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ENTRAPMENT AND INSTIGATION: THE BORDERLINE DEFENSES

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"NOTHING corrodes the foundation of a democratic society as perniciously as the railroading of an innocent person to jail by overzealous and ambitious minions of the law." The danger of this practice becomes more patent when we take into consideration that in most police agencies of this country, the efficiency of the police officers are gauged by the number of persons they have prosecuted or have sent to jail. Many peace officers are prone to forget the ethics of their profession in their desire to reap personal glory and win credits to their department. One of the practices of peace officers of sending an otherwise innocent person to jail is by instigation as it is known in Philippine jurisprudence or entrapment as it is denominated in American jurisprudence. It is a method employed by peace officers of inducing or instigating a person to commit a crime and then apprehending him during the commission of the offense. In the layman's term, this is called a "frame-up."

The question whether such practices preclude prosecution and afford a ground of defense, and if so, upon what theory, has given rise to conflicting opinions.[1]

The Federal Courts have generally approved the statement of Justice Sanborn in the leading case of *Butts v. United States*[2] as follows:

> The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite to and create crime for the sole purpose of prosecuting and punishing it. Here the evidence strongly tends to prove, if it does not conclusively do so, that their first and chief endeavor was to cause, to create, crime in order to punish it and it is unconscionable, contrary to public policy and to the established law of the land to punish a man for the commission of an offense of the like of which he had never been guilty, either in thought or in deed, and evidently never would have been guilty of if the officers of the law had not inspired, incited, persuaded, and lured him to attempt to commit it.

This statement, therefore, enunciates the principle that entrapment and

* LL.B., 1957.

[1] Sorrels v. United States, 287 U.S. 435, 441 (1932).

[2] 273 Fed. 35 (1921).

instigation may be interposed as a defense in a criminal prosecution. But the validity of this principle as stated and applied is challenged both upon theoretical and practical grounds. The argument, from the standpoint of principle, is that the court is called upon to try the accused for a particular offense which is defined by statute and that, if the evidence shows that this offense has knowingly been committed, it matters not that its commission was induced by officers of the government in the manner and circumstances assumed.[3] It is said that where one intentionally does an act in circumstances known to him, and the particular conduct is forbidden by law in those circumstances, he intentionally breaks the law in the only sense in which the law considers intent.[4] Moreover, as the statute is designed to redress a public wrong and not a private injury, there is no ground for holding the government estopped by the conduct of its officers from prosecuting the offender.[5] To the suggestion of public policy, the objectors answer that the legislature, acting within its constitutional authority, is the arbiter of public policy and that when conduct is expressly forbidden and penalized by a valid statute, the courts are not at liberty to disregard the law and to bar a prosecution for its violation because they are of the opinion that the crime has been instigated by government officials.[6]

It is manifest that these arguments rest entirely upon the letter of the statute.[7] They take no account of the fact that application in the circumstances under consideration is foreign to its purpose; and that such an application is so shocking to the sense of justice that it has been urged that it is the duty of the court to stop the prosecution in the interest of the government itself, to protect it from the illegal conduct of its officers and to preserve the purity of the courts.[8] Can an application of the statute creating a situation so contrary to the purpose of the law and so inconsistent with its proper enforcement as to invoke such a challenge fairly be deemed within its intendment?[9] Literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has been condemned.[10] To construe statutes so as to avoid absurd or glaringly unjust results foreign to the legislative purpose, is, as we have seen, a traditional and appropriate function of the courts.[11]

Objections to the defense of entrapment are also urged upon practical

[3] Ellis v. United States, 206 U.S. 246, 257 (1906).
[4] *Ibid.*
[5] Sorrels v. United States, 287 U.S. 435, 445 (1932).
[6] *Id.* at 445-446.
[7] Casey v. United States, 276 U.S. 413 (1927).
[8] *Ibid.*
[9] Sorrels v. United States, 287 U.S. 435, 446 (1932).
[10] *Ibid.*
[11] *Id.* at 450.

grounds.[12] But consideration of mere convenience must yield to the essential elements of justice.[13] The argument is pressed that if the defense is available, it will lead to the introduction of issues of a collateral character relating to the activities of the officials of the government and to the conduct and purpose of the defendant previous to the alleged offense.[14] For the defense of entrapment is not simply that the particular act was committed at the instance of government officials.[15] That is often the case where the proper action of the officials leads to the revelation of criminal enterprises.[16] The predisposition and criminal design of the defendant are relevant.[17] But the issues raised and evidence adduced must be pertinent to the controlling question whether the defendant is a person otherwise innocent whom the government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials.[18] If that is the fact, common justice requires that the accused be permitted to prove it.[19] The government in such a case is in no position to object to evidence of the activities of its representatives in relation to the accused and if the defendant seeks acquittal by reason of entrapment, he cannot complain of an appropriate and searching inquiry into his own conduct and predisposition as bearing upon that issue.[20] If in consequence he suffers a disadvantage, he has brought it upon himself by reason of the nature of the defense.[21]

