43 Phil. 860

**[ G. R. No. 18925. September 28, 1922 ]**

**THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. PEDRO MIRASOL, DEFENDANT AND APPELLANT.**

**D E C I S I O N**

**JOHNSON, J.:**

It appears from the record that a complaint was presented against the defendant in the court of the justice of the peace of the municipality of Romblon, of the Province of Romblon, on the 10th day of November, 1921; that the defendant was arrested and after numerous delays the preliminary examination was concluded and he was held for trial in the Court of First Instance of said province; that on the 19th day of December, 1921, the prosecuting attorney of said province presented a complaint in the Court of First Instance in which the defendant was charged with the crime of abduction of the offended person, Matilde Abello, a virgin of 14 years of age, without violence; that after some delays the defendant was arraigned on the 13th day of January, 1922, and pleaded not guilty; and that the cause was brought on for trial on the same day, and after hearing the testimony of said Matilde Abello the Honorable Fernando Salas dictated the following order on the 14th day of January, 1922:

> "It appearing from the complaining and principal witness, Matilde Abello, that the abduction committed by the accused was effected against her will; taking into account her minority, her mental state which was shown here and her physical development, as observed by the court at the time of giving her testimony; and above all, her attitude, demeanor and manners;
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> "Considering that abduction against the will of the offended party is much graver than abduction with consent;
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> "The court, making use of the powers granted it by article 37 of General Orders

No. 58, orders that the information presented be dismissed and the prosecuting officer present another information for abduction against the will of the offended party, and that the accused be arrested unless he gives a bond for P12,000.

"So ordered."

On the 16th day of January, 1922, the prosecuting attorney of said province, in accordance with the direction of the judge in the order above quoted, presented a new complaint against the defendant, which alleged:

"That on or about the 1st day of November, 1921, in the municipality of Romblon, Province of Romblon, P. I., the above named accused did willfully, unlawfully, and criminally with violence and against the will of Matilde Abello, with unchaste designs, abduct and take her, a maiden 14 years old, away from the house of Sebastian Felices where her father Nicasio Abello had left her as a servant.

"Contrary to law."

Upon that complaint the defendant was duly arraigned on the 18th day of January, 1922, and pleaded not guilty. On the same day the cause was brought on for trial. At the beginning of the trial, and after having pleaded not guilty, the defendant interposed the special defense of former jeopardy, alleging that he had been placed in jeopardy under a former complaint for the same offense, and asked that the present complaint be dismissed for that reason. The lower court denied the motion of the defendant and set the cause down for trial on the 19th day of January. At the close of the trial, and after hearing and considering the evidence adduced, the lower court found the defendant guilty of the crime charged in the complaint and sentenced him to be imprisoned for a period of seventeen years, four months and one day of *reclusion temporal* and to "dotar" the offended person, Matilde Abello, in the sum of P1,000, and to recognize the child if any should be born by virtue of the illicit relation, and to pay the costs. From that sentence the defendant appealed. In this court the appellant contends that the lower court committed the following errors:

(1) In finding the defendant guilty of the crime of abduction committed against the will of the supposed offended person; and

(2) In not sustaining the defense of double jeopardy. With reference to the first assignment of error, it may be said that we have made a careful examination of the evidence adduced,

and are convinced, beyond a reasonable doubt, that the following findings of fact made by the lower court are fully sustained thereby:

> "(1) That on the 1st day of November of last year, 1921, the girl, Matilde Abello, of 13 years of age, who was living as a servant in the house of Don Sebastian Felices, a Spaniard of long residence in the country and here in Romblon, received order to. buy some bananas, at 7 o'clock, p. m., and left the house, going south of the town;
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> "(2) That on arriving at a side of the Central School, she found herself face to face with the accused, and the latter asked the girl where she was going, to which she answered that she was going to buy some bananas by order of her masters; thereupon and without any further word, the accused snatched the tray of porcelain (*bandejado*, as it is called in this country) which the girl was carrying, and hurled it against one of the iron posts which serve as supports to said school building;
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> "(3) That at this juncture one Vicente Rocha and the latter's wife named Simplicia Real happened to pass by the place, and to the interpellation of Vicente to the accused and the girl, instead of answering, he (the accused) told Vicente to come to him, which Vicente and his wife attempted to do;
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> "(4) That then, having become aware of the reality of what was taking place, Vicente answered the accused saying that he will not approach him for fear of the consequences of what might happen, and the accused replied imposingly: 'Don't you like to come? You ought to know that I am a councilor of this municipality; I am not afraid even if my enemies were 20,000;' in view of which Vicente and his wife became afraid and obeyed the order of the accused, and thus the four of them found themselves together at the foot of the Rizal monument standing in the center of the public square of this town;
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> "(5) That there (already at the foot of the monument) the accused told the girl to go with him and with those who were there present to the barrio of Bagakay; the girl alarmed to some extent in spite of the ignorance which is natural in her age, answered that she would not, for her masters were waiting for her; to which the accused replied: 'You go, Matilde, for being a councilor, I fear nobody here in Romblon;'

"(6) That by these statements of the accused the girl in turn was frightened, and being afraid, she did what the accused had indicated; and then the latter ordered Simplicia to go ahead with Matilde, ordered Vicente to separate from the group and in the meantime he (the accused) took the way to the house of Mr. Felices to find out whether the offended party was being missed there;

"(7) That a few moments thereafter, before Simplicia and the offended party could pass the limits of the public square, the accused came back to join again with these two women; taking the girl by the left hand, he walked ahead with her until they reached Bagakay in company with Simplicia, while Vicente followed the group secretly at a distance of about 50 meters from behind;

"(8) That when the four all reached Bagakay, Vicente a few moments after the group, once in the house, the accused ordered Vicente and his wife to leave the house and pass the night in the hen-house; warning them for the second time that he (the accused) was a councilor of the town and was not afraid even of 20,000 persons; and then he remained alone with the offended party in the house of said spouses;

"(9) That once the things were in this state, he solicited the offended party to have carnal knowledge with him, which she refused to do in the beginning; but then as the accused showed an imposing attitude for being a councilor, and boasted that as such he was not, and could not, be afraid either of the Constabulary men or of the father of the girl, the latter in her bashfulness yielded to first sexual intercourse against her will;

"(10) That the girl remained in this condition detained in Bagakay and at the will of the accused for three days and three nights he (the accused) enjoying her twice more successively during said period of time, until the father (of the girl) named Nicasio Abello appeared there on the fourth day; then he (the father) entered upon an investigation of what had happened, she revealed the way of pain passed over under the clutches of the accused, and her father took her from the place, bringing her to the town, to the house of one Benita Dianson;

"(11) That in the house of Benita Dianson, the girl remembering that she had left some clothings in Bagakay, asked permission from her father to take them; and there in Bagakay she was again met by the accused, and for the second time the

> latter took hold of her, carrying her to another place or barrio known as Sawang;
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> "(12) That in Sawang the accused detained her again in the house of his brother named Leon, where pitying the girl and in view of her attennuation, the latter advised the accused not to continue abusing too much; there he detained her for two nights and two days more, enjoyed her again until she left the place on account of the accused himself having warned her that the Constabulary men were looking for her;
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> "(13) That she left that confinement to go back to the paternal dwelling, meeting her father at 3 o'clock in the evening in the open public square of this town; and her father, after having recovered her for the second time, came to court, presenting the proper complaint, which caused the initiation of the present case."

Considering the foregoing facts in relation with the official character of the defendant, and the threatening and intimidating language used by him at the time of the occurrence of the facts related in the complaint, we are of the opinion that the defendant did, at the time and place mentioned in the complaint, abduct the said Matilde Abello, against her will, with violence, and with lewd and unchaste designs.

