43 Phil. 907

[G. R. No. 18760. October 09, 1922]

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. MEDARDO VALTE, DEFENDANT AND APPELLANT.

D E C I S I O N

STATEMENT

The following information was filed against the defendant by the Provincial Fiscal of Bulacan:

> "That on or about the 14th of November, 1921, in the municipality of Norzagaray, Province of Bulacan, Philippine Islands, the accused herein, being the chief of police of the said municipality, with abuse of authority, and by means of intimidation, did wilfully, illegally, and maliciously threaten with a revolver, which he was then carrying, the municipal policeman Segundo Correa to compel the latter to release Pio Bernabe who had been arrested by him by virtue of a judicial order, and was under the custody of the said Segundo Correa; that the latter, having been threatened in the aforesaid manner by the accused with the revolver which the latter was carrying, released, for fear, the said Pio Bernabe, who succeeded in escaping.
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> "All within the jurisdiction of this Court of First Instance, contrary to law, and with the aggravating circumstances of taking advantage of superior strength, and of public position, and insult or disregard of the public authority."

February 9, 1921, the defendant was arraigned, the complaint was read to him, and he entered a plea of not guilty when the following proceedings were had:

"The accused after having been informed of the complaint and of the contents thereof plead not guilty.

"BERNARDO. The accused respectfully asks for a reasonable time in order to answer the complaint, in accordance with section 19 of General Order No. 58.

"The COURT. The motion is denied for not having been presented immediately, and because the tendency is to delay the case, for the same attorney who now defends him has asked for a postponement of the case which was denied, and has not presented the demurrer which he announces now.

"BERNARDO. I want respectfully to state that the attorney for the defense does not intend to present any demurrer to the complaint, but that he wants only to exercise the constitutional right granted the accused to ask for a reasonable time, not less than one day, according to section 19 of General Order No. 58. I want also that it be stated in the record that the accused is not duly prepared to enter upon the trial, on the ground that his former attorney has just advised him that he is not prepared for the hearing of the case, and having taken charge of the defense in this case only this morning at 8 o'clock, his present counsel thinks that the time that elapsed from 8 a. m. to 3 p. m. is not sufficient for the due preparation of the defense, and, for this reason, defendant's counsel submits that, if the trial of this case is carried on, it would injure the substantial rights of the accused.

"THE COURT. There does not appear in the record what the attorney has said, and the Judge who presides this court has seen with regret that many of the accused have tried and are trying to delay the criminal cases when they are set for trial, and the court is interested in disposing of the greatest number of cases possible. Moreover, the accused received notice of the hearing many days ago, and, consequently, he has had time to state to the court the reasons which he now alleges.

"BERNARDO. With my exception."

Over his protest and objection, the defendant was then and there forced to trial, six days after which the court found the defendant guilty, and sentenced him to six months of *arresto mayor*, to pay a fine of 1,000 *pesetas*, and costs, to which the defendant duly excepted, and

from which" he appealed and assigns the following errors:

> "I. That the trial court erred in denying the motion of the defendant immediately after the arraignment that he be given a reasonable time to prepare for his defense.
>
> "II. That the lower court erred in holding that the prosecution has at the trial of the case proven beyond a reasonable doubt that the defendant has committed the crime charged."

Johns, J.:

The only question which we will consider is the first assignment of error, which does not involve the guilt or innocence of the defendant. Section 19 of General Order No. 58 says:

> "If, on the arraingment, the defendant requires it, he must be allowed a reasonable time, not less than one day, to answer the complaint or information. He may, in his answer to the arraignment, demur or plead to the complaint or information."

And section 30 says:

> "After his plea the defendant shall be entitled, on demand, to at least two days in which to prepare for trial."

