

[G.R. No. 995. July 25, 1906]

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. FELICIANO LUCINARIO ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

WILLARD, J.:

In the vestibule of the Junquera Theater, in the city of Cebu, on the evening of the 27th of February, 1902, near the close of the first act, a quarrel took place between Vicente Sotto, a Filipino, and Fidel Alberto Moas, a Spaniard. Moas was arrested by the police there on duty, but objected to being taken to the *ayuntamiento* unless Sotto was also arrested. The Spanish consul, who was in one of the boxes in the upper part of the theater, hearing the disturbance, went into the vestibule on the lower floor and engaged in some conversation with Moas and the municipal president Rallos. According to the testimony of the consul he started to return to his box upstairs. The vestibule at that time was filled with people, there was considerable excitement, and he was attacked with clubs by the policemen and knocked to the ground. For this assault this prosecution was commenced.

There were on duty that night in and about the theater seventeen municipal policemen. All of the seventeen were defendants in the case. All were present at the trial except Nicasio Guibelondo, and as to him the trial was suspended. The Government presented the testimony of fourteen witnesses, most of them eyewitnesses of the occurrence. The testimony of these witnesses was to the effect that the consul was attacked by policemen; some of them stated by all of the policemen in the building, others by five or six, but no one of these witnesses, with the exception of Eustaquio Lopez, whose testimony will be considered later, was able to identify any of the defendants as the persons who made the assault upon the consul. At the conclusion of the testimony of these witnesses the Government rested. The defendants made a motion that the case be dismissed for the reason that no evidence had been offered sufficient to convict them. The Government

consented to the dismissal of the case as to the defendants Balbino Patolin and Maximino Usua. The Assistant Attorney-General then asked permission of the court to call these two defendants as witnesses. This permission was granted against the objection and exception of the defendants. Both of these witnesses declared that they did not witness the assault made upon the consul; that they did not go into the vestibule until after the event. After the examination of these witnesses, the Assistant Attorney-General stated that he again rested his case. The court then announced that it intended to dismiss the case as to certain of the defendants in order that they might be used as witnesses for the Government. Thereupon the case was dismissed as to the defendant Fruto Besarte. He was then called as a witness for the Government. His testimony did not identify any of the defendants as the persons who had committed the assault upon the consul. At the close of his testimony the Assistant Attorney-General moved that the case be dismissed as to Adriano Garcia, for the purpose of calling him as a witness for the State. He was called as such witness, but his testimony did not identify any of the defendants as the persons who assaulted the consul. He testified, however, that he saw some one strike at the municipal president, but that the blow missed the president and struck the defendant Naval, a policeman. The Government thereupon again rested its case, and the court again announced that it intended to dismiss the case as to other defendants in order that they might testify for the Government, and the case was dismissed as to the defendants Francisco Mustosa and Lucio Cristaba. They testified as witnesses for the Government, but did not identify any of the defendants as the persons who assaulted the consul. The Government again rested its case, whereupon the court ordered a dismissal to be entered in favor of the defendants Luchaves, Sacmar, and Tenchaves, in order that they might testify for the Government. The only one of these three who testified was the defendant Sacmar. He did not identify any of the defendants as the persons who attacked the consul. The Assistant Attorney-General again rested his case, and the defense moved for a dismissal of the action as to all the defendants except Naval. The court ordered the action dismissed as to the defendants Bias Tuga and Brigido Violanda. Quite a large number of witnesses were presented by the defense.

The court, in its final judgment, acquitted the defendant Urbano Antigua, convicted the defendants Felicia no Lucinario, Marcelino Rama, Tomas Naval, and Estanislao Tirado, and sentenced each one of them to one year eight months and twenty days imprisonment (*prision correccional*). From this judgment the defendants convicted appealed. The Government also appealed.

The appeal of the Government is dismissed upon the authority of *Kepner vs. United States* (195 U. S., 100).

We do not think that the evidence is sufficient to support the judgment of the court below as to any of the defendants convicted except the defendant Tomas Naval.

As has been stated, there were seventeen policemen stationed in and about the theater upon the night in question. There was in the theater a lieutenant of police, but there is evidence that the defendant Feliciano Lucinario, a sergeant and one of the defendants convicted, was in the immediate charge of the other policemen. No witness testifies that this defendant struck the consul, or that he was seen engaged in the attack upon the consul. Eustaquio Lopez, who was an eyewitness of the event, when called upon to identify the persons who made the attack, stated in his direct examination that he saw the defendant Antigua and the defendant Lucinario immediately before the attack, but that he did not know whether they were there at the moment of the attack. On cross-examination he testified that he did not see them at the moment of the attack, but before, and when asked where he saw them he said "I do not remember whether it was inside or outside, I saw them because I knew them before that time." It is to be noticed that the defendant whom this witness associates with Lucinario as one of the policemen whom he saw immediately before the attack in the vestibule is the defendant, who was acquitted by the court on the ground that he was outside of the theater and took no part in the assault. There is affirmative evidence that this defendant Lucinario was not in the vestibule at the time of the assault. Three of the defendants as to whom the case had been dismissed and who were utilized by the Government as witnesses testified that they did not see the sergeant in the vestibule. Tomas Naval also so testified, but the most significant testimony of all is that given by L. E. Ross, the Constabulary officer who was an eyewitness of the event from its commencement and who was in charge of the Constabulary forces stationed in Cebu. He stated that he did not see the sergeant in the vestibule. The sergeant himself, testifying as a witness, declared that he was upstairs in the theater, and took no part in the assault.