The government considers the defense as analogous to a plea of pardon.[22] It is assumed that the accused is not denying his guilt but is setting up special facts in bar upon which he relies regardless of his guilt or innocence of the crime charged.[23] According to the opponents of this theory, this is a misconception. They assert that the defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend he is guilty of a crime where the government officials are the instigators of his conduct.[24] The Federal Courts in sustaining the defense have proceeded in the view that the defendant is not guilty.[25]

It will be seen therefore, that there are several theories advanced with

[12] *Id.* at 451.
[13] Grimm v. United States, 156 U.S. 604 (1894).
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.*
[17] Sorrels v. United States, 287 U.S. 435, 451 (1932).
[18] *Ibid.*
[19] *Ibid.*
[20] *Id.* at 451-452.
[21] *Ibid.*
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] *Ibid.*

respect to this matter. This Note is a humble attempt to clarify these issues and to explain certain decisions of the courts on this subject.

Definition and Concept.

In the Philippines, entrapment may be defined as a method employed by public officers for trapping and capturing the lawbreaker in the execution of his criminal plan[26] by providing ways and means for its execution.[27] In the United States, entrapment is considered as a lawless law enforcement practiced by some public officials[28] of implanting a criminal scheme in the mind of an otherwise innocent individual with a view to prosecuting the individual.[29]

From these definitions, we can readily see that there exists a distinction between entrapment as understood in the Philippines and entrapment as applied in the United States, for while in the latter, the term is considered as a lawless law enforcement, the same is not true with the former. In entrapment as applied in the United States, the criminal scheme is implanted in the mind of an otherwise innocent person, which is not the case in the Philippines. Both however, are employed for trapping and capturing the individual with a view to eventual prosecution. In both instances, the entrapment is made by a public officer or peace officer.

According to Webster's International Dictionary, to instigate is "to goad or urge forward; to provoke or to incite used chiefly with reference to evil actions; as to instigate one to a crime." Instigation, therefore, is the act by which one incites another to do something, as to injure a third person, or to commit some crime or misdemeanor.[30] It will be noticed that this definition is broad in the sense that it embraces both a private person and a public officer as the instigator. In the Philippines, instigation is limited to the inducement made by a public officer only, as shown in the various decisions of the Supreme Court as well as the Court of Appeals, which will be discussed subsequently.

[26] People v. Galicia, (CA) 40 O.G. 4475 (1941).

[27] The Spanish Penal Code from which our Revised Penal Code has been derived does not have any specific provision regarding entrapment. Likewise, the present Revised Penal Code of the Philippines has not incorporated any provision on entrapment. The texts on Criminal Law by Professor Padilla (1 CRIMINAL LAW, 6th ed. 1955), Reyes (THE REVISED PENAL CODE, 1954 ed.), and Francisco (1 THE REVISED PENAL CODE ANNOTATED, 2d ed. 1954) discuss the topic of entrapment and instigation under article 12 of the Revised Penal Code which provides for: "Circumstances which Exempt from Criminal Liability."

[28] Note, *Entrapment as a Defense to Criminal Prosecution*, 44 HARV. L. REV. 109 (1930).

[29] The word entrapment is not found in BOUVIER'S LAW DICTIONARY (Rawle's 3d ed. 1914), nor in WORDS AND PHRASES (2d Ser. 1914).

[30] BOUVIER'S LAW DICTIONARY 1605 (Rawle's 3d ed. 1914).

Entrapment and Instigation as a Defense in the Philippines.

Entrapment is no bar to the prosecution and conviction of the lawbreaker. The case of *People v. Galicia*,[31] bears out this point. The defendants here, arguing that the Constabulary agent induced them to embark on the venture of excavating the tomb and burial place in a Catholic Cemetery, charged the government agent with having instigated them to commit the offense. This was denied by the Constabulary agent who stated that they were merely instructed to shadow the defendants, who were suspected of planning to desecrate the tomb. The court found out that there was no instigation, only entrapment, and decided as follows:

> While it has been said that the practice of entrapping a person into crime for the purpose of instituting criminal prosecutions is to be deplored, and while instigation, as distinguished from mere entrapment, has often been condemned and has sometimes been held to prevent the act from being criminally punishable, the general rule is that it is no defense to the perpetrator of the crime that facilities for its commission were purposely placed in his way, or that the criminal act was done at the 'decoy solicitation' of persons seeking to expose the criminal, or detectives feigning complicity in the act were present and apparently assisting in its commission. Especally is this true in that class of cases where the offense is one of a kind habitually commited, and the solicitation merely furnishes the evidence of a course of conduct. Mere deception by the detectives will not shield the defendant, if the offense was committed by him free from the influence or instigation of the detective.

