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[G.R. No. 1855. January 22, 1905]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. CATALINO COFRADA, DEFENDANT AND APPELLANT.

D E C I S I O N

MAPA, J.:

The robbery with which the defendant is charged has been fully proven. Three witnesses testify to the same facts, corroborating each other, and testimony is of their own personal knowledge, since they themselves were the victims of the robbery.

The crime was perpetrated on the afternoon of December 10, 1903, in a deserted place called Mahabangtanao, within the jurisdiction of the town of Majayjay, Laguna Province, by two persons who had their faces blackened. One of the robbers was armed with a bolo and a revolver and the other with a bolo; both of them exercised violence on the victims, and, with intimidation of the same, took from them 5.80 pesos in cash, a penknife, a package of cigarettes, and a small mirror.

The participation which the defendant had in the commission of the offense is also proven by the testimony of the witnesses above referred to. One of these witnesses positively affirms to have identified the defendant at the time the robbery took place, in spite of having his face blackened, since he knew him of old, and also on account of the tattooing he had on his hands. One of the other witnesses states that, although he did not identify the robbers by their faces on account of the aforesaid disguise, he, however, saw that one of the robbers had his hands tattooed and that his body and height were similar to that of the defendant. The defendant was ordered by the judge to show his hands

upon the request of the prosecuting attorney, and when he did so, without any objection or protest on his part, it was found that he really had his hands tattooed and that the marks and designs of his tattooings were identical, according to the witness, to those which he saw at the time the robbery took place. The third witness affirms that one of the two robbers was of the same size as the accused, Cofrada.

The defense in this instance alleges that the judge violated one of the rights of the accused when he ordered him to show his hands so as to obtain material proof of his guilt, and that such a violation vitiates the proceedings in the case and makes the record null and void. Assuming even that the accused had really the right to refuse to show the tattooing on his hands, it is evident that he did not only waive that right but relinquished it voluntarily when he showed the said tattooing without protest or objection against such order. This would, at all events, deprive him of his right to object to the validity of those proceedings in this instance. This circumstance is certainly not the only one which furnishes the evidence of the defendant’s guilt, since, even without taking it into consideration, the affirmation of one of the witnesses that the said accused had been well identified by him at the time the robbery was committed would be sufficient to prove his guilt; and this affirmation has been furthermore corroborated by the other two witnesses, who stated that one of the robbers was like the accused in his body and height.

The evidence introduced by the accused in order to establish an alibi does not deserve serious consideration. One of his two sole witnesses confined himself in his testimony to the fact that he saw the defendant pass in front of his house at noon on that day, going toward the office of the municipal president of the town; and the other, when testifying—in fact without giving satisfactory explanation of his statement—that he constantly saw the defendant doing police duty at the president’s office in the town during all day and night on the date of the occurrence with the exception of one of the early hours in the morning, when the said accused returned to his house for breakfast, not only contradicts the first witness, who states that he had seen the accused out of the president’s office, but also contradicts the accused

himself, who, upon testifying on his behalf, said that on that day he went twice to his house to take breakfast and dinner and that he was at his house in the afternoon, leaving the same at 5 o'clock to go to town for the purpose of buying some food..

The facts in the case fall within the provisions of section 5 of article 503 of the Penal Code, which punishes it with *presidio correccional* to *presidio mayor*.
The offense having been committed with the aggravating circumstances of uninhabited place and use of a disguise by the accused, his face being blackened in order to secure impunity, the punishment should be imposed upon the accused in its maximum degree, within the limits of which the judgment appealed from is confined.

The accused is furthermore sentenced by the said judgment to return the money and property taken, and, if in default, to suffer subsidiary imprisonment at the rate of one day for each 12 1/2 pesetas unpaid.
This latter part of the sentence does not conform with the law. Article 51 of the Penal Code provides that subsidiary imprisonment shall not be imposed on the defendant when the penalty to which he has been sentenced is higher in the general scale of penalties than that of *residio correccional*. The penalty of *presidio mayor*,
which is higher than the last-mentioned penalty, having been imposed upon the accused, it is manifest that he can not legally be sentenced to subsidiary imprisonment in case of insolvency.

The judgment thus modified is hereby affirmed with the costs of this instance against the accused. So ordered.

Arellano, C. J,, Torres, Johnson, and *Carson, JJ.*, concur.

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