There is no dispute about the facts. It is true that in the first instance defendant's counsel stated that he "respectfully asks for a reasonable time in order to answer the complaint, in accordance with section 19 of General Order No. 58," which was promptly denied by the court. It is also true that in his second appeal, the defendant again specifically mentioned section 19, but the language then used clearly points out that the defendant was not then ready for trial, and advises the court that the attorney who was making the objection was employed at 8 of that morning, and that his former attorney was not able to be present, and among other things says that Mr. Bernardo who had "taken charge of the defense in this case only this morning at 8, thinks that the time that elapsed from 8 a. m. to 3 p. m., is not

sufficient for the due preparation of the defense, and, for this reason, defendant's counsel submits that, if the trial of this case is carried on, it would injure the substantial rights of the accused." Although in this statement the attorney specifically refers to section 19 of General Order No. 58, and does not mention section 30, it is very apparent from the language used that the defendant was urging the court to give him "a reasonable time not exceeding one day" in which to prepare for trial. The objecting attorney was employed that morning, and the defendant was arraigned and entered his plea of not guilty on the same day, and promptly appealed to the court to grant him time in which to prepare for his defense. This the court not only refused, but in substance reprimanded him and accused him of trying to delay the trial. The language used clearly brings, it within the terms and provisions of section 30 of General Order No. 58, under which, on demand, the defendant, as a matter of law and as a matter of right, is clearly entitled "to at least two days in which to prepare for trial." He was denied that right and forced to trial upon the day in which he was arraigned, and had to use an attorney whom he employed at 8 a. m. of the day on which he was arraigned.

The defendant cites and relies upon the decision of this court in Schields vs. McMicking (23 Phil., 526), and the prosecution relies upon 238 U. S., 99,[1] in which that decision of this court was reversed. It is only upon principle that either decision is in point. In that case, the defendant was charged with the crime of larceny, and demanded two days in which to prepare for trial. His application was overruled, and he was forced to trial at once, convicted and sentenced. The opinion of this court says:

> "He applied for a writ of habeas corpus upon the ground that the judgment was void as a matter of law as he had been convicted without due process of law."

The writ was allowed, and after a hearing and argument of counsel, the defendant was discharged, Johnson, J., dissenting.

It will be noted there that the defendant applied to this court for a writ of habeas corpus based upon which after trial and conviction in the lower court, he was discharged by this court, as prayed for in the writ. The Attorney-General took the case to the Supreme Court of the United States where the decision of this court was reversed, holding that it was error to discharge the defendant in a habeas corpus proceeding upon the facts shown in the record. In its decision, among other things, this court says:

> "Section 30 of General Order No. 58, provides that 'after his plea the defendant shall be entitled, on demand, to at least two days in which to prepare for trial.' The refusal of the time in which to prepare for trial and the consequent forcing of the defendant to his defense on the instant is, under the provisions of our law, equivalent, in our judgment, to the refusal of a legal hearing. It amounts in effect to a denial of a trial. It is an abrogation of that due process of law which is the country's embodied procedure, without which a defendant has, in law, no trial at all.
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> "The courts must be the first to follow the law. Where the law is express and, therefore, clear, where it is imperative, and, therefore, with no discretion lodged anywhere, a court should never attempt to change it by interpretation or circumvent it by construction. The lawmakers realized fully the necessity of time to prepare for trial. They well knew that, without time to prepare, a trial was a mockery and a farce. They were fully informed that if they left that question to the discretion of the court, the trial itself would be rather a matter of favor than of right. It has never been the policy of constitutions or of statutes to permit the inalienable right of trial to be left to the discretion of any man. The makers of laws and of constitutions clearly foresaw the unbearable conditions' which would ultimately prevail if the right to a hearing should depend upon the discretion of the judge or of the court. * * *
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> "There is no procedure known to the Philippine Islands wherein a defendant is refused time to prepare for trial.

There is no practice by which he is deprived of it. There is no law under which he can be denied it. On the contrary, the only procedure known to us is one embodied in the imperative law wherein the accused is expressly given two days in which to prepare for trial."

In legal effect, this court then held that all of such questions could be raised and tried in a habeas corpus proceeding, and that, by reason of the fact that the court forced the defendant to trial, his conviction could not be sustained, and that he should be discharged. The United States Supreme Court held that was error, and that upon the record the defendant ought not to have been acquitted, and the *syllabus* of its opinion says:

> "The denial of the accused's request for time to answer and to prepare a defense, even if contrary to General Order No. 58, in force in the Philippine Islands, did not warrant his discharge on habeas1 corpus on the ground that he was thereby deprived of his right, under the Philippine Organic Act of July 1, 1902 (32 Stat. at L., 691, chap. 1369, Comp. Stat. 1913, sec. 3804), sec. 5, to due process of law, but is at most a mere error of law, which cannot be revised by habeas corpus. * * *"