Entrapment therefore, as distinguished from instigation, cannot offer a valid excuse to defeat prosecution. This was the ruling set forth in the case of *People v. De Hilario*,[32] and subsequently reiterated in *People v. Tiu Ua*.[33]

In the former case, the agents of the Price Stabilization Corporation presented themselves in the store of the defendant and indicated their intention to buy some articles for sale therein. The purpose of going to the store was in obedience to a preconceived plan to determine if the law was being violated. It was held that inasmuch as these agents have not done any overt act which may in any way induce or influence the defendants to sell their goods at prices beyond those fixed by law, the question of inducement is out of the picture, since charging excessive prices originated from the mind of the accused and not from the agents. What they did was merely to lay a trap to detect those who violated the law.

Entrapment is not prohibited as contrary to public policy. It is instigation which is contrary to public policy and considered illegal.[34] Thus, the mere fact that the Chief of the Customs Secret Service pretended to agree to a plan for smuggling illegally imported opium through the Cus-

[31] (CA) 40 O.G. 4475 (1941).

[32] 49 O.G. 2242 (1953).

[33] G.R. No. L-6793, March 31, 1955.

[34] *Ibid.*

toms House in order to better assure the seizure of said opium and the arrest of its importers is no bar to the prosecution and conviction of the latter.[35] Our Court of Appeals has applied the same doctrine holding that entrapment would not be a valid cause for quashing the prosecution.[36] In one case, a policewoman in charge of preparing indorsements regarding applications for firearm licenses, hinted to an NBI agent that she was not averse to receiving some money for expediting the approval of licenses, and when offered ₱50.00 in connection with the approval of firearms license of a Chinaman, she received it. This is a clear case of entrapment, not instigation, and the Court of Appeals convicted the defendant, declaring:

> The principle evolved from the cases appears to be that in a prosecution for an offense against the public welfare, such as accepting a bribe, the defense of entrapment cannot be successfully interposed; and this is so when it appears that there was a ground of suspicion or belief of the existence of official graft and a conspiracy by officials to obtain bribes, in which the persons caught were not the passive tools of the entrapping party, but knowingly received the bribe, especially since the persons entrapping them had no intention to participate in the wrong.[37]

Instigation however, is a valid defense in criminal prosecutions, provided it is made by a public officer. In the case of *United States v. Phelps*,[38] for instance, an Internal Revenue agent went to the defendant three times to convince the latter of his genuine desire to smoke opium; because of the agent's insistence the defendant made efforts to find a place where they could smoke the drug. The accused was acquitted on the ground that the criminal intent originated in the mind of the entrapping agent and Phelps was merely induced to commit the act by repeated solicitations. The same doctrine was subsequently upheld in the case of *People v. Abella*.[39] Having received information that certain persons in Cebu were illegally selling dynamite, a certain Lt. David, put on a disguise, simulating a merchant, offered a tempting price, and caused the accused to sell him dynamite. The Attorney-General contended that the officer did not induce but merely tried to ascertain whether his information as to the illegal sale of dynamite was well-founded. The court believed that there was inducement, direct, persistent and effective, because the officer who wanted to verify the information he had, did not limit himself merely to inquiring into the consummated acts, but induced the accused to commit another act similar to those about which he had information. The court went on a step further, condemning the inducement or instigation made by the public officer as highly reprehensible and reasoned out as follows:

[35] People v. Lua Chu, 56 Phil. 44 (1931).
[36] People v. Tan Tiong, (CA) 43 O.G. 1285 (1947).
[37] People v. Vinzol, (CA) 47 O.G. 294 (1949).
[38] 16 Phil. 440 (1910).
[39] 46 Phil. 857 (1923).

> Any member of the Constabulary who may know of a contemplated criminal act, or of any act that may lead to the commission of the crime, will do his utmost to prevent it rather than allow it to continue merely for the purpose of securing the conviction of the offenders.[40]

In the United States.

As a rule, one who is instigated, induced, or lured by an officer of the law or other person for the purpose of prosecution, into committing a crime which he had otherwise no intention of committing may avail himself of the defense of entrapment[41] under a plea of not guilty.[42] It is a positive defense[43] the invocation of which necessarily assumes that the act charged was committed.[44] Such entrapment is shown where it appears that the officers or their agents incited, induced, instigated, or lured the accused into committing an offense which he otherwise would not have committed and had no intention of committing.[45] In other words, if the criminal intent or design to commit the offense charged originates in the mind of the person who seeks to entrap the accused[46] and to lure him into commission of the crime merely for the purpose of arresting and prosecuting him[47] no conviction may be made.

