 244; Grafton v. U.S., 206 U.S. 333, republ. in 11 Phil. 776; italics ours.)

(3) Where an information has been filed in a competent court wherein the accused is duly tried; and the court determines *erroneously that it has no jurisdiction, when in fact it has, and thereby dismisses the information and discharges the accused, the plea of double jeopardy is sustainable in a subsequent action for the same offense.* (*Vide*, U.S. v. Regala, 28 Phil. 58.)

(4) One who has been charged with an offense cannot be again charged with the same or identical offense though the latter be lesser or greater than the former. "As the Government cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest with precisely the same result." (Melo v. People et al., No. L-3530, arch 22, 1950; also, People v. Martinez, 55 Phil. 6, U.S. v. Lim Suco, 11 Phil. 484).

(5) While the rule against double jeopardy prohibits prosecution for the same offense, it seems elementary that an accused should be shielded against being prosecuted for several offenses made out from a single act. Otherwise, an unlawful act or omission may give rise to several prosecutions depending upon the ability of the prosecuting officer to imagine or concoct as many offenses as can be justified by said act or omission, by simply adding or subtracting essential elements. (People v. Del Carmen et al., L-3459, January 9, 1951).

(6) Where the Court of First Instance had jurisdiction over the case, *the judgment dismissing the case cannot be appealed by the state because the appeal would place the accused in a second jeopardy.* (People v. Hernandez, No. L-4312, November 28, 1953; italics ours).

(7) Again, where a person has been tried and convicted for a crime which has various incidents included in it, *he cannot be a second time tried for one of those incidents without putting him twice in jeopardy for the same offense.* (In re Nielson, 131 U.S. 176, cited with approval in U.S. v. Lim Suco, 11 Phil. 484; emphasis ours).

Whatever doubt or confusion there might have been before among members of the Bench and Bar on this all-embracing question of whether or not the

government can appeal from a judgment of conviction or acquittal in cases identical or similar to the case at bar, has, we submit, been definitely settled once and for all in the recent decision of this Tribunal in the case of People v. Ang Cho Kio, G.R. Nos. L-6687-6688, promulgated on July 29, 1954, the intimate facts and circumstances of which bear striking resemblance with those of the instant case.

The facts of the *Ang Cho Kio* case are briefly summarized as follows: Ang Cho Kio, popularly known as the PAL plane hijacker and killer, was charged with the crimes of Murder, and Grave Coercion with Murder, respectively, in two separate informations. The accused pleaded guilty to both informations for which the Trial Court sentenced him, in the first information, from 12 years of *prision mayor*, minimum, to 20 years *reclusion temporal*, maximum, to pay ₱6,000.00 to the heirs of the deceased and costs; and in the second information he was sentenced to life imprisonment, to pay ₱6,000.00 to the heirs of the victim, and costs. The prosecution filed several motions for reconsideration of said decision, alleging that the accused should have been convicted to life imprisonment in the first information; and to death in the second information. The lower Court denied those motions filed by the prosecution. Hence, the latter appealed to the Supreme Court.

Can the government appeal in a criminal case? This is the fundamental question posed by this Tribunal in the Ang Cho Kio case. And in answering this query in the *negative*, this Honorable Tribunal made the following lucid and scholarly exposition of the philosophy and history of this rule on double jeopardy, thus:

