

## THE UNITED STATES, PLAINTIFF AND APPELLEE VS. ROSAURO ENRIQUEZ, DEFENDANT AND APPELLANT.

*G.R. No. 15081. December 19, 1919*

Ponente: TORRES, J.

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### TORRES, J.:

Upon an information filed by the provincial fiscal in the Court of First Instance of Bulacan accusing Rosauro Enriquez of the crime of a violation of the Gambling Law (Act No. 1757), the present cause was instituted and on February 27, 1917, judgment was rendered therein sentencing the accused to two months imprisonment with costs. From said judgment counsel for the defendant appealed.

It appears that during certain days in August and September, 1916, a game called jueteng was going on in the house of Pedro San Agustin, municipal secretary, situated in the barrio of Liang, municipality of Malolos, Bulacan; that one of the bankers was the accused Rosauro Enriquez, who used to receive the sums betted, for the collection of which were employed Quirino Reyes and Marcelo Santiago; that the latter testified affirming the foregoing fact and saying that (as collectors of said sums which the players used to give to them in their respective residences) they used to deposit the money collected into the hands of the bankers, among them the accused Enriquez until September 9 when they were arrested by the insular police.

The accused pleaded not guilty, and in his testimony denied that he knew said collectors, Reyes and Santiago, or Sergeant Isidro Roxas of the Constabulary, who was one of the agents watching Pedro San Agustin's house, which the accused admitted he frequented and stayed in during two days in the month of September, 1916, on account of stomach trouble.

Section 7 of Act No. 1757 prohibits the playing of monte, jueteng, or any form of lottery or policy or any banking game, etc.; and according to section 3 thereof any person violating said Act shall be punished by a fine of not less than P10 nor more than P500 or by imprisonment for not more than one year, or both such fine and imprisonment, in the discretion of the court. In case of a second conviction both fine and imprisonment shall be imposed.

It is an indisputable fact that Rosauro Enriquez, being one of the bankers of the game of jueteng which was being played in Malolos, he was conducting this game with others, employing the two collectors, Reyes and Santiago; and for that purpose the accused stayed at the house of said Pedro San Agustin, where he lived and received the sums which his collectors were able to collect from the players, having in this manner violated its provisions and has incurred the penalty provided for by law.

In attacking the judgment appealed from, counsel for the accused alleges that the trial court erred in admitting, as ground for its decision and as evidence of the charge against the prisoner, the testimonies of Quirino Reyes and Marcelo Santiago, witnesses for the prosecution, who had also taken part in the game of jueteng; and that, said witnesses not having been charged in the information filed by the provincial fiscal, they could not be allowed to testify against the accused because they have not been previously excluded from said information in order that their testimonies might serve as evidence for the prosecution and against the defendant.

With the object of ascertaining whether or not the pretension of the defense is tenable and in accordance with law, we insert the following first two sections of Act No. 2709.

"Section 1. Every prosecution for a crime shall be in the name of the United States against all persons who appear to be responsible therefor, except in the cases determined in section two of this Act.

"Sec. 2. When two or more persons are charged with the commission of a certain crime, the competent court, at any time before they have entered upon their defense, may direct any of them to be discharged, that he may be a witness for the Government when in the judgment of the court;

"(a) There is absolute necessity for the testimony of the accused whose discharge is requested;

"(b) There is no other direct evidence available for the proper prosecution of the crime committed, except the testimony of said accused;

"(c) The testimony of said accused can be substantially corroborated in its material points;

"(d) Said accused does not appear to be the most guilty, and

"(e) Said accused has not at any time been convicted of the crime of perjury or false testimony or of any other crime involving moral turpitude."

From the provisions of the foregoing two sections, the inference is that in order that they may be utilized as witnesses for the prosecution to prove the existence of the crime and the guilt of its author, it is neither requisite nor necessary that said persons be previously charged in the information even if it appears that they had taken part in the commission of the crime.

The fiscal is free to produce as witnesses for the prosecution, all the persons who had been present at, and cognizant of, the perpetration of the crime and who he believes can testify to the truth hereof. To do this, neither is it requisite that there be circumstantial evidence or presumptions showing that they or some of them were accomplices or might have taken part in the crime, nor is it necessary and indispensable that they be previously charged or included in the information so that, upon being afterwards excluded, they might testify as witnesses for the prosecution against the accused.

The fiscal may not have sufficient evidence to prosecute a definite person who, according to informations received by him, had a participation or took part in the commission of a crime; and under such circumstances he does not violate any procedural law by producing said person as witness for the prosecution without previously charging him in the information and afterwards excluding them therefrom, provided he is qualified to testify in the proceeding.