The defense seems to have been given impetus by the case of *Woo Wai v. United States*,[48] where the government officers, in order to inveigle the accused into a position where they could squeeze certain information out of him, formed a scheme to smuggle Chinese into the United States and then after months of urging, induced him to take charge so that he might be prosecuted. In Idaho, officers originated and carried into effect a plan as a result of which the accused was charged with attempting to induce a female to reside with him for immoral purposes, although in fact his intentions were innocent.[49] A similar outrage is found where a member of a "purity squad" induced the procuring of a prostitute by a hotel servant previously innocent of such an act.[50] In *Sam Yick v. United*

[40] *Ibid.*
[41] United States v. Kaiser, 138 F.2d 219 (1944).
[42] Sorrels v. United States, 287 U.S. 435 (1932).
[43] People v. Lee, 48 P.2d 1003 (1935).
[44] State v. Varnon, 174 S.W.2d 146 (1943).
[45] Kott v. United States, 333 U.S. 837 (1947).
[46] Gargano v. United States, 24 F.2d 625 (1928); Newman v. United States, 281 F.2d 681 (1924); Reyles v. United States, 340 U.S. 877 (1950).
[47] United States v. Echols, 253 Fed. 862 (1918); Sam Yick v. United States, 240 Fed. 60 (1917). Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent. Thomas v. State, 187 S.W.2d. 529 (1945).
[48] 223 Fed. 412 (1915).
[49] State v. Mantis, 32 Idaho 724 (1920).
[50] State v. McCormish, 59 Utah 58 (1921).

States,[51] a Chinese offered a bribe to an officer who, thereupon, enticed the accused to combine with him in the smuggling of Chinese, and then charged him with the latter crime. Other instances are the suggestion of a bribe by officers;[52] the formation of a plan for bringing in liquor from Canada where officers had no evidence of prior violation by those concerned;[53] persuasion of an innocent person to obtain narcotics;[54] accosting a partially intoxicated citizen by a Military Police Officer to entrap him into obtaining liquor;[55] sending an Indian decoy, who had not the racial characteristics, to purchase liquor;[56] and the soliciting of articles to be shipped in violation of the Food and Drugs Act without facts on which to base suspicion of prior violation.[57]

In all these cases, it is necessary that the element of inducement or instigation be present.[58] Furthermore, the entrapment must have been made by a public officer. Thus, instigation by a private person not acting in cooperation with public officers is no defense.[59] The exception to this rule is when the private party instigating is the offended party himself. The owner therefore, cannot aid, encourage, or solicit the commission of a crime against his own property;[60] and where such is the case no offense is committed because in law, one cannot be deemed to be injured by an act which he was instrumental in procuring to be done.[61] Mere passive acquiescence in the commission of a criminal act for the purpose of securing the detection and punishment of the perpetrator has, however, been construed as not amounting to consent.[62] Thus, where the accused has formed his own intent and design to commit the offense against property, the fact that the owner, on the discovery of such an intended crime, stands by and permits the act to be done[63] or even facilitates its commission[64] as by

[51] 240 Fed. 60 (1917).
[52] United States *ex. rel.* Hassel v. Mathues, 22 F.2d 979 (1927).
[53] United States v. Certain Quantities of Intoxicating Liquor, 290 Fed. 825 (1923).
[54] Butts v. United States, 273 Fed. 35 (1921).
[55] United States v. Echols, 253 Fed. 862 (1918).
[56] Voves v. United States, 249 Fed. 191 (1918).
[57] United States v. Eman Mfg. Co., 271 Fed. 353 (1920). The defense has been raised in cases involving bank robbery and murder but further cases of atrocious crimes have not been found.
[58] Polski v. United States, 33 F.2d 686 (1929); Newman v. United States, 281 F.2d 681 (1924).
[59] Polski v. United States, 33 F.2d 686 (1929). Evidence of defendant's conversation and dealings with informer in trial for transporting intoxicating liquor is inadmissible to show entrapment, in the absence of evidence that informer was an officer or agent of the government. Beard v. United States, 59 F.2d 940 (1932).
[60] Love v. People, 160 Ill. 501 (1896).
[61] Connor v. People, 18 Colo. 373 (1894).
[62] Conway v. United States, 1 F.2d 274 (1924).
[63] State v. Hughes, 181 S.E. 737 (1935).
[64] People v. Hall, 23 P.2d 783 (1933).

permitting an agent to act as a supposed confederate,[65] does not constitute consent to the commission of the crime as will establish entrapment, on the theory that the consent is given only to the performance of anything that may be necessary to an exposure of the crime and not to the commission of the crime itself.[66]

Essence of the Defense of Entrapment.

