6 Phil. 413

[G.R. No. 2821. August 30, 1906]

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MARIANO ANASTASIO, DEFENDANT AND APPELLANT.

D E C I S I O N

CARSON, J.:

The accused in this case was charged with an "attempt to commit rape" and brought to trial for that offense. After the evidence had been submitted, and before judgment was rendered, the trial court was of opinion that a mistake had been made in charging the proper offense and that the facts proven did not constitute the crime with which the accused was charged, but that there was reasonable ground to believe that he had committed the crime of *abusos deshonestos*, as defined and penalized in article 439 of the Penal Code. Thereupon the information charging attempted rape was dismissed and in accordance with the provisions of section 37 of General Orders, No. 58, the accused was committed to answer to the charge of *abusos deshonestos.*

After arraignment on this charge, the accused and his counsel, in open court, and with the consent of the court, entered into an agreement with the prosecuting attorney to submit the case upon the evidence of Record in the former case for "attempt to commit rape," together with the exceptions and rulings of the court filed therein. Upon this evidence the accused was convicted and sentenced to three years six months and twenty-one days of imprisonment at hard labor, less one-half of the period of one month and seven days during which he had been confined pending trial, and to the payment of the costs of the proceedings.

From this judgment and sentence the accused appealed and his counsel now assigns as error the action of the court in consenting to the above set out agreement, alleging that the right of the accused to be confronted with the witnesses was impaired thereby.

We are of opinion that there was no error in the proceedings prejudicial to the rights of the accused and that the contention of counsel for the appellant ought not to be sustained.

The right to be confronted with the witnesses upon which counsel for appellant rests his contention is guaranteed in section 5 of an act of Congress of July 1, 1902, which prescribes:

> "That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf."

And it is provided in section 15 of General Orders, No. 58, that in all criminal prosecutions the defendant shall be entitled "to be confronted at the trial by, and to cross-examine, the witnesses against him."

The right of confrontation thus guaranteed and secured to the accused is a personal privilege, and there does not seem to be any reason founded on principle or the circumstances of this particular case which prohibits its waiver.

With full knowledge of the consequences, under the advice of counsel, in open court, and for reasons sufficient to himself the accused entered into the agreement for the submission of the case on the record taken in the former trial, which was based upon the same facts though upon a complaint charging a distinct offense, and in natural reason one should not complain of a thing done with his consent, except in those cases where the doctrine of the waiver of rights is limited by adverse doctrines interposing with superior force. Since the right to meet the witnesses face to face is strictly a personal privilege, there seems to be no reason based upon the above cited provisions of law which would prohibit the waiver of such right.

This view is sustained by the great weight of authority in the United States. In Louisiana it has been held that, as the right of being confronted with the witnesses is a personal one, the accused may waive it (State *vs*. Hornsby, 8 Rob., 554, 41 Am. Dec., 305); in Michigan it has been held that a conviction of murder can not be set aside for the admission of depositions in pursuance of voluntary stipulations by the parties, and that by making such a stipulation the respondent waives his constitutional right to be confronted by the witnesses (People *vs*.

Murray, 52 Mich., 288, 17 N. W. Rep., 843); in Montana it has been held that where the defendant, to prevent a postponement of the trial, admits that witnesses present would testify to certain facts stated in the affidavit of the prosecution for a continuance, he waives his constitutional right to be confronted with the witnesses referred to in the affidavit (United States *vs*. Sacramento, 2 Mont., 239, 25 Am. Rep., 742); in New York that defendant is bound by an explicit waiver of the constitutional privilege to be confronted with the witnesses against him (Wightman *vs*. People, 67 Barb., 44); in Texas that the prisoner may waive his constitutional right to meet adverse witnesses, by consenting to the reading of a written statement of their testimony (Hancock *vs*. State, 14 Tex., App., 392), and that one indicted for a crime may waive his right to be confronted with the State's witnesses (Allen *vs*. State, 16 Tex., App., 237); in Alabama that in a criminal case the constitutional right of the accused to be confronted by the witnesses against him may be waived, as where he agrees that a deposition taken in a civil suit between him and the prosecutor may be read in evidence without requiring the personal attendance of the witness (Rosenbaum *vs*. State, 33 Ala., 354); and in Iowa that the waiver by agreement of counsel of the presence of a witness for the State and reading a written statement of his testimony to the jury is not a violation of the defendant's constitutional right to be confronted with the witnesses against him (State *vs*. Pooks, 65 Iowa, 452, 21 N. W. Rep., 773).

> "The chief purpose of confrontation is to secure the opportunity for cross-examination; this has been repeatedly pointed out in judicial opinion, so that if the opportunity of cross-examination has been secured the function and test of confrontation has also been accomplished, the confrontation being merely the dramatic preliminary to cross-examination. The second and minor purpose is that the tribunal may have before it the deportment and appearance of the witness while testifying. But the latter purpose is so much a subordinate and incidental one that no vital importance is attached to it; consequently if it can not be had it is dispensed with, provided the chief purpose, cross-examination, has been attained." (Greenleaf on Evidence, vol. 1, par. 163.)

This trial and the former trial were heard before the same judge and were based on the same facts and the accused and his counsel were present when the evidence of record in the former trial was taken, and exercised the right to cross-examine the witnesses for the prosecution and to present his own witnesses for the defense. It thus appears that both the primary and secondary purposes of confrontation were attained and, while there can be no

doubt that the accused had the right to demand that the witnesses be called again to testify if they could be produced, there does not appear to be any reason based on the circumstances of this particular case which would prohibit him from waiving this right, nor does it appear that he was in any wise prejudiced thereby.

The evidence admitted of record establishes the guilt of the accused of the crime with which he is charged beyond a reasonable doubt.

In imposing sentence the trial court took into consideration as an extenuating circumstance the fact that the accused is a native of the Philippine Islands, in accordance with the provisions of article 11 of the Penal Code; but in view of the fact that the crime of which the accused is convicted was committed upon an innocent child of from 8 to 9 years of age, we are of opinion that this extenuating circumstance should not have been taken into consideration and that, there having existed the aggravating circumstance that the crime was committed in the house of the offended person (No. 20 of art. 10 of the Penal Code), the penalty should be imposed in its maximum degree; and we therefore reverse the sentence imposed by the trial court and instead thereof impose upon the accused the penalty of six years' imprisonment (*prision correccional*), with the accessory penalties prescribed in article 61 of the Penal Code and the costs in both instances, but with allowance, nevertheless, in favor of the accused of one-half of the time during which he has been detained pending trial.

Let judgment be entered in accordance herewith and the record returned to the. court from whence it came for proper action. So ordered.

Arellano, C. J., Torres, Mapa, Willard, and *Tracey, JJ.,* concur.

Date created: May 02, 2014