Any witness who has testified for the prosecution or for the accused may afterwards be charged in an amended complaint and be brought to trial after the cause is decided.

To do this, it is no obstacle that said witness has testified in the same cause for the prosecution or for the accused taking always into consideration the fact that the testimony of a co-author of a crime, who in turn admits and confesses his own guilt, is perfectly valid and binding against his co-accused so long as said testimony appears substantially corroborated at the hearing by circumstantial evidence.

The sole and principal object of the law is, not to restrain and limit the action of the prosecuting officer, but especially to impose conditions whereby an accused, already charged, in the information, may not be arbitrarily and capriciously excluded therefrom, as must have happened more than once, and to remedy the evil consequence of an unreasonable and groundless exclusion which produces the real impunity of the most guilty criminal and subjects to prosecution the less wicked, who have not found protection in whims and

arbitrariness unlike others who have secured unfounded and unjust exclusion when they really deserved severe punishment.

The provision of section 1 of said Act cannot be understood as limiting the Fiscal's action and the court's power as to the production and admission of witnesses as long as they were not charged in the information lest they might afterwards be accused of the same thing to which they testified—because criminal process is only binding and produces its consequences when the guilt of the person accused of a crime is established. If the Fiscal, charged with the prosecution of all crimes in the name of the Government, does not believe that he has sufficient evidence to warrant the filing of an information against a definite person or persons, he is not, naturally, obliged to do so; and if he believes that these persons may be useful as witnesses for the prosecution, there is no law prohibiting him to produce them as witnesses against the accused, without prejudice to his right to charge them in an amended information as participants in the crime if afterwards he has sufficient evidence establishing their participation therein.

From the foregoing considerations, it appears legally proven that the testimonies of Quirino Reyes and Marcelo Santiago as witnesses for the prosecution are relevant and material and, together with other evidence, have satisfactorily established the guilt of the accused Rosauo Enriquez as banker in the game of jueteng.

For these reasons, the judgment appealed from must be affirmed, as we hereby affirm it, provided that the accused Rosauo Enriquez is further sentenced to pay a fine of two hundred pesos (P200) or to suffer the corresponding subsidiary imprisonment in case of insolvency with costs against him. So ordered,

Arellano, C.J., Johnson, Street, and Moir, JJ., concur.

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#### DISSENTING

AVANCENA, J., with whom concur ARAULLO and MALCOLM, JJ.,

I dissent. It was an error to admit the testimony of Quirino Reyes and Marcelo Santiago as witnesses. For this error the judgment must be reversed.

Although the interpretation of this Act No. 2709 may be considered in general terms, I believe it convenient to state briefly the case at bar from the view points of this dissenting opinion. In a game of chance called jueteng Rosauo Enriquez was acting as banker, Quirino Reyes and Marcelo Santiago being his agents for the collection of the wagers. An information was filed against Rosauo Enriquez for a violation of the Gambling Law (Act No. 1757). Quirino Reyes and Marcelo Santiago were not charged in the information. At the hearing the Fiscal produced them as witnesses for the prosecution. Upon observing in the course of the testimony of Quirino Reyes and Marcelo Santiago that they were co-authors of the crime charged, counsel for Rosauo Enriquez, invoking Act No. 2709, objected to the testimony of said witnesses; but the court overruled the objection. In deciding the case, the court took into consideration the testimony of these witnesses.

It does not appear, nor has it been alleged, nor is it mentioned in the majority decision that the fiscal was ignorant before the hearing that Quirino Reyes and Marcelo Santiago were co-authors of crime prosecuted. As it is the Fiscal's duty to conduct an investigation before subscribing the information and to inform himself of what his witnesses know before producing them before the court, it must be presumed that, when he filed the information against Rosauo Enriquez and when he called Quirino Reyes and Marcelo Santiago as witnesses, he knew already that the latter were co-authors of the former—above all because it appears that it was precisely by reason of the participation of these witnesses in the crime that they had knowledge of the facts to which the fiscal wanted them to testify. Consequently, Act No. 2709 in question is herein applied to the case wherein, there being three authors

of the crime, the fiscal filed an information only against one of them and produced at the hearing the other two as witnesses, knowing, upon filing the information as well as upon producing these witnesses, that all of the three are authors of the crime.

In the discussion in the Senate preceding the approval of Act No. 2709, the following was said:

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"This (arbitrariness) has been committed under the protection of the legal provision contained in section 34 of General Orders No. 58. This section empowers the Fiscals not to accuse those who should be accused of a crime or misdemeanor so that they may be witnesses for the Government, without any proviso or condition to follow for a, better selection from among the accused of those who would be discharged.

