

## THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. GREGORIO T. GIMENEZ, DEFENDANT AND APPELLANT.

*G.R. No. 11262. March 02, 1916*

Ponente: TRENT, J.

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### TRENT, J.:

This is an appeal from a judgment condemning the defendant, Gregorio T. Gimenez, to six years and one day of prision mayor, to the accessory penalties provided by law, and to the payment of the costs of the cause for the crime of bigamy (illegal marriage).

Upon arraignment, the defendant entered a plead of "not guilty" and the case proceeded to trial. After presenting three witnesses for the prosecution, the trial was suspended until the following day, when, upon the reconvening of the court, counsel for the defendant made this statement:

"LIONGSON. Since conferring with the defendant he wishes to withdraw his plea to the complaint of 'not guilty' and to substitute therefor that of 'guilty.'

"The COURT. Enter in the record that the attorney for the defense requests to withdraw the plea of 'not guilty' entered by the defendant, and the substitution therefor of the plea of 'guilty.'

Forthwith, the court rendered the following judgment:

"Gregorio Gimenez having pleaded guilty to the crime of illegal marriage, provided for and penalized by article 471 of the Penal Code, the court sentences him to six years and one day of prision mayor, with the accessories of article 61, and to the payment of the costs."

Although the language used by counsel and the court, above quoted, may not definitely show that the plea of not guilty was actually withdrawn and the plea of guilty substituted therefor, yet all admit that this was, in fact, done by counsel, notwithstanding the charge is for a felony.

The principal question raised on this appeal relates to the legality of the conviction of the defendant on a plea of guilty entered by his counsel.

The statutory law touching the question under consideration may be briefly stated as follows: If the charge against the accused in a criminal case is for a felony, he must be personally present at the arraignment and pronouncement of judgment if convicted; but if for a misdemeanor, he may appear by counsel and the judgment may be pronounced in his absence. (General Orders No. 58, sees. 16 and 41.) The arraignment shall consist in reading the complaint or information to the defendant and asking him whether he pleads guilty as charged. (Id., sec. 18.) "A plea, of guilty 'can be put in only by the defendant himself in open court." (Id., sec. 25.)

It is well settled in this jurisdiction that a defendant in a criminal case, although the charge be a felony, has a right to withdraw his plea of guilty or not guilty and to interpose another even after the trial has commenced. (U. S. vs. Sakay, 8 Phil. Rep., 255.) That the defendant in the instant case could have personally withdrawn his plea of not

guilty and entered a plea of guilty there can be no doubt.

From the above mentioned provisions of General Orders No. 58 it will be seen that there is a clear distinction, with reference to pleas, between misdemeanors and felonies. In the former the accused need not appear personally at all, but if the crime charged be the latter, "A plea of guilty can be put in only by the defendant himself in open court." Stronger and clearer language could not have been used. Only, as thus used, is clearly restrictive and excludes, as clearly as language can, the idea that someone else can enter the plea of guilty for an accused person charged with a felony. Only, coupled with the words "the defendant himself," has the effect of absolutely prohibiting any other person from entering such a plea. If a plea of guilty be entered by another person, where the charge is that of a felony, although such person may be the counsel for the accused, it is a nullity and no conviction can rest thereon.

Section 1018 of the Penal Code of California provides that:

"A plea of guilty can be put in by the defendant himself only in open court, unless upon indictment or information against a corporation, in which case it may be put in by counsel."

In the note to section 1017, wherein section 1018 is cited, it is said: The requirement of the law that defendant must plead personally cannot be cured by the fact that he was brought into court and tried without objection. (People vs. Monaghan, 102 Cal., 229.) In all cases amounting to a felony the defendant must plead in person. (People vs. Corbett, 28 Cal., 328.) A plea by his attorney for him is a nullity. (McQuillen vs. State, 8 Smedes & M., 587; Younger vs. State, 2 W. Va., 579; 98 Am. Dec, 791.) In cases of misdemeanor the defendant may plead in person or by attorney. (People vs. Ebner, 23 Cal., 158.)

We, therefore, conclude that the judgment appealed from must be set aside and a new trial awarded to the defendant, unless it is necessary under the law to discharge or acquit him, as claimed by his counsel, on the ground that he cannot be again put upon his trial for the same offense.

At the time the plea of guilty was substituted for that of not guilty, legal jeopardy, within the meaning of that portion of the fifth section of the Philippine Bill providing that "no person for the same offense shall be twice put in jeopardy of punishment," had attached, if this provision covers the case under consideration wherein we have just annulled the judgment at the request of the accused. (U. S. vs. Ballentine, 4 Phil. Rep., 672, 673.) And the defendant can avail himself of the once-in-jeopardy clause as a bar to a new trial of the offense for which he was convicted, provided he did not waive his right to this plea in seeking and obtaining a reversal of the judgment.