And among other things the opinion says:

> "We are unable to agree with the conclusion of the Supreme Court that the judgment pronounced by the Court of First Instance was void and without effect. Under the circumstances disclosed denial of the request for time to answer and to prepare defense was at most matter of error which did not vitiate the entire proceedings. * * *
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> "The court of first instance placed no purely fanciful or arbitrary construction upon these sections and certainly they are not so peculiarly inviolable that a mere misunderstanding of their meaning or harmless departure from their exact terms would suffice to deprive the proceedings of lawful effect and enlarge the accused.
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> "Mere errors in point of law, however serious, committed by a criminal court in the exercise of its' jurisdiction over a case properly subject to its cognizance, cannot be reviewed by' habeas corpus. That writ cannot be employed as a substitute for the writ of error." (Citing numerous decisions of that court.)
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> "The decree of the Supreme Court of the Philippine Islands, granting the writ of habeas corpus, and discharging the prisoner, must be reversed and the cause remanded to that court for further proceedings not inconsistent with this opinion."

Section 77 of General Order No. 58 says:

> "Every person unlawfully imprisoned or restrained of his liberty under any

> pretence whatever may prosecute a writ of habeas corpus, in order to inquire into the cause of such imprisonment or restraint."

That is the general rule, and it is elementary law that where a defendant is convicted in a court of record which has jurisdiction of the offense that the conviction will not be set aside, and the defendant released in a habeas corpus proceeding. In all such cases, the defendant has an ample remedy by appeal or writ of error. It is only in a case where the court does not have jurisdiction of the subject-matter of the offense that a writ of habeas corpus should be granted. The distinction is clearly pointed out and the rule is well stated in Ruling Case Law, vol. 12, p. 1192, where it is said:

> "The writ of habeas corpus is not designed to interrupt the orderly administration of the laws by a competent court acting within the limits of its jurisdiction, but is available only for the purpose of relieving from illegal restraint, and persons restrained of their liberty by virtue of the final judgment of any competent tribunal or by virtue of any execution issued thereon are excluded, generally speaking, from the benefits of the writ, as such persons are not illegally restrained, but are deprived of their liberty by due process of law. Proceedings on habeas corpus to obtain release from custody under final judgment being in the nature of a collateral attack, the writ deals only with such radical defects as render the proceeding or judgment absolutely void, and cannot have the effect of an appeal, writ of error, or certiorari, for the purpose of reviewing mere error and irregularities in the proceedings leading up to the final judgment or sentence of a court of competent jurisdiction by virtue of which the prisoner is committed."

Cyc., vol. 21, p. 285, says:

> "The writ of habeas corpus is not designed to fulfil the functions of an appeal or a writ of error. It is not intended to bring in review mere errors or irregularities, whether relating to substantive rights or to the law of procedure, committed by a court having jurisdiction over person and subject-matter. Such errors and irregularities do not affect the jurisdiction of the court or render its judgment void, and the remedy is therefore by appeal, exceptions, or writ of error."

In *Ex parte* Watkins (3 Peters, 193; 7 L. ed., 650), Mr. Chief Justice Marshall qf the Supreme Court of the United States says:

> "An imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous."

In the case of Schields vs. McMicking, supra, the court had jurisdiction of the person of the defendant and of the subject-matter of the offense, and he was tried, and convicted, and because the trial court did have such jurisdiction, the Supreme Court of the United States, reversing the decision of this court, held that the defendant ought not to be acquitted and discharged in a habeas1 corpus proceeding.

In the instant case, the trial court had jurisdiction of the defendant and of the crime charged, and upon which he was convicted, and the defendant appealed direct to this court, claiming that the court erred in not allowing him the time in which to prepare for his defense, as specified in section 30 of General Order No. 58.

Article 567 of the Code of Criminal Procedure of the State of Texas gives the defendant two days after a copy of the indictment has been served upon him in which to prepare for trial. In construing that statute, the Supreme Court of Texas says:

> "This we understand, under the law, to be a right guaranteed a defendant 'in all cases/ and it is not necessary for him, in order to protect himself in this guaranty, that he make known to the court what character of written pleadings he may desire to present, or that he desires to present any written pleadings."