> *"¿Puede el ministerio fiscal apelar?*
>
> ". . . .
>
> "En una larga lista de decisiones despues de decidida en casacion la causa la Kepner contra Estados Unidos, 195 U.S. 100; Jur. Fil. 689, se ha establecido invariablemente por este Tribunal la doctrina de que la acusacion no puede apelar contra una sentencia en que se absuelve al acusado por la razon de que por segunda vez se le pone en peligro de ser castigado por el mismo delito. 'El derecho comun americano prohibia tambien un segundo juicio por el mismo delito hubiera el acusado sufrido o no algun castigo, o sido absuelto o condenado en una causa anterior.'
>
> "En la causa de Estados Unidos contra Sanges, citada en la de Kepner, se dijo: 'Desde la epoca del Lord Hale hasta la fecha del caso de Chadwick que acabamos de citar, los libros de texto, con raras excepciones, dan por supuesto o afirman que el acusado (o su representante), es el unico que puede obtener un nuevo juicio o recurrir en casacion en causa criminal, y una sentencia en su favor es definitiva y concluyente.' (Vease 8 Hawk., c. 47, sec. 12; c. 50, sec. 10 y siguientes. Bac. Ab. Trial, 9...)
>
> *"No error however flagrant committed by the Court against the State can be reserved by it for decision by the Supreme Court when the defendant has once been placed in jeopardy and discharged, even though the discharge was the result of the error committed."* (State v. Rook, 49 L.R.A. 61 Kan. 382, 59 Pac. 653 [1 L.R.A. 242]).
>
> *"Este tribunal nunca ha resuelto una cuestion parecida a la causa presente en que el acusado fue condenado por una pena menor que la señalada por la ley, y el ministerio fiscal, en apelacion, pide que, de acuerdo con el Codigo Penal Revisado, se imponga al acusado una pena mayor.* Si el fiscal — como el acusado — puede apelar para corregir un error de ley, entonces sera forzoso imponer el acusado la pena de reclusion perpetua. ¿Despues de haber sido ya — por errores — condenado por el tribunal inferior a la pena de 12 años de prision mayor a 20 años de reclusion temporal, no es poner otra vez al acusado en peligro de ser condenado a mayor pena por el mismo delito? *Si el acusado fuese el apelante, no tendria derecho a quejarse si se le impusiera una pena mayor; en la caso presente el que apela es el ministerio fiscal, y dicha apelacion pone en peligro al acusado de recibir otra condena mayor.*
>
> "Creemos que en el caso presente se pone al acusado en doble jeopardy, esto es, en el peligro de recibir la condena de reclusion perpetua despues de haber sido condenado ya por el juzgado inferior a una pena menor. Por "este peligro, el ministerio fiscal no puede apelar, de acuerdo con el articulo 2 de la Regla 118 y siguiendo la garantia constitucional de que 'no se podra a una persona en peligro de ser castigada dos veces por la misma infraccion o en jeopardy.'" (People v. Ang Cho Kio, G.R. L-6687-6688; italics ours).

In the case of *Ang Cho Kio*, supra, the real sentiment and unequivocal stand of this Tribunal is perhaps best and most convincingly expressed in the following brief but pungent and clear-cut concurring opinion of Mr. Justice Bengzon. He said:

> "I concur in the dismissal of the appeal on the ground that it places the accused in a second jeopardy. However, since the case is not properly before this Court, we have no business discussing the correctness of the penalty. Whether correct or not, it must stand. *In effect, therefore, we are rendering either an advisory opinion which we are not empowered to render, or a declaratory judgment on a controversy not covered by the Rules. A practice is thereby inaugurated allowing the prosecution to appeal on questions of law 'for future guidance of trial courts . . .' a practice which in some States is observed pursuant to specific statutory directions* (cf. C.J.S. Vol. 24, pp. 262, 263 & cases cited), not embodied in the set of Philippine laws." (Concurring opinion in People v. Ang Cho Kio, supra; Emphasis supplied).

May we state, in passing, that the authorities cited and relied on by the government have no bearing nor any binding force and effect in the resolution of the instant case either because said cases involved offenses other than rebellion, or that they were cases of acquittal and not of conviction. And to the suggestion of the state that "the time has come for a re-examination and revision of the rule adopted by this Honorable Court on double jeopardy since the majority decision of the Federal Supreme Court in the case of U.S. v. Kepner" (Appellant's brief, p. 37), we beg to state, on the contrary, that the crying need of the hour is not *re-examination* but the *re-affirmation* of our close adherence to old faiths, to recognized and settled rules and to the time-honored principle that had been laid down, consistently upheld and adhered to by this August Tribunal across the half-century of its glorious and fruitful existence, namely, that the state cannot appeal from a judgment of conviction or aquittal in a criminal case as that would place the accused in a second jeopardy. We respectfully reiterate that the ruling in the *Ang Cho Kio case* above cited is controlling and conclusive on this score.