The very essence of the defense of entrapment is that the crime originated in the mind of the officer rather than in that of the accused.[67] To obviate the defense of entrapment therefore, it may be shown that the accused has himself done everything essential to make out a complete offense against the law.[68] The defense is available if the entrapping officer or person performs any of such essential acts.[69] Nothing done by the entrapping person, who is present with the knowledge and consent of the victim, will be imputed to the accused and the prosecution will fail if it is necessary that something done by such person should be imputed to the accused in order to constitute the offense.[70] Hence, a distinction has been drawn between the inducement of an innocent person to do an unlawful act, and the setting of a trap to catch one in the execution of a criminal plan of his own conception.[71] An act of the latter character by an officer is not regarded as a defense to a person who has the intent and design to commit a criminal offense and who in fact does commit the essential acts constituting it merely because an officer of the law, in his effort to secure evidence against such person, affords him an opportunity to commit the criminal act or purposely places facilities in his way or aids and encourages him in the perpetration thereof.[72] It is no defense, therefore, for breaking and entering a store, that a town marshal, for detective purposes, encouraged, counselled, and aided the accused in such act.[73] An officer may, when acting in good faith with a view to detecting crime, make use of deception, trickery, or artifice;[74] and so it is not a defense that decoys were used to

[65] People v. Rodriguez, 214 Pac. 452 (1923). The original design, however, must be formed independently of such an agent; and where a person approached by the thief as his confederate notifies the owner or public authorities, and being authorized by them to do so assists the thief in carrying out the plan, the larceny is nevertheless committed. Varner v. State, 72 Ga. 745 (1884).
[66] People v. Rodriguez, 214 Pac. 452 (1923).
[67] Capuano v. United States, 2 F.2d 41 (1928).
[68] People v. Lanzit, 233 Pac. 816 (1925).
[69] Stevens v. State, 2 P.2d 282 (1931).
[70] People v. Lanzit, 233 Pac. 816 (1925).
[71] United States v. Roett, 336 U.S. 960 (1949); Ryles v. United States, 340 U.S. 877 (1950); United States v. Smith, 43 F.2d 173 (1930); Partan v. United States, 251 U.S. 561 (1920).
[72] United States v. Roett, 336 U.S. 960 (1949); United States v. Spadafora, 340 U.S. 897 (1951).
[73] State v. Abley, 80 N.W. 225 (1899).
[74] United States v. Wray, 8 F.2d 429 (1925); Stein v. United States, 334 U.S. 844 (1948).

present an opportunity for the commission of the crime[75] or that detectives or others feigning complicity in the act were present and were apparently assisting in its commission.[76] Especially is this true in that class of cases where the solicitation merely furnishes evidence of a course of conduct.[77] In such a case the entrapper may even provoke or induce the commission of a particular violation of the law, if he knows or has reasonable grounds to believe that the accused is a repeated or habitual offender.[78] But if an officer of the law or his agent generates in the mind of one who is entirely innocent of any criminal purpose the original intent to commit the acts which are in violation of statutes or induces him to do such acts, a conviction is improper.[79]

Nature, Basis, and Application of the Doctrine of Entrapment.

The practice of inducing or instigating the commission of a crime by an otherwise innocent person has been denounced as reprehensible and contrary to sound public policy.[80] The underlying basis of the doctrine is that the accused has committed no crime at all rather than that he is furnished an excuse or justification.[81] It has a limited application, the basic thought being that officers of the law shall not incite crime merely to punish the perpetrator.[82] The dignity of the state which overshadows any question of violation of personal rights is at stake.[83]

Entrapment and Instigation, Distinguished.

In the Philippines, a distinction is made by the Court as follows:

> There is a wide difference between entrapment and instigation, for while in the latter case the instigator practically induces the will-be accused into the commission of the offense and himself becomes a co-principal, in entrapment ways and means are resorted to for the purpose of trapping and capturing the lawbreaker in the execution of his criminal plan.[84]

[75] Price v. United States, 56 F.2d 135 (1932); Polski v. United States, 33 F.2d 686 (1929); Butts v. United States, 273 Fed. 35 (1921).
[76] State v. Berry, 93 P.2d (1939).
[77] Nero v. United States, 342 U.S. 872 (1951); Moss v. States, 111 Pac. 950 (1910).
[78] United States v. Becker, 62 F.2d 1007 (1933). The fact that one of two co-defendants was entrapped does not exonerate the other. People v. Ficke, 175 N.E. 543 (1931).
[79] United States v. Certain Quantities of Intoxicating Liquor, 290 Fed, 825 (1923); Billingsley v. United States, 257 U.S. 656 (1921).
[80] Strader v. United States, 72 F.2d 589 (1934); Ritter v. United States, 293 Fed. 187 (1923).
[81] Woo Wai v. United States, 223 Fed. 412 (1915); State v. Mantis, 32 Idaho 724 (1920).
[82] United States v. Swallum, 39 F.2d 390 (1930).
[83] Casey v. United States, 276 U.S. 413 (1927) (dis. op.)
[84] People v. Galicia, (CA) 40 O.G. 4475 (1941).