With reference to the second assignment of error, to wit, that the appellant had been placed twice in jeopardy for the same offense, it may be said that the lower court, after hearing the testimony of the offended person during the trial of the first complaint, reached the conclusion that the crime committed by the appellant was not that of "abduction with consent" but abduction with "violence and against the will of the offended person, with lewd and unchaste designs," and, in accordance with the authority granted by virtue of section 37 of General Order No. 58, directed that a new complaint be presented against the defendant, charging him with the crime of "abduction with violence, and with lewd and unchaste designs," and required the defendant to give bail for his appearance at the time of the trial under the new complaint. Said section 37 provides that: "When it appears at any time before judgment is taken, that a mistake has been made in charging the *proper offence*, the defendant *must not be discharged* if there appear to be good cause to detain him in custody, but the court must commit him to answer to the proper offence, and may also require the witnesses (the defendants) to give bail for their appearance at the trial."

From a reading of the order of the lower court, directing that a new complaint be presented

against the defendant, and that he be held for trial under the new complaint, in relation with said section 37, it will be seen that said order was fully justified, and the plea of former jeopardy cannot therefore be sustained if it appears that the new complaint contains elements entirely different from the offense described in the first complaint.

The crime charged in the first complaint is punished under article 446 of the Penal Code, as amended by Act No. 2298. The elements of that crime are: (*a*) The abduction of a virgin over 12 and under 18 years of age and (*b*) with her consent. The crime charged in the second complaint is punished under the provisions of article 445 of the Penal Code, and the elements of the crime charged in the second complaint are: (*a*) That the person abducted was a woman, without reference to her age or that she was a widow, a married woman, or a virgin; (*b*) that she was abducted by means of violence or against her will; and (*c*) that she was abducted for lewd and unchaste designs. It will be seen therefore that the elements of the crime described in the second complaint are entirely different and distinct from the elements of the crime charged in the first complaint, even though they are both described as the crime of "abduction." An illustration may be given which would justify the trial court, under the provisions of section 37 of General Order No. 58, in dismissing the defendant from one complaint and holding him for trial under another complaint without affording the defendant the defense of former jeopardy. For example: A is charged with the crime of homicide under article 404 of the Penal Code. He pleads not guilty. At the close of the trial, or at any time during the trial, it appears from the evidence that the person alleged to have been killed, was killed with "the attendance of any of the circumstances enumerated" in article 403 of the Penal Code, which attending circumstances show clearly that the defendant is not guilty of the crime of homicide but is guilty of the crime of assassination. The prosecuting attorney, under the direction of the court, presents a new complaint charging the defendant with the crime of assassination. May the defendant plead former jeopardy against the second complaint? We are of the opinion, and so decide, that the defense of former jeopardy is not a valid defense in such cases, even in the absence of a provision like section 37.

Or suppose, for example, A is charged in the complaint with the offense of assault and battery. He is arrested, arraigned, and pleads not guilty. A witness is called for the prosecution. From his declaration it clearly appears that the real crime committed is homicide and not assault and battery. The court, by virtue of the provisions of said section 37, is fully justified and authorized to direct the prosecuting attorney to file a complaint against the defendant for the real offense committed and to direct that the defendant be held in custody in the interim, and that may be done, providing the new complaint is for a

different and distinct offense from that charged in the first complaint. In such a case the defense of former jeopardy would not be available. (U. S. vs. Diaz, 15 Phil., 123; U. S. vs. Diaz, 223 U. S., 452.)

It has been held in numerous cases that a defendant in a criminal case is in jeopardy when he is placed upon trial upon (*a*) a valid complaint; (*b*) before a competent court; (*c*) when he is arraigned; (*d*) a plea to the complaint entered; and (*e*) the trial of the cause has actually been commenced by the calling of at least one witness. When those facts have occurred, he then has been in legal jeopardy and cannot be tried again for the same offense. ( U. S. vs. Ballentine, 4 Phil., 672.)

