

## THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. EUGENIO P. ESCALANTE, DEFENDANT AND APPELLANT.

*G.R. No. 12442. August 10, 1917*

Ponente: JOHNSON, J.

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### JOHNSON, J.:

On the 7th day of November, 1916, the prosecuting attorney of the Province of Iloilo presented a complaint in the Court of First Instance of said province, charging the defendant with a violation of section 2662 of the Administrative Code. The complaint alleged:

"That, during, the month of October of the present year, 1916, within the district of this municipality of Iloilo, Province of Iloilo, Philippine Islands, the said accused was cashier of the Iloilo customhouse, duly qualified and appointed as such; that while, by virtue of his office, collecting, receiving and depositing funds as customs duties belonging to the Philippine Government, he did willfully, unlawfully and criminally take and misappropriate and fail duly to account for and enter in the customhouse books P12,000 collected by him on October 19, 1916, which sum he appropriated to his own use and for his personal gain to the prejudice of the Philippine Government until October 24, 1916, and did not pay and turn into the treasury said misappropriated sum until after he had been required so to do; acts committed with violation of law."

Upon said complaint the defendant was duly arrested and arraigned upon the 22d day of November, 1916. Upon arraignment the defendant pleaded guilty to the crime charged in the complaint. In view of the voluntary confession of guilt made in open court by the defendant the lower court found him guilty of the crime charged and sentenced him to be imprisoned for a period of fifteen months and to pay the costs of the prosecution. He was further sentenced to be disqualified forever from holding any public office or employment of any nature whatever within the Philippine Islands. He was further deprived of all accrued leave.

From the sentence of the lower court the defendant appealed to the Supreme Court.

The appellant alleges that the lower court committed the following errors: (1) no preliminary investigation having been previously held, the court a quo never acquired any jurisdiction over the case and the accused; (2) the accused not having been ever informed of his right to appear with the aid of counsel, he was deprived of his constitutional right to have counsel and consequently the proceedings held were null and void.

With reference to said errors it may be said :

First. That while defendants in criminal actions are entitled of right (a) to a preliminary examination and (b) to be represented by an attorney, they are renounceable rights. The right to a preliminary investigation is a personal right conferred by statute and may be waived. (People vs. Tarbox, 115 Cal., 57; Korth vs. State, 46 Neb., 631; Ryan vs. The State, 83 Wis., 486; People vs. Harris, 103 Mich., 473; Benjamin vs. State, 25 Fla., 675; U. S. vs. Cockrill, 8 Phil. Rep., 742; U. S. vs. Asebuque, 9 Phil. Rep., 241; U. S. vs. Aquino, 11 Phil. Rep., 244; U. S. vs. Lete, 17 Phil. Rep., 79.)

If no objection is raised in the court below on the ground that there has been no preliminary investigation the accused will be deemed to have waived his right thereto and such objection cannot be raised for the first time upon appeal. (U. S. vs. Lete, 17 Phil. Rep., 79; State vs. Myers, 54 Kan., 206; Coffield vs. State, 44 Neb., 417.)

It is true that under the provisions of General Orders No. 58 persons accused of crime are entitled to attorneys for their defense if they have the means, or if they are without such means to have attorneys de officio appointed by the court, but that right is a personal one and may be waived also. It is waived when the defendant voluntarily submits himself to the jurisdiction of the court and proceeds with the defense. Under such circumstances the prosecution may go to trial without violating that particular right of the accused. (U. S. vs. Go-Leng, 21 Phil. Rep., 426; U. S. vs. Labial and Abuso, 27 Phil. Rep., 82; U. S. vs. Custan, 28 Phil. Rep., 19; U. S. vs. Kilayko, 31 Phil. Rep., 371.)

Second. That when the appellant fails to raise the question of his right to have an attorney and to have a preliminary examination in the trial court that question will not be considered when raised for the first time in the Supreme Court. The failure of the record to disclose affirmatively that the trial judge advised the accused of his right to have counsel and to have a preliminary investigation is not sufficient ground to reverse the judgment of conviction and to send the case back for a new trial. (U. S. vs. Labial and Abuso, 27 Phil. Rep., 82; U. S. vs. Custan, 28 Phil. Rep., 19.) There is nothing in the record in the present case to show that the defendant raised these questions in the court below. The doctrine *omnia presumuntur rite te solemniter esse acta donec probetur in contrarium* is specially applicable against the contention of the appellant. And, moreover, paragraph 31 of section 334 of Act No. 190 provides that the courts will presume that "the law has been obeyed," until the contrary is shown.

We find nothing in the record which would justify a modification of the foregoing rules of law. The defendant was the cashier of the department of customs in the city of Iloilo. That fact would indicate that he was a man of at least ordinary intelligence.

It will be remembered that the lower court, in its sentence, deprived the defendant of his accumulated leave. We assume that the defendant was in the civil service and was entitled to certain leave privileges. The law under which the defendant was accused provides for no such punishment. That part of the sentence, therefore, is null and void.

For the foregoing reasons, we are of the opinion, and so hold, that the sentence of the lower court should be modified and that the defendant should be sentenced to be imprisoned in accordance with the provisions of section 2662 of the Administrative Code, for a period of fifteen months, and be disqualified forever from holding any public office or employment of any nature whatever within the Philippine Islands, and to pay the costs. So ordered.

Arellano, C. J., Carson, Araullo, and Street, JJ., concur.

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MALCOLM, J., dissenting:

Two of the basic privileges of the accused in a criminal prosecution are the right to the assistance of counsel and the right to a preliminary examination. President McKinley made the first a part of the Organic Law in his Instructions to the Commission by imposing the inviolable rule that in all criminal prosecutions the accused "shall enjoy the right \* \* \* to have the assistance of counsel for his defense." Judge Cooley says that this is "perhaps the privilege most important to the person accused of crime." (Cooley, *Constitutional Limitations*, 7th ed., 74.) The Code of Criminal Procedure contains mandatory provisions reinforcing both rights. True, it is, that the accused

may waive these personal prerogatives. True also is it, that the appellant court can properly indulge in all reasonable presumptions in favor of the regularity of the proceedings of the trial court. But this does not mean that without the slightest indication in the record, the Supreme Court can vitiate these vital rights of the accused by erecting an edifice of presumptions upon the sands of an empty record. In the case at bar, there is not a word in the record to indicate that the accused was informed by the court of his right to counsel, and that he waived this right; and, that he waived his right to a preliminary examination. To read these things into the record is to do a grave injustice to the accused.

The early decision of the Supreme Court of the Philippine Islands in *U. S. vs. Gimeno* ([1902] 1 Phil., 236) seems to state the true rule. Since then, unfortunately, the court, following the dissenting opinion in the *Gimeno* case, has finally been led to enunciate the doctrine in *U. S. vs. Labial and Abuso* ([1914] 27 Phil. 82) that the failure of the record to disclose affirmatively that the trial judge advised the accused of his right to have counsel is not sufficient ground to reverse the judgment of conviction and to send the case back for a new trial. To such a doctrine, repugnant as it is to the fundamentals of Philippine organic and statutory law, I cannot give my assent.

I would suggest that, in this or similar cases in which counsel on appeal advance these errors, they make use of the best evidence obtainable to substantiate their claims.

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