Entrapment, as distinguished from instigation, cannot offer a valid excuse to defeat prosecution.[85] It is not prohibited as contrary to public policy. Instigation, however, is considered contrary to public policy and held illegal.[86]

In the United States, no distinction is made between the two terms. Instigation is usually applied to designate the means employed by the peace officer in the entrapment of a person and for this reason the terms are oftentimes used interchangeably. It should be observed that the instigation referred to in the Philippines is the entrapment interposed as a defense in the United States; and the entrapment known in the Philippines corresponds to the *legal* entrapment[87] in the United States.

Questions Relative to This Subject.

1. Suppose a private person not acting in cooperation with a public officer induces another to commit a criminal act, for what he believes was a noble purpose of entrapping and capturing the individual with a view to eventual prosecution. Will the defense of instigation lie?

This question would not have presented much difficulty if the instigator had no intention of capturing the individual, because in such case the instigator would be a principal by inducement[88] and the instigated person, a principal by direct participation[89] or a principal by indispensable cooperation[90] as the case may be. The intention to apprehend, however, does not change the situation. Referring to the doctrine of entrapment in the United States, which is instigation in the Philippines, it says:

> Furthermore the entrapment must have been made by a public officer. Instigation by a private person not acting in cooperation with public officers is no defense.[91]

To constitute a valid defense, therefore, the entrapment must be made by a public officer or by a private person acting in cooperation with a public officer. Any other private person is excluded, unless the private person who instigates the crime is the *offended party himself*,[92] in which case, the defense may also be raised.

[85] People v. De Hilario, 49 O.G. 2242 (1953).
[86] People v. Tiu Ua, G.R. No. L-6793, March 31, 1955.
[87] Thomas v. State, 187 S.W.2d 529 (1945).
[88] Article 17 of the Revised Penal Code provides: "The following are considered principals: 1. Those who take a direct part in the execution of the act. 2. Those who directly force or induce others to commit it. 3. Those who cooperate in the commission of the offense by another act without which it would not have been committed."
[89] *Ibid.*
[90] *Ibid.*
[91] Polski v. United States, 33 F.2d 686 (1929). See also: Beard v. United States, 59 F.2d 940 (1932).
[92] Love v. People, 160 Ill. 501 (1896).

2. What is the criminal liability of the instigator with respect to the offense allegedly committed by the instigated individual?

If he is a private person, not acting in cooperation with a public officer, he is deemed to be a principal by inducement as stated above by virtue of the provision of Article 17 of the Revised Penal Code.

But if he is a public officer, may he be considered also a principal by inducement?

There are two views with respect to this question. One view follows the principle stated in the case of *People v. Galicia*,[93] which considers the instigator (a police officer) as a co-principal because he induces the accused to commit the offense. The officer, therefore, in instigating a person to commit an offense will be exposing himself to criminal prosecution as a principal by inducement, regardless of his intention to ensnare and apprehend the accused. The objection to this theory is that the statement in the *Galicia* case is a mere dictum inasmuch as the police officer was not on trial.

The other theory maintains that the instigating public officer cannot be held liable as a co-principal by inducement, with respect to the crime induced, provided that his intention is merely to entrap. This is premised on the belief that the underlying basis of the doctrine of entrapment is that *no crime has been committed*,[94] and not to furnish an exempting[95] or justifying circumstance.[96] Therefore, if no crime is committed, there is also no criminal. And if the instigated individual is acquitted on this ground, the same should hold true with respect to the instigator. However, there is no decision yet, by the Supreme Court or the Court of Appeals, resolving this particular question.

3. May the instigated individual file a criminal action against the instigating officer?

According to Article 363 of the Revised Penal Code, "Any person who, by any act not constituting perjury, shall directly incriminate or impute to an innocent person the commission of a crime, shall be punished by *arresto mayor*."

This provision has been interpreted by the Supreme Court in the case of *People v. Rivera*[97] to refer to any act which tends directly to cause a false prosecution. The instigator may be prosecuted under this article because his instigation tends to cause a false prosecution.

4. If, as a consequence of the instigation, damages resulted to a private person, has he the right to recover civil damages against the persons involved in the instigation? For example, a member of the purity squad induced the procuring of a prostitute by a hotel servant previously innocent of such an act. Publicity was given to the arrest and as a result of which decent people shied away from patronizing the hotel. Who will be civilly liable for the damages suffered by the hotel owner? Or supposing that robbery was committed at the instigation of a policeman and damage was suffered by the victim in terms of broken windows, furniture, machineries, etc., who will shoulder the civil liability?

[93] (CA) 40 O.G. 4475 (1941).
[94] Woo Wai v. United States, 223 Fed. 412 (1915); State v. Mantis, 32 Idaho 724 (1920).
[95] See Article 12 of the Revised Penal Code.
[96] See Article 11 of the Revised Penal Code.
[97] 59 Phil. 236 (1933).