One is not "in jeopardy" in the meaning of that term as used in the organic act of the Philippine Islands (July 1, 1902; August 29, 1916), until his trial has actually begun, that is to say, until he has been arraigned and the first witness called. ( U. S. vs. Montiel, 9 Phil., 162.)

Of course, that rule is subject to many exceptions. For example, suppose at the close of the trial he was found guilty of the crime charged in the complaint and should appeal to the Supreme Court. If the Supreme Court should find that some error has been committed during the trial, prejudicial to the defendant, a new trial might be ordered upon the same complaint, and the plea of double jeopardy would not be available as a defense. Many other exceptions might be mentioned which would justify a new trial upon the same complaint.

Generally speaking, a defendant cannot plead former jeopardy as a defense to a subsequent action without showing: (*a*) That he is the same person accused in the former complaint and (*b*) that the offense or crime charged in the second complaint is the same as that charged in the former complaint. It is not sufficient to show that the acts charged in the second complaint are the same acts charged in the first complaint, for the reason that the same acts may constitute two different offenses. ( U. S. vs. Capurro and Weems, 7 Phil., 24; Garcia Gavieres vs. U. S., 220 U. S., 338; U. S. vs. Flemister, 5 Phil., 650; U. S. vs. Flemister, 207 U. S., 372; U. S. vs. Chan Cun Chay, 5 Phil., 385; U. S. vs. Lim Tigdien and Esteves, 30 Phil., 222; U. S. vs. Tan Oco, 34 Phil., 772.)

As indicated above, the offense described in the complaint in the present action was not the same offense charged in the complaint in the former action. Therefore, applying one of the tests of former conviction, it clearly appears that the defendant is not entitled to the defense of former jeopardy. The offense upon which he was placed on trial in the present case is not

the same upon which he had been placed upon trial in the other case.

Having found that the evidence adduced during the trial of the cause showed that the defendant was guilty of the crime charged in the complaint, and that he had not been placed in former jeopardy, and considering that there existed the aggravating circumstance of nocturnity, we are fully persuaded, and so decide, that the sentence of the lower court should be, and is hereby affirmed, with costs. So ordered.

*Araullo, C. J., Avanceña, Villamor, Ostrand, Johns,* and *Romualdez, JJ.,* concur.

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*CONCURRING AND DISSENTING*

**STREET**, *J.:*

I entirely concur in the proposition advanced in the opinion of the court in this case to the effect that the dismissal of the complaint charging abduction with consent (*con anuencia*) of the injured girl does not constitute jeopardy with respect to the subsequent complaint charging abduction without consent; but upon the question of fact as to whether the accused has been really guilty of the higher offense, for which he has now been sentenced to imprisonment for seventeen years, four months and one day, I respectfully beg leave to record my earnest dissent, as the proof clearly shows in my opinion that the offense of abduction was accomplished with the consent of the injured girl.

The only witnesses for the prosecution are Matilde Abello herself, the injured girl, and the woman Simplicia Real, in whose house the accused kept Matilde Abello for three days and nights. As may always be expected in the case of this kind, the injured girl, sensible of the stain on her character, pretends that she was carried away against her will, but the falsity of this is conspicuous enough. In this connection it appears that upon the occasion of this abduction, while the accused was talking to the girl on the public square, he was approached by Simplicia Real and her husband, Vicente Rocha. The four having thus met in a casual encounter, but probably with some prior mutual understanding, the accused directed the girl to accompany the pair to their home in Bagakay, which she did. No violence was offered and evidently none was necessary, and apparently of her own free will the girl proceeded with the pair, while the accused himself made a little detour to ascertain whether anybody might be out looking for the girl. He afterwards joined the party and they all proceeded to Bagakay where the girl remained for three days and nights without

constraint from any person whomsoever. At the end of this time she was carried away by her father, but a day or two later she obtained the consent of her father to return to Bagakay on the pretext of getting some clothes which she had left in that place. Upon going to Bagakay she was joined by the accused and he took her in charge a second time and kept her for two days, though at a different place than at the home of Simplicia Real.