In the instant case, over his protest and objection, the defendant was denied any time whatever after arraignment to prepare for trial. Section 30 is mandatory and unequivocal.

It is not the province of any court to set aside and nullify the plain language of a statute. The delay of which the court complains was the fault of the prosecution and not of the defendant. He could not enter his plea of not guilty until after he was arraigned and he was arraigned on the very day of his trial, and the law expressly says that after his plea is made the defendant shall be "entitled, on demand, for at least two days in which to prepare for

trial." Over the protest, objection and exception of the defendant, the court forced him to trial on the day in which he entered his plea.

We are not passing upon the guilt or innocence of the defendant, but it was the imperative duty of the court, upon his request, to allow the defendant the statutory time of two days to prepare for trial.

No decision of any supreme court based upon a statute, like section 30, General Order No. 58, will ever be found sustaining a conviction where the defendant, as in the instant case, was forced to trial over his objection, protest and exception upon the day of his arraignment.

There is a marked legal distinction between section 130 of the Code of Civil Procedure and section 30 of General Order No. 58.

The last section says:

> "After his plea the defendant shall be entitled, on demand, to at least two days in which to prepare for trial."

Section 130 says:

> "The court may, in its discretion, for cause, and with or without terms, postpone a trial from day to day, or to a stated time during the term of the court, or to the next succeeding term."

Section 30 is mandatory, and, by its terms, the defendant, on demand, is entitled, as a matter of positive law, "to at least two days in which to prepare for trial."

Under section 130, the postponement of a trial is discretionary with the court.

In the instant case, the application was made under section 30, and was a matter of legal right, and, hence, was not discretionary with the trial court.

The case of Schields vs. McMicking, *supra*, was a habeas corpus proceeding in which the defendant sought his discharge. The instant case is a direct appeal to this court from the

decision of the lower court on a judgment of conviction of the crime charged.

Upon the question involved in this opinion, the defendant could not and will not be discharged. Therein lies the important distinction between a habeas corpus proceeding and an appeal or a writ of error.

Over his protest, objection and exception, the defendant was forced into trial upon the day of his arraignment. For the refusal of the trial court to grant the defendant delay under the provisions of section 30, General Order No. 58, the judgment of the lower court is reversed and the case is remanded for a new trial, with costs *de officio*. So ordered.

Street, Malcolm, Avanceña, Villamor, Ostrand, and *Romualdez, JJ.,* concur.

DISSENTING

JOHNSON, *J.* with whom concurs **ARAULLO**, *C. J.*,

The principal question presented by the appellant is whether or not he had been given a fair and impartial trial by the lower court, and whether or not he had been deprived of due process of law. If the appellant has been given a fair and impartial trial, with the full opportunity to hear the witnesses presented for the prosecution, and an opportunity to present all of the witnesses which he desired to present, then he was given a fair and impartial trial and was not denied any of the elements of due process of law. It was argued by the lower court that the request for a transfer of the trial was purely dilatory and without merit, and the Attorney-General in this court sustains" that conclusion of the lower court. The facts may be briefly stated as follows:

(*a*) That on the 14th day of November, 1921, the municipal president of the municipality of Norzagaray, of the Province of Bulacan, presented a complaint in the court of the justice of the peace, charging the defendant with the crime of *coaccion* committed by means of force

and intimidation upon the person of a policeman by the name of Segundo Correa.

(*b*) That the said justice of the peace on the same day (November 14, 1921), after an investigation of the facts charged in the complaint, issued a warrant of arrest for the defendant and the defendant was arrested on the 15th day of November, and on the same day was arraigned and declared that he was1 not guilty of the crime charged, and gave bond for his appearance in court.

(*c*) That on the 15th day of November, 1921, the said justice of the peace fixed the 18th day of November for the preliminary examination and issued a notice to the defendant of the time set for the examination. The policeman who attempted to deliver a copy of the notice of the time fixed for the preliminary examination, attempted to deliver the same to the defendant, who refused to sign a receipt therefor, saying that "he had no time to sign."