It goes without saying that in the criminal action against the person instigated, the action is between the state and the instigated. And the basic theory for the acquittal is that the state thru its agents, the police officers, has induced the accused to commit the crime. The injustice and repugnance to public policy which characterize such practice is absent in the event that civil suit is brought against the instigated, if the party who suffered the damage has no part in the instigation. Instigation does not preclude discernment on the part of the person instigated. Further, the person instigated cannot logically claim ignorance of the wrongful act. The peace officer who is a party to the commission of such act must necessarily be also civilly liable. A person who is not criminally responsible may still be civilly liable. Thus, acquittal on the ground that the guilt has not been proved beyond reasonable doubt does not bar a civil action for damages.[98]

Rule 107, Section 1, paragraph (d) of the Rules of Court expressly provides:

> Extinction of the penal action does not carry with it extinction of the civil, unless the extinction proceeds from a declaration in a final judgment that the fact from which the civil might arise did not exist.

Article 21 of the New Civil Code of the Philippines provides:

> Any person who wilfully causes loss or injury to another in a manner that is contrary to morals, good customs or public policy shall compensate the latter for the damage.

The courts are uniform in their opinion that instigation is reprehensible and contrary to public policy. Some authorities have even gone to the extent of saying that instigation is as condemnable, if not more so, as third degree,[99] since it involves the creation of a criminal by governmental agency.[100] It is reiterated, however, that this offensive characteristic should not prejudice an innocent third party who suffered damages as a result of the instigation.

[98] Art. 29 NEW CIVIL CODE.
[99] Note, *Entrapment as a Defense to Criminal Prosecution*, 44 HARV. L. REV. 109 (1930).
[100] Polski v. United States, 33 F.2d 686 (1929).

5. In cases of entrapment, is the crime attempted, frustrated, or consummated?

This question can best be answered by citing specific illustrations. For instance, a man was under investigation by a police officer for a probable violation of the law. He offered the officer ₱1000 if the latter would drop the investigation and further action against him. The officer pretending to go along with the proposition reported the matter to his superior officer. A plan for entrapment was laid. When the person under investigation gave the money to the Police Officer, he was placed under arrest. Is this attempted, frustrated, or consummated corruption of public officials?

In the case of *People vs. Ng Pek*,[101] the Supreme Court found the accused guilty of attempted corruption of public officials when he offered and delivered the amount of one peso to a patrolman in order to dissuade him from complying with his duty to arrest said accused but who instead of acceding to such proposal immediately placed the person under arrest. Pertinent portion of the decision is quoted as follows:

> Be that as it may, and assuming that the accused really offered and delivered money to the police officer, there is no question that the latter refused to be corrupted. In similar cases this court has repeatedly held the crime to be attempted. (U.S. vs. Paua, 6 Phil. 740; U.S. vs. Camacan, 7 Phil. 329; U.S. vs. Tan Gee, 7 Phil. 738; U.S. vs. Sy-Suikao, 18 Phil. 842; and U.S. vs. Te Tong, 26 Phil. 453).
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> In the last of these cases herein cited, it appears that the accused Te Tong offered and delivered ₱500 to a police in consideration of the latter's agreeing to deliver to the Chinaman certain books, which the police officer had seized from him and which showed that he was guilty of playing the prohibited game of jueteng, and to substitute said books with others fraudulently concocted for the purpose. Immediately after the delivery and substitution of the books and the receipt of ₱500, the police officer arrested the Chinaman. The Court said that the only question was whether the crime was attempted, frustrated, or consummated bribery. Following the previous cases above cited, which involved similar facts, the court held that "while there is some authority to the contrary, we are of the opinion that we should follow substantially uniform holding of this court which declares the crime to be attempted bribery."

It will be noted that there appears to be a misnomer, for while the court kept on designating the crime as bribery a reading of the case shows that the crime under consideration is Corruption of Public Officials defined in Article 212 of the Revised Penal Code.[102]

What is the stage of execution of the crime of direct and indirect bribery as defined in Articles 210 and 211 of the Revised Penal Code respectively, in cases involving entrapment?

[101] 46 O.G. (1s) 360 (1948).

[102] Article 212 of the Revised Penal Code provides: "Corruption of Public Officials.—The same penalties imposed upon the officer corrupted, except those of disqualification and suspension, shall be imposed upon any person who shall have made the offers or promises or given the gifts or presents as described in the preceding articles."

Bribery is consummated by the consent of the official. It is not essential that the public officer should actually perform the act which he agreed to commit.[103] In the case of *People v. Vinzol*,[104] the accused was found guilty of bribery, the court stating in effect that while there was entrapment, there was no instigation. Examination of the penalty imposed indicated that Vinzol was adjudged guilty of consummated bribery.

In another case, a person posed as the representative of a certain employment agency and promised a job seeker employment, should the latter give him ₱50 supposedly required by the agency. The intended victim asked that he be given until the next day to raise the money. Subsequent thereto, he went to the main office of the agency to determine if the accused was really its agent. He was informed that the man was in no way connected with the firm. Officers of the law were informed and an entrapment laid. Upon receipt of the money from the intended victim, the defendant was placed under arrest. Is this attempted, frustrated, or consummated estafa?