Another of the defendants convicted was Marcelino Rama, The evidence shows that Rama, who was a corporal, was stationed in the upper part of the theater. Adriano Garcia testified that when Moas had been arrested, Rama turned him (Moas) over to Garcia, with directions to take him to the *ayuntamiento*, and Rama followed Garcia and Moas to the street entrance. Rama himself testified that he went as far as the sidewalk with Moas, and that he was outside of the building when the consul was attacked. There is no direct evidence that he took any part in the assault. The only evidence in the case to show that he was in the vestibule at the time is the testimony of his codefendant Naval, who said that he saw him there attempting to quiet the people and keep them in order.

Estanislao Tirado was also convicted. The witness Eustaquio Lopez, after pointing out the defendants Antigua and Lucinario as two of the persons who were in the vestibule shortly before the attack, added that the defendant with the blue coat (indicating Estanislao Tirado) was also present. The witness added: "I judge only by his height, as I do not recognize his face." Upon cross-examination he said "and that one whom I pointed out on account of his height, I only recognize on account Of his size, but his face I do not know."

"Q. Well, if there were any tall policemen here would you be able to distinguish this one? Would you be able to say this man was there?—A. No sir; I could not distinguish him, because I did not pay attention to his face.

"Q. Then, all you can say is that there was a tall policeman there?—A. Yes, sir; among the rest there was one taller than the others."

The evidence showed that this defendant was stationed at the street entrance of the theater. The defendants who testified for the State, Maximino Usua, Balbino Patolin, and Francisco Mustosa, testified that they did not see this defendant in the vestibule. Tom&s Naval and Feliciano Lucinario did not mention this defendant as one of the persons whom they saw in the vestibule. The defendant Sacmar, testifying for the State, stated that Tirado was one of the policemen who were driven out of the theater by Captain McIntyre, Tirado himself stated that being stationed at the street entrance, he went across the street to a tienda, and was not present during any part of the disturbance. No witness testified that he saw Tirado engage in the attack on the consul, and the only witness who testified that he was in the vestibule at the time was the witness, Sacmar, who, as has been said, stated that he was one of those driven out by Captain McIntyre after the affair was over.

The contention of the Government is, first, that it is proved that the assault was made by all the policemen in the vestibule, that these defendants were in the vestibule, and consequently are guilty. If the evidence showed that these four defendants were in the vestibule at the time, the judgment might perhaps be supported. But the evidence does not show this. On the contrary, it is shown that other policemen were there, and as to the latter point, Maximino Usua testified that he saw in the vestibule Tomas Naval and Nicasio Guibelondo, the defendant who was absent at the trial; that the policemen were formed in line in the vestibule at once after the event, in order that the consul might identify, if possible, the persons who assaulted him. In this line were Tomas Naval, Nicasio Guibelondo, Brigido Violanda, Adriano Garcia, Balbino Patolin, and the witness. Balbino Patolin testified

that he saw the same people in the vestibule, and that they were in the formation thus made. Fruto Besarte testified that he saw in the vestibule Brigido Violanda. Epifanio Sacmar testified that he saw in the vestibule the defendants, Naval, Violanda, Patolin, and Guibelondo. Naval testified that Garcia and Guibelondo were in the vestibule. Lucinario testified that he saw Naval and Guibelondo there.

That the consul was struck by policemen is proved, but that he was struck by any of the defendants convicted except Naval is not proved. Neither is it proved that any of these three convicted defendants took part in that assault. As to them the judgment must be reversed.

Tomas Naval admitted at the trial that he struck the consul he did not know how many times. He had made a similar statement in writing before the trial. The reason he gives for this assault is that he had been previously struck by the consul with a cane which the consul was carrying. We do not think the evidence is sufficient to establish this defense.

The court convicted the defendants of the violation of article 419 of the Penal Code, which is as follows:

“Less grave injuries inflicted on parents, ascendants, guardians of persons or property, teachers, or persons holding public rank or authority shall be punished always with *prision correctional* in its minimum and medium degrees.”

The court held that the Spanish consul was a “*dignidad o autoridad publica.*” We do not think he was a public authority. But we hold that he comes within the definition of the term “*dignidad*” The case as to him falls within said article 419 of the Penal Code.

The judgment of the court below, so far as it relates to the defendants Feliciano Lucinario, Marcelino Rama, and Estanislao Tirado is reversed, and they are acquitted with the costs *de oficio*. So far as it relates to the defendant Tomas Naval it is affirmed, and he is convicted of the crime defined in article 419 of the Penal Code, the term, of imprisonment being one year eight months and twenty-one days, to pay one-fourth of the costs of this instance, and one-seventeenth of the costs of the first instance. He is entitled to an allowance of one-half of the time during which he has been confined prior to the entry of the judgment of this court.

After the expiration of ten days from the date of final judgment let the case be remanded to the court below for action in accordance herewith. So ordered.

Arellan, C. J., Mapa, and Tracey, JJ., concur.

DISSENTING

TORRES, J.:

The undersigned is of the opinion that the facts complained of constitute the crime of *lesiones menos graves*, penalized in article 418 of the Penal Code, in its maximum degree, aggravating circumstance No. 20 of article 10 of the said code having attended the commission of the offense, considering the rank and dignity of the injured party as Spanish consul at Cebu; consequently the defendant should be sentenced to four months and one day of imprisonment and to pay one-fourth of the costs, he being entitled to be credited with one-half of the time he has been held in detention.

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