(*d*) That on the 18th day of November, 1921, at the time set for the preliminary examination the defendant refused to appear even though a special policeman was sent after him. Thereupon the justice of the peace issued an order requiring the defendant to appear before him on the 21st day of November, 1921, and to show cause why he should not be punished for contempt. Notice of that order was served upon the defendant on the 19th day of November, 1921. The justice of the peace at the same time fixed the preliminary examination for November 21, due notice of which was given to the defendant.

(*e*) That on the 19th day of November, 1921, the defendant appeared in court and asked that the preliminary examination be transferred from the 21st day of November to the 28th day of November; that notwithstanding that the witnesses' for the prosecution were present on the 21st day of November, the justice of the peace granted the motion of the defendant and transferred the preliminary examination to the 28th day of November.

(*f*) That on the 25th day of November, 1921, the defendant appeared in court by his attorney, J. R. Mateo, and asked the court to transfer again the preliminary examination from the 28th day of November to the 5th day of December, which motion was granted by the justice of the peace on the 28th day of November, upon condition that the defendant having already obtained two transfers, the court would grant no more. Due notice of that order was delivered to the defendant on the 2d day of December.

(*g*) That on the 5th day of December, 1921, the defendant appeared in court at the time fixed for the preliminary examination and challenged the right of the justice of the peace to conduct said examination, which challenge was overruled, and the justice of the peace

directed that the preliminary examination should continue immediately. From that order the defendant appealed.

(*h*) That the preliminary examination did continue on the 5th day of December, at the close of which the justice of the peace found that there was probable cause for believing that the defendant was guilty of the crime charged in the complaint and held him for trial in the Court of First Instance.

(*i*) That on the 27th day of December, 1921, the prosecuting attorney of the Province of Bulacan presented a complaint in the Court of First Instance, again charging the defendant with the crime of *coaccion*. The complaint alleged:

"That on or about the 14th of November, 1921, in the municipality of Norzagaray, Province of Bulacan, Philippine Islands, the accused herein, being the chief of police of the said municipality, with abuse of authority, and by means of intimidation, did wilfully, illegally, and maliciously threaten with a revolver, which he was then carrying, the municipal policeman Segundo Correa to compel the latter to release Pio Bernabe who had been arrested by him by virtue of a judicial order, and was under the custody of the said Segundo Correa; that the latter, having been threatened in the aforesaid manner by the accused with the revolver which the latter was carrying, released, for fear, the said Pio Bernabe, who succeeded in escaping.

> "All within the jurisdiction of this Court of First Instance, contrary to law, and with the aggravating circumstances of taking advantage of superior strength, and of public position, and insult or disregard of the public authority."

(*j*) That on the 20th day of January, 1922, the trial of the complaint against the defendant was fixed for the 26th day of January, 1922, at 8 o'clock a. m. On the same day citations of the witnesses for the prosecution were issued as well as of the defendant, a copy of which was served personally upon him by the deputy sheriff on the 21st day of January.

(*k*) That later, and for reasons which do not appear in the record, the trial of the cause was transferred from the 26th day of January to the 9th day of February, 1922, and the witnesses were again cited to appear on that date.

(*l*) That on the first day of February, 1922, the defendant presented a request to the clerk of the Court of First Instance, asking that the following witnesses: Jose Punzal, Pio Bernabe,

Ambrosio Enriquez and Jorge Fernandez, all of the municipality of Norzagaray, be cited to appear in court as witnesses to declare in his behalf on the said 9th day of February. In accordance with that request, the citations were issued to the witnesses named by the defendant and duly served upon each of them by the deputy sheriff.