In the case of *People v. Gutierrez*,[105] the facts disclosed that the accused offered to give the complaining witness work as office boy in Ft. McKinley with a salary of ₱25. He asked from the complainant ₱3.75 for X-ray examination. Upon receipt of the money he was placed under arrest. The court found him guilty of frustrated estafa. The basis for said decision was that the element of damage for this particular offense was not present as the amount given by the intended victim had been recovered.

Entrapment in extortion cases (robbery) should be regarded as consummated even if the money had been recovered from the culprits inasmuch as damage to the victim is not an essential element of the crime of robbery.[106]

The determination therefore, of the stage of execution of a criminal offense involving entrapment depends upon the kind of crime charged and the circumstances surrounding it. This is attributed to the fact that the elements satisfied in the crime during entrapment varies with the crime involved.

Conclusion.

An examination of this Note reveals that the defense of entrapment has been the subject of various legal controversies. In the illustrations

[103] PADILLA, 2 CRIMINAL LAW 299 (1955).

[104] (CA) 47 O.G. 294 (1949).

[105] (CA) 40 O.G. 125 (1939).

[106] See Art. 293 of the Revised Penal Code.

given, it will be seen how easily officers of the law may deviate from the truth in their testimony before the courts in order to make it appear that the apprehension of the accused was by virtue of an entrapment which finds judicial sanction in this jurisdiction. We can see from the very nature of these cases that this doctrine involves a ticklish and sensitive application. If a public officer could resort to instigation, it is not idle thinking to assume that he is capable of claiming entrapment by the simple expediency of testifying that the criminal intent originated from the accused. Peace officers in their desire to enforce the law should not resort to this foul means. Their zeal and enthusiasm should be tempered with judiciousness in order to protect innocent citizens from unnecessary embarrassment and suffering.

However, the strong probability that the person apprehended and charged as a consequence of a valid entrapment would shift the criminal initiative to the officers who have arrested him cannot be overlooked. These considerations expose the courts to uncertainties and errors in its findings of facts upon which the conviction or acquittal of the accused hinges. It must have been for this reason that entrapment and instigation came to be referred to as the borderline defenses.

The actuation of the accused of passing the criminal initiative to the peace officer is understandable because he is fighting for his freedom. But the practice of the agents of the law of instigating a crime and then of arresting and prosecuting their otherwise innocent tools is beyond rational comprehension. As Justice Sanborn said:

> The first duties of the officers of the law are to prevent, not to punish crime. It is not their duty to incite and create crime for the sole purpose of prosecuting and punishing it.[107]

[107] Butts v. United States, 273 Fed. 35 (1921).

REFERENCE DIGEST

CONSTITUTIONAL LAW: FREEDOM OF CONSCIENCE. The Rizal Bill is a bill sponsored by Senator Laurel seeking to make as compulsory reading in colleges and universities the original and unexpurgated copies of the *Noli Me Tangere* and *El Filibusterismo*. Because of its controversial nature, it has provoked the opposition of a great segment of our population. The bill thereby gave rise to several conflicting opinions.

Originally, the bill sought to make *compulsory reading* of the unexpurgated and original version of the famous novels in colleges and universities. Subsequently, an amendment was introduced by Senator Laurel making them *basic texts* in colleges and universities.

Objections were raised on the ground that this bill would violate the freedom of conscience enjoyed by citizens of a democratic country; that it seeks "unification of opinion" by compulsion. Senator Laurel himself admitted that the word "compulsion" is obnoxious; that it is the very antithesis of freedom and that it is something which is abhorred in a democratic country.

It is this element of compulsion which gave rise to the controversy over the bill. By compelling a Catholic student to read the unexpurgated copies of the *Noli* and the *Fili*, which admittedly contain some "degree of irreverence" towards the Catholic faith, his freedom of conscience is violated. In support of their contention, the opponents of the bill cite the case of *Barnette* v. *Virginia*.[1] According to the proponents of the bill, however, the case of Barnette is not applicable, because while in that case the student was compelled not only to salute the flag but also to recite the pledge of allegiance to the United States, here all that the original bill would compel the student to do would be to read the unexpurgated version of the novels; that he is left free to make his own conclusions and that the state does not, as in the case of Barnette, compel him to make an act of faith; that he is not compelled to believe what Rizal has written; and that, therefore, his religious convictions are not invaded. To this contention, the opponents of the bill argued that the amendment proposed to make the two novels as basic texts, which means that a student is not only required to read and examine them, but also to study and learn them if he would pass the course. If he does not learn the ideas contained in the novels, he would be penalized by getting low grades and ultimately fail in his

[1] 319 U.S. 624 (1943).