

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MARCELO SOTAVENTO AND PRIMITIVO SOTAVENTO, DEFENDANTS AND APPELLANTS.

G.R. No. 15450. September 20, 1919

Ponente: TORRES, J.

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TORRES, J.:

The present case has been brought to this court on an appeal presented by the two accused, Marcelino and Primitivo Sotavento. This appeal which was made to appear in the record at the request of the two appellants presented October 4, 1918, was taken against the judgment of the preceding September 23, sentencing each one of them as authors, to cadena perpetua together with the accessories. After counsel de oficio had presented a written brief in defense of the accused, the fiscal petitioned on the second of the present month, that said appeal be declared null and void inasmuch as said accused had failed to transmit a written copy of the notice of appeal to the provincial fiscal of Leyte, in accordance with the provision of section 45, General Orders No. 58, regarding criminal procedure.

Attached to the proceedings appears the written appeal signed by the accused and presented within fifteen days after the date on which said judgment was rendered by the trial court and it was made to appear by the clerk on the same date that the accused have been informed of said judgment, sections 45 and 47 of said General Orders No. 58 having thus been complied with.

The petition that the appeal presented by the accused be declared null and void is based on the fact that it does not appear in the cause that a copy of the notice of appeal has been transmitted to the provincial fiscal as required by the aforementioned section 45 of General Orders No. 58, which became the law of criminal procedure followed and enforced by the courts of these Islands.

In fact, it is true that when the accused presented their appeal they were not represented by counsel and did not transmit to the provincial fiscal a written copy of the appeal thereof; but we do not find any legal provision by virtue of which we ought to consider as essential and indispensable said requirement to serve a written copy of appeal on the adverse party which, in the present case, is the provincial fiscal, the official representative of the Government, in order that the appeal may be perfected.

In truth, it is a proceeding proper and of the highest convenience for the purposes of the prosecuting officer in the exercise of his duties in connection with criminal prosecutions, that the provincial fiscal as well as the Office of the Attorney-General should be notified of all notice of appeals presented by the accused, upon the initiation of whose cases the provincial fiscal should notify the Office of the Attorney-General. But, if such requirement is not complied with and thereby the remedy of appeal is considered defective, the defect would be a technical one which would have affected the rules established by law concerning the relations which depend upon and necessarily ought to exist between the Office of the Attorney-General and the prosecuting officer. But the importance of the defect is in itself neither far-reaching, nor does it affect the essential rights of the accused, and

much less the exercise of the right and duties of the prosecuting officer as the representative of the Government of the United States.

What is important is that the accused should be able to exercise, as an essential right, the right to appeal against whatever resolution or judgment he might consider prejudicial and that the actual exercise of such a right should be accomplished in a writing and within the period of fifteen days. The defect which may have taken place by not having transmitted a copy of his written appeal to the provincial fiscal, or to any official representative whatever of the Government, is not a defect which can nullify the remedy of appeal presented or prejudice in a far reaching manner his indisputable rights. For the computation of the said period it is necessary that the clerk cause to appear in the case the date of the service to the accused of the notice of the rendition of the judgment or resolution signed by the latter.

Furthermore, it appears in the case, and the fiscal has been duly and timely so informed, that, by a resolution of this court, a counsel de officio was named to institute the remedy presented by the accused and to defend them; that this counsel in order to fulfill his trust asked at the proper time for two postponements of the period fixed by law; and that in fact on the twelfth of last August he presented his brief for the defense. In view of all these proceedings it is not possible, in good and sound practice based upon the general provision of the Procedural Law, to dismiss the appeal solely because of lack or failure on the part of the accused to transmit a copy of the notice thereof to the provincial fiscal.

It matters not that in previous cases this court may have acceded to the fiscal's motions praying for the dismissal of appeals based on such ground because, as we are dealing with the administration of strict and full justice and with the necessary consequence that judgments are in fact affirmed, by which penalties have been imposed, not only correctional but also very serious ones, as that of life imprisonment (*cadena perpetua*) imposed in the present cause upon the appellants—a result which would happen if this court should declare the appeal presented lay them null and void—the time has come, in our judgment, not to continue the practice followed for several years during which, happily, there has been no case of appeal from a judgment imposing life imprisonment (*cadena perpetua*).

Whatever may have been the penalty imposed upon the accused, it is in accordance with strict justice that, henceforth, it be recognized that the appellant ought not to lose his right to prosecute his appeal which he had presented until final judgment, on the sole ground of having failed to serve a copy of the notice thereof to the provincial fiscal who has taken part therein, a defect or fault of this requirement so much the more excusable inasmuch as in the great majority of appeals notice of appeals appear signed by the accused themselves, many of whom are poor and ignorant and are not aided by counsel. This fault incurred by them will not in any manner deprive them of their very important right to appeal from all judgments and resolutions which they consider prejudicial.

If, to comply with section 48 of the said General Orders No. 58, the provincial fiscal is notified of the order which may be issued, and which, considering the appeal as filed in due time, requires the lower court to forward the case to the Supreme Court on account of the said appeal, it is clear that the provincial fiscal is thereby informed of the appeal filed by the accused.

Rectifying, from now on, the manner in which the provision contained in the said section 45 of the General Orders No. 58 should be understood and interpreted, this court is now of the opinion that the noncompliance of the procedure in question does not constitute a substantial defect leading to the dismissal of the written appeal, a written notice of which was not served on the provincial fiscal. Furthermore, since our Procedural Law, or the said section 45, does not provide that because of such a defect the accused thereby loses his right to prosecute his appeal until final judgment, it is therefore proper to consider the appeal subsisting and to follow it until finally

decided.

Therefore, from these considerations, it is hereby declared that there is no ground to dismiss the appeal filed by the two accused, Marcelino and Primitivo Sotavento, and that the case is hereby returned to the fiscal in order that he should file the corresponding brief within the period fixed by law. So ordered.

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

CONCURRING

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

Considering that under the provisions of section 45 of General Orders No. 58 the appeal in criminal cases is perfected by filing, with the clerk of the court in which the judgment or order was rendered, a notice in writing of such intention to appeal, and by serving a copy thereof upon the adverse party or his attorney; and

Considering that the adverse party in case of an appeal by the defendant is the Government; and

Considering that filing the written notice with the clerk is tantamount to service upon the adverse party; and

Considering that the prosecuting attorney of the province has nothing whatsoever to do with the appeal in criminal cases, for the reason that it is incumbent upon the clerk, when the appeal is perfected in accordance with the provisions of section 45 in relation with section 47 of General Orders No. 58, to transmit to the clerk of the Supreme Court the complete record in the case together with such notice of appeal.

I am of the opinion that the requirements of sections 45 and 47 of General Orders No. 58 are satisfied when the defendant files a written notice of appeal with the clerk within the time prescribed by section 47, and, therefore, in view of the fact that the defendant in the present case filed a written notice of appeal within the time prescribed by section 47, the law has been complied with, and the motion of the Attorney-General should be denied.

MALCOLM, J., concurring in the result:

I have reluctantly decided to concur in the result but, in so doing, would not wish to have it understood that I agree to what seems to amount to a judicial repeal of the last clause in section 45 of the Code of Criminal Procedure.

The facts are few and undisputed. The two accused were prosecuted for the crime of murder and on conviction were sentenced to life imprisonment. They personally signed a notice of appeal. A copy of this notice, however, was not served on the fiscal. In accordance with judicial precedents of this court, beginning with the first volume of the Philippine Reports and ending with the last, the Attorney-General was thus led to move in this court for a dismissal of the appeal. The court, out of extreme regard for the rights of the accused, who had been sentenced to what amounts to a living death, has properly been led to disagree with the Attorney-General and to permit the appeal to subsist, but in so doing has, in my judgment, gone further than is necessary, with the result that all the judicial precedents of the court bearing on the subject are revoked and a portion of the law has been rendered a nullity.

The Code of Criminal Procedure names the right of appeal in all cases as one of the rights of the accused at the trial. This right of appeal, however, as has been previously decided by this court and by the United States Supreme Court, is but a purely statutory right which must be perfected in accordance with the statute. (U. S. vs. Gomez Jesus [1915], 31 Phil., 218; McKane vs. Durston [1894], 153 U. S., 684.) In the exercise of this legislative

right to establish reasonable statutory regulations, the Code of Criminal Procedure has provided in section 45 that "An appeal shall be taken by filing with the clerk of the court in which the judgment or order was rendered, or with such court, a notice stating the appeal, and by serving a copy thereof upon the adverse party or his attorney." This language of the code is easily understandable and needs only judicial application.

Since, as before intimated, the right to an appeal is merely a privilege which can only be taken advantage of when the provisions of law are followed, and since the Legislature, by the use of the word "shall" has made the language mandatory, no court would be justified in permitting attorneys or defendants to perfect an appeal without complying with the terms of the statute. As held in numberless cases, without any dissent, the failure to give notice of appeal in conformity with the statute is ground for dismissal of the appeal; where the defendant is required to serve his notice of appeal on the prosecuting attorney, on failure to comply with this statutory requirement, the appeal is dismissed. I am shown no good reason for this court to stand alone and to establish a rule out of entire harmony with the jurisprudence of other jurisdictions and entirely antagonistic to the intention of the Legislature. (U. S. vs. Flemister [1902], 1 Phil., 317; U. S. vs. Perez [1902], 1 Phil., 322; U. S. vs. Trincio [1904], 4 Phil., 90; U. S. vs. Torrero [1907], 8 Phil., 88; U. S. vs. Rota [1907], 9 Phil., 426; U. S. vs. Court of First Instance of Manila [1913], 24 Phil., 321; U. S. vs. Vayson [1914], 27 Phil., 447; U. S. vs. De Iro [1916], 33 Phil. 475; U. S. vs. Enriquez [1917], 36 Phil., 725; Hunter vs. Territory [1894], 4 Ariz., 197; Hizer vs. State [1909], 173 Ind., 192; State vs. Sexton [1889], 42 Minn., 154; Means vs. State [1913], 10 Okla. Cr., 581; State vs. Horner [1900], 36 Ore., 68; People vs. Ah Yute [1880], 56 Cal., 119; People vs. Clark [1875], 49 Cal., 455; People vs. Bell [1886], 70 Cal., 33; People vs. Philipps [1872], 45 Cal., 44; People vs. Colon [1898], 119 Cal., 668; 17 C. J., 104-106.)

The foregoing are, in substance, my views on the legal question. My reasons for concurring in this instance are these: The defendants have been given next to the maximum penalty; they have had no attorney to advise them as to the technical legal formalities; a reading of the record discloses that it is very probable that an appeal would serve to diminish the sentence; the Attorney-General has notice of the pending appeal; and applied justice which, after all, should be the purpose of law, makes of this an exception to the general rule. But, to repeat what was before stated, this exception should not crystallize into a precedent and should not be made to overturn judicial precedents and to nullify the law.

Motion of dismissal denied.

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