In these facts, the consent of the injured girl to this abduction is evident and undeniable. If she had not consented to go in the first place, all that would have been necessary would have been to refuse to accompany the accused and the pair already mentioned. That no violence was used is quite certain, but the mere fact that the accused took the girl by the hand to conduct her on the way, if he did this thing, is not indicative of a violation of her will. If her pretext for returning to Bagakay was true; namely, that she had left some clothes in that place upon the occasion of her first sojourn of three days, it would probably show that prior plans had been laid for the abode in Bagakay in which she must have participated. But this is unimportant, as other acts conclusively show not only that she consented to go, but that she also actually consented to the first act of intercourse. In this connection she says that at first she objected and made some resistance but yielded when the accused assured her that she need have no fear and it would make no difference whether her father should come or not,—all of which shows that any resistance on her part was due to her natural timidity in the situation in which she found herself and not to any aversion from the act of intercourse. Her willing participation in these acts of intercourse, extending altogether over the period of five days and nights, is further conspicuous in the circumstance that during the second elopement, the girl showed evident signs of fatigue or exhaustion from sexual intercourse, so much so that a brother of the accused had to caution him against further excesses. All this without complaint on the part of the girl to anybody.

In this case the fiscal at first presented a complaint charging abduction with consent, which after all appears to have been the proper qualification of the crime. When the cause was called and the trial judge became aware of the ugly nature of the offense, he was naturally aroused and ordered a dismissal of the complaint charging abduction with consent and instructed the fiscal to present a complaint for the higher offense of abduction without consent. When the cause came on for trial the court was of course confronted by a dilemma, in that he either had to convict the accused of the higher offense or acquit him altogether, since the dismissal of the complaint for abduction with consent, after arraignment, naturally operated to prevent the court from now convicting him of the lower offense.

I note that the Attorney-General in his brief adopts the point of view which is held by the

undersigned, and he recommends the acquittal of the accused of the offense for which he is now on trial, I believe that the recommendation contained in his brief is correct, and I am therefore unable to concur in the affirmance of the judgment.

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*DISSENTING*

**MALCOLM**, *J.:*

I agree with Attorney-General Villa-Real and Mr. Justice Street that the defendant and appellant in this case should be acquitted. According to their clear analysis of the facts, with which I concur, the proof establishes beyond a reasonable doubt that the defendant abducted a girl 14 years of age with her consent, which is the crime punished by article 446 of the Penal Code. (Compare with U. S. vs. Yumul [1916], 34 Phil., 169.) Since, however, the defendant has been placed in jeopardy for this offense, he cannot now be convicted thereof.

If the facts bore out the thesis of the majority opinion, that the defendant was guilty of the abduction of the complaining party against her will and with lewd designs, which is the crime punished by article 445 of the Penal Code, then what is said on the subject of double jeopardy would be good law. But as the defendant has been placed on trial for the crime of abduction with consent, upon a good information, before a competent court, has been arraigned, and the investigation of the charges has actually commenced by the calling of a witness, he is put twice, in jeopardy of punishment for the same offense, to follow the phraseology of the Organic Act.

The case of United States vs. Regala ([1914], 28 Phil., 57), is in point. It was there held that where an information has been filed in the Court of First Instance charging *estafa*, and the accused is duly tried for that crime, and the court determines erroneously that it has no jurisdiction of the act, dismisses the same, and discharges the prisoner, the plea of double jeopardy is sustainable in a subsequent action in the same court against the same accused charging him with malversation of public funds arising out of exactly the same acts, it appearing in the second action that the facts alleged and proved did not constitute malversation of public funds but *estafa*, for which the accused had been already tried and acquitted by a court of competent jurisdiction.

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