(*m*) That on the 9th day of February, 1922, the trial of the cause was called and the defendant was duly arraigned and pleaded not guilty. Immediately after declaring that he was not guilty, his lawyer, Justino Bernardo, asked for a reasonable time to answer the complaint, in accordance with section 19 of General Order No. 58, notwithstanding the fact that he had already pleaded not guilty to the complaint upon arraignment. That request of the attorney for the defendant was denied by the lower court for the reason, as given by the Judge, that the petition was for the sole purpose of delaying the trial of the cause. The attorney for the defendant then made a further request for a delay of the trial of the cause, under section 19 of General Order No. 58 upon the ground that he was not prepared to enter upon the trial of the cause, and alleging further that the former lawyer of the defendant was not disposed to enter upon the trial of the cause. The lower court denied that request of the attorney for the defendant, saying: "There does not appear in the record what the attorney has said, and the Judge who presides this court has seen with regret that many of the accused have tried and are trying to delay the criminal cases when they are set for trial, and the court is interested in disposing of the greatest number of cases possible. Moreover, the accused received notice of the hearing many days ago, and, consequently, he has had time to state to the court the reasons which he now alleges," to which order of the court the defendant excepted, and the cause proceeded to trial, no further objection having been presented by the defendant. During the trial the prosecution presented three witnesses while the defense presented four. After the presentation of the witnesses for the prosecution and the witnesses for the defense, the trial of the cause was closed without any complaint whatever on the part of the defendant, that he had not been given an opportunity to present the only defense and all the defense which he desired to present. He closed his side of the case without any complaint whatever that he had not had an opportunity to present every witness whom he desired to present and all the proof that he had. He submitted the cause to the court for decision, without any objection or complaint of any kind or character whatsoever.

After a consideration of the evidence adduced during the trial of the cause, the Honorable Vicente Jocson, judge, in a very carefully prepared opinion in which every piece of important testimony was referred to and analyzed, reached the conclusion that the defendant was guilty of the crime charged and sentenced him to be imprisoned for a period of six months

of *arresto mayor* and to pay a fine of P200, and in case of insolvency to suffer subsidiary imprisonment in accordance with the provisions of the law, with the accessory penalties of the Penal Code, and to pay the costs. From an examination of the evidence we find that the statement of facts' proven and found by the lower court, shows beyond a reasonable doubt that the defendant is guilty of the crime charged in the complaint. They are:

(1) That the defendant is the chief of police of the municipality of Norzagaray;

> "(2) That at about 4 o'clock in the evening in question, in the municipality of Norzagaray, Province of Bulacan, the policeman Segundo Correa received from the Justice of the Peace of said municipality an order of arrest against Pio Bernabe, who was accused of theft in a criminal cause pending in said Justice of the Peace court (Exhibit "A"). With that order the policeman went to look for Pio Bernabe in his barrio, and after arresting him he took the way back to the municipal building—it was then growing dark—and upon arriving in front of the store of Feliciana de Guzman, he found the herein accused posted there. There the accused stopped the policeman Correa and the person arrested, and asked him why he had arrested that man, and the policeman then answered that he had done so by virtue of an order of arrest issued by the Justice of the Peace, which the chief of police (the accused) read, and after reading it, said that the same was falsified, and told the person under arrest, Pio Bernabe, not to go with the policeman because said order was not worth anything; and as the policeman insisted in taking Pio Bernabe to the municipal building, the chief of police (the accused) took his revolver and pointed it at the policeman Segundo Correa in order for the latter to release Pio Bernabe; whereupon the person arrested ran away. Then the policeman Correa reported to the President the act committed by the chief of police, frustrating the arrest ordered by the Justice of the Peace. On that same night, they consulted the provincial fiscal, Mr. Doroteo Amador, by telephone, as to what they should do, and said officer gave the proper instructions for the filing of a complaint against the chief of police who had committed the act above stated."

Having reached the conclusion, after a careful examination of the evidence, that the defendant is guilty of the crime charged in the complaint and that the penalty is in conformity therewith, we have answered the second assignment of error by the appellant,

and we now pass to a consideration of the first assignment of error, which is, "that the trial court erred in denying the motion of the defendant immediately after the arraignment, that he be given a reasonable time to prepare for his defense." It is difficult to tell from the brief of the appellant whether he now relies upon the provisions of section 19 of General Order No. 58 or section 30. In the court below he cited and relied upon section 19, notwithstanding the fact that his statements made to the court showed that he must have intended to rely upon section 30. Said section 30 provides that: "After his plea the defendant shall be entitled, on demand, to at least two days in which to prepare for trial." The majority opinion holds that said provisions are mandatory and that a failure to grant the request of the defendant constitutes a reversible error and requires that the appellate court shall grant a new trial.