In determining whether legal jeopardy had attached and, if so, whether the defendant waived the rights and benefits resulting therefrom by reason of the reversal of the judgment upon his own appeal, it is necessary to note the appellate power and jurisdiction of this court in hearing and determining criminal cases. Appeals in such cases are perfected by the defendant by filing with the clerk of the Court of First Instance, or with such court, a notice stating the appeal and by serving a copy thereof upon the adverse party. This operates as a supersedeas and requires the clerk or judge to transmit to the Clerk of the Supreme Court the complete record in the case, together with the notice of the appeal. When the case is regularly submitted to this Court on appeal, if it be one originating in the Court of First Instance, this Court proceeds to review the record and in the event that for any reason it cannot affirm the judgment entered in the court below, it may then retry the case upon the record, determining both questions of law and fact, and on the findings of fact thus made, modify or reverse the judgment accordingly, thereby entering a new judgment convicting or acquitting the appellant as the case may be, or it may reopen the trial, as provided in section 42 of General Orders No. 58, and grant a new hearing. The new hearing shall take place in the court of original jurisdiction. This Court may also order a new trial in case the record or any material part of it has been lost or destroyed through no fault on the part of the officers of the Government. In the cases just

mentioned, where new trials are thus granted, the defendant may be retried upon the same charge without violating the once-in-jeopardy clause above quoted. (U. S. vs. Sunga and Bautista, 11 Phil. Rep., 601; U. S. vs. Laguna, 17 Phil. Rep., 532.)

The reviewing courts, both State and Federal, in the United States determine, as a general rule, only questions of law, where the appellant is convicted of a felony, and if a reversible error is committed, the case is returned for a new trial. Some of the appellate courts in that country will also grant new trials if the verdict of guilty has no evidence to support it or is flagrantly contrary to the evidence.

The state courts, however, are not in harmony upon the question as to the limits of new trials thus granted or ordered. Some hold that where the accused has been acquitted in the first instance of the greater offense charged in the indictment, but convicted of the lesser offense included therein, he can be tried for the lesser offense only, while others hold that upon a new trial the whole case is open as if there had been no former trial at all.

The courts which limit the new trial proceed upon the ground that the accused by appealing waives his constitutional protection as to double jeopardy, but such waiver goes no further than the accused himself extends it and as he asked for so much of the judgment as convicts him of guilt and does not ask for a reversal of so much of it as acquits him, he waives his privilege as to the one and keeps it as to the other. While on the other hand, the courts holding that a new trial is not so limited are of the opinion that in appealing from the judgment the accused necessarily appeals from the whole thereof, as well that which acquits as that which condemns; that the judgment is one entire thing; and that, as he brings up the whole record for review, he thereby waives the provisions of the once-in-jeopardy clause for the purpose of attempting to gain what he thinks is a greater benefit, viz., a review and reversal by the higher court of a judgment of conviction. Or in other words, when at his own request an accused has obtained a new trial, he must take the burden with the benefit and go back for a new trial of the whole case. The latter view, as to the extent of the waiver, is supported by the Supreme Court of the United States. (Trono vs. U. S., 11 Phil. Rep., 726; 199 U. S., 521.)

In this jurisdiction we may, as we have said, retry the case upon the record and, if the record will permit, pronounce a final verdict of guilty or not guilty and render judgment accordingly, while in cases arising in the United States proper the case is returned to the lower court for final disposition, generally for a new trial. But, if the case be like the one under consideration, where a fatal error was committed during the progress of the trial and where the trial was not completed on account of such error, the record will not permit a retrial in this court upon the merits and a judgment of conviction or acquittal finally disposing of the case. Whether we take the view upon the limits of the waiver as to the once-in-jeopardy provision, as indicated in Trono vs. U. S., supra, or whether we accept the view also expressed in that case by the Supreme Court of the United States to the effect that "the constitutional provision (as to double jeopardy) was really never intended to, and, properly construed, does not cover the case of a judgment under these circumstances, which has been annulled by the court at the request of the accused, and there is, therefore, no necessity of relying upon the waiver, because the correct construction of the provision does not make it applicable," the result is the same. We must follow the holding of the Supreme Court of the United States upon these questions.

For the foregoing reasons, the judgment appealed from is set aside and the record will be returned to the Court of First Instance, whence it came, for a new trial upon the same charge. So ordered.

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

Moreland, J., concurs in the result.

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