\* \* \* \* \*

" The Supreme Court of the United States has laid down a doctrine on this particular subject in the case, if I remember well, of Ray vs. State. In said decision the Federal Supreme Court expresses itself in these or similar terms:

" The same safeguard of the courts of justice and of the community where these courts are established demands that, in order that the prosecuting officer may utilize some of those who ought to be prosecuted as witnesses for the Government, certain conditions are required, to wit: 1. That there is no other direct evidence available for the prosecution to justify the allegations in the information, 2. That the testimony of the accused who is asked to be discharged can be substantially corroborated in its material points, 3. That the accused who is going to be discharged does not appear to be the most guilty."

"Mr. President: these are the same conditions established in this proposed law." \* \* \* (Speech of Senator Pedro Ma, Sison, Chairman of the Judicial Committee.)

In the case of U. S. vs. Abanzado (37 Phil. Rep., 658) this Court has already had the opportunity of construing this law and of declaring its objects. It was then said:

"Examining the terms of these statutory enactments, it is clear that it was not the intention of the legislator, by the enactment of Act No. 2709, to deprive the prosecution and the state of the right to make use of the accomplices and informers as witnesses, but merely to regulate the exercise of that right by establishing the conditions under which it may properly be exercised. It is clear, furthermore, that the legislator intended to rest the manner of the enforcement of these conditions in the sound judicial discretion of the courts.

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"In enacting the statute now under consideration, the Philippine Legislature clearly recognized the need for the use, of the testimony of accomplices in certain cases, and undertook merely to establish conditions under which the court, and not the prosecuting officer, may authorize the practice in a particular case."

If the object of this statute is to leave in the sound judicial discretion of the courts, and not of the prosecuting officer, the practice of utilizing in criminal proceedings, under certain conditions, the testimony of accomplices, the statute should be so construed as to give this result. But construing it as the majority decision does, the result is just the opposite. The court absolutely did not intervene to determine whether these witnesses, who were co-authors, could be admitted to testify in the case. The fiscal was the only one who decided this question. These witnesses were admitted to testify without considering whether they were under the conditions which this statute requires in order that they may be witnesses in the case.

From the majority decision, it seems to be inferred that because these witnesses were not charged in the information, they could be produced to testify in the case without being under the conditions required by the statute and without the court's intervention. If this reasoning is good, its effect would be that a co-author of a

crime would be unconditionally admitted as a witness in the exclusive discretion of the fiscal so long as he was not charged in the information, as was done in the instant case. In this manner the case rests completely in the hands of the fiscal, and not of the court, against the spirit of the law.

It appears, however, that the framework of the statute is well conceived in order to attain its effects. Section 2 of the law was, undoubtedly, not considered enough because it would be inapplicable to the case wherein the witnesses who are accomplices have not been included in the information. And for this reason, in order to close this exit and to insure the objects of the statute, section 1 was inserted, whereby the fiscal is required to include in the information all persons who appear to be responsible for the crime. It is evident that section 1 was inserted to insure the application of section 2.

If, on one hand, the statute requires that all persons who appear to be responsible for a crime be charged in the information and, on the other hand, it provides that all persons charged in the information cannot be witnesses in the case except under certain conditions and in the court's discretion, and after his discharge from the information, the logical inference from the combination of both provisions seems to be that the intention of the Legislature is clear that any person who appears to be responsible for the crime cannot testify as witnesses in the case except under such conditions, in the court's discretion and after their discharge from the information.

What has been said is not, naturally, applicable when the fiscal upon producing an accomplice as witness did not know he was such. But, as has been shown, the instant case is different. Moreover even if it is not different, from the moment that the witnesses were found to be accomplices, the objection of the defense should have been sustained without prejudice to the fiscal's right to ask the court that the witnesses be charged in the information and afterwards that they be discharged therefrom in order to continue testifying for the prosecution.

Entering upon other considerations, it may be said that a witness, even if he were an accomplice, when discharged from the information, with the effect that, according to sec. 36 of G. O. No. 58, he could not then be prosecuted for the same offense, would be more free and a better witness than if he were not discharged and were still dependent upon the action of the prosecuting officer who produces him and those sympathies he desires to win. Recognizing that the testimony of an accomplice is in itself suspicious, the statute also proposes to purify it by subjecting it to certain special conditions which would place the witness outside of the influence of all that would induce him to pervert the truth. With this object, undoubtedly, it is required that he should be first discharged from the information in order to place him in such a situation that the interest in his liberty may not influence his mind in giving his testimony. The two witnesses in this cause were not in this situation.

Judgment modified; penalty increased.

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