Our first proposition is, that a refusal to postpone the trial of a criminal case is discretionary and unless it is found that the court abused its discretion, its judgment will not be modified or reversed on that account. (Franklin vs. South Carolina, 218 U. S., 161, 168; People vs. Owens, 132 Cal., 469, 471; People vs. Fredericks, 106 Cal., 554, 557; People vs. Francis, 38 Cal., 183; People vs. Warren, 130 Cal., 678; People vs. Winthrop, 118 Cal., 85, 87; People vs. Breen, 130 Cal., 72, 77; People vs. Totman 135 Cal., 133; State vs. Harris, 100 Iowa, 188; State vs. Thompson, 95 Iowa, 464; State vs. King, 97 Iowa, 440; State vs. Jordan, 87 Iowa, 86; U. S. vs. Bonete, 40 Phil., 958; U. S. vs. Pellejera, 17 Phil., 587; U. S. vs. Salvador, 2 Phil., 549; U. S. vs. Jarandilla, 6 Phil., 139; U. S. vs. Ramirez, 39 Phil., 738; U. S. vs. Torrente, 2 Phil., 1; McMicking vs. Schields, 238 U. S., 99; People vs. Warren, 130 Cal., 678, 681; People vs. Goldenson, 76 Cal., 341.)

In the case of Franklin vs. South Carolina (218 U. S., 161, 168), a continuance was asked for because, it was alleged, the attorney for the accused had not had sufficient time or opportunity to examine the notes' of the testimony taken before the coroner who investigated the case. The motion was denied. The Supreme Court of the United States held that the defendant not having been deprived of "due process of law" no error had been committed.

In the case of People vs. Owens (132 Cal., 469), the Supreme Court of California held that: "An allowance of any period of time is entirely a matter of discretion upon the part of the trial court, and in the absence of a showing of an abuse of that discretion this court will not interfere." (Decided in April, 1901.)

In the case of People vs. Fredericks (106 Cal., 554), the Supreme Court of California said:

"We conclude this branch of the case by saying that we do not think the mere fact of fixing the day of the trial at a time so soon after the arraignment and plea, ipso facto furnishes sufficient ground for a reversal of the judgment." (Decided on March 21, 1895.)

In the case of People vs. Totman (135 Cal., 133) the Supreme Court of California said, quoting from the decision in the case of People vs. Gaunt (23 Cal., 157) : " 'Applications for the postponement of the trial are addressed largely to the discretion of a trial court, and its decision upon such motion will not be disturbed on appeal, unless there has been a gross abuse of discretion.' " (Decided in December, 1901.)

In the case of People vs. Francis (38 Cal., 183, 188), the Supreme Court of California said: "Whilst great liberality should be extended toward persons charged with crime, in preparing the defense, * * * the rule must not be so relaxed as to defeat the ends of justice."

In the case of McMicking vs. Schields (238 U. S., 99), a ease in which the Supreme Court of the Philippine Islands revoked the judgment of the lower court because the judge, refused to give the defendant time within which to prepare his defense, the Supreme Court of the United States said: "We are unable to agree with the conclusion of the Supreme Court (of the Philippine Islands) that the judgment pronounced by the Court of First Instance was void and without effect. Under the circumstances disclosed denial of the request for time to answer and to prepare defense was, at most, matter of error which did not vitiate the entire proceedings. * * * The accused had known for weeks the nature of the charge against him. He had notice of the hearing, was present in person and represented by counsel, testified in his own behalf, introduced other evidence, and seems to have received an impartial hearing. There is nothing to show that he needed further time for any proper purpose, and there is no allegation that he desired to offer additional evidence or suffered substantial injury by being forced into trial. But for the sections * * * from General Order No. 58, it could not plausibly be contended that the conviction was without *due process of law*." (*Ex parte* Harding, 120 U, S., 782; Re Wilson, 140 U. S., 575; Felts vs. Murphy, 201 U. S., 123; Re Moran, 203 U. S., 96; Frank vs. Mangum, 237 U. S., 309.)

The right to time for preparation for a trial is not a *fundamental* right affecting jurisdiction, but is a matter resting in the sound discretion of the court. (Franklin vs. South Carolina, 218 U. S., 161; People vs. Harper, 139 Appeal Div. [N. Y.], 344; Evans vs. State, 36 Texas Criminal Rep., 32; People vs. Warren, 130 Cal., 678, 681; People vs. Goldenson, 76 Cal., 341.)

While the defendant should not be forced to trial before he is prepared as a general rule, yet where he has been in custody, charged with the crime for some time before the presentation of the indictment and has had the advice and assistance of counsel, or an opportunity to procure such assistance, he has no absolute right to a continuance of the trial. A continuance should never be granted *merely for delay* or for the mere convenience of the defendant or his counsel. (People vs. Jackson, 111 N. Y., 362.)

If the defendant has been negligent in not preparing for trial, want of preparation is no ground for a continuance, and negligence of his counsel must ordinarily be imputed to him. (Smith vs. State, 132 Ind., 145; People vs. Collins, 75 Cal., 411; Price vs. People, 131 III., 223; North vs. People, 139 111., 81; State vs. Deschamps, 41 La. Ann., 1051; People vs. Warren, 130 Cal., 678, 681; People vs. Goldenson, 76 Cal., 341.)

Our second proposition is, that section 30 of General Order No. 58 may be waived and that it is waived when the defendant submits himself to trial even after a motion far a continuance is denied, provided he has been given a fair trial and an opportunity to present all the witnesses which he desired to present. (State vs. Harris, 100 Iowa, 188; State vs. King, 97 Iowa, 464.)

Our third proposition is, that even granting that said section 30 is mandatory and that the lower court, if it believed that the defendant required additional time to prepare for trial should have granted the same, yet we contend that inasmuch as the defendant submitted himself to trial, was given an opportunity to present all of his witnesses and permitted the trial to be closed without a request for an opportunity to present additional proof or defense, that then then judgment of the lower court should not be interfered with unless and until the defendant has shown that he was not given a full and fair opportunity to present all the proof he had. We believe that, while the said section may be regarded as mandatory in the first instance, the courts, under the circumstances of the present case, should construe it as purely directory. (Lino Luna vs. Rodriguez, 39 Phil., 208; Palton vs. Walkins, 130 Ala., 387; Jones vs. State, 153 Ind., 440; People vs. Warren, 130 Cal., 678, 681; People vs. Goldenson, 76 Cal., 341.)

It will be noted that many of the decisions quoted above from the Supreme Court of California were after the adoption of the Penal Code of that State, from which section 30 of General Order No. 58 was copied.

In the case of People vs. Warren (130 Cal., 678, 681), the Supreme Court of California in

1900, in a case very analogous to the present, said: "We do not think the court erred in refusing to further continue the case. *Motions of this kind rest much in the discretion of the court, below, and it is only in cases of arbitrary action or abuse of discretion that we would be justified in interfering with the order of the court*. In this case the court did not act arbitrarily, but proceeded with care and a constant regard for the rights of defendant. *Several adjournments were granted to give counsel time to prepare for trial* and to become familiar with the case. While the rights of a defendant should always be carefully guarded, so that his defense may be fully presented, at the same time the public interest and business must be conducted in an orderly manner. Here a jury had been impaneled and the trial had progressed to the afternoon of the second day. Witnesses were in attendance and the case taking its regular course. The counsel could not, by becoming intoxicated or incurring the penalty of contempt, give the defendant the right to an indefinite postponement of the case. *All the defendant could require, as a matter of right, would be a reasonable time to have other counsel become familiar with the facts of the case.* This time was granted by the court, and, under the circumstances, appears to have been amply sufficient. The court must have discretion in such cases. (People vs. Goldenson, 76 Cal, 341.)"

In the present case the appellant makes no complaint even now in this court nor did he make any complaint in the Court of First Instance, that he had not been permitted to present in his defense all of the proof which he had. He makes no allegation, even now, that he had some other proof which he desired to present. If he should even now, in this appeal, make some showing, by affidavit or otherwise, that by reason of the refusal of his request he had been prevented from presenting proof which would show or tend to show that he was not guilty of the crime charged, we would have some patience with his claim. But there is no such showing, nor even an attempt to show that even though he is granted a new trial he had any proof of any kind or character in addition to that which he has already presented. We are fully persuaded that when Judge Jocson denied the motion of the defendant upon the ground that the same was purely dilatory, made for the purpose of delaying the trial of the cause, that he was fully justified in so doing; that he exercised the sound discretion conferred upon him by law; that no error was committed by him, and that the judgment appealed from should be affirmed and a new trial should be denied.

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