

CALIXTO BERBARI, PETITIONER, VS. THE HON, PEDRO CONCEPCION, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA AND THE PROSECUTING ATTORNEY OF THE CITY OF MANILA, RESPONDENTS.

G.R. No. 15766. October 24, 1919

Ponente: JOHNSON, J.

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JOHNSON, J.:

This is a petition to obtain an order (a) to prohibit the respondent judge from proceeding with the trial of a certain criminal case without first appointing assessors in accordance with the provisions of section 154 of Act No. 190 in relation with section 2477 of Act No. 2711, and (6) to require the respondent judge to appoint such assessors.

The facts alleged in the petition are admitted, with certain explanation by the respondents. The only question presented therefore is one of law, to wit: Does section 154 of Act No. 190 in its relation with section 2477 of Act No. 2711, require the judge of the Court of First Instance of the city of Manila to appoint assessors, in a criminal case, when a request therefor is made ? Are the provisions of such section 154 mandatory? Has the judge a discretion to deny such a request?

Section 154 of Act No. 190 provides that: "Either party to an action may apply in writing to the judge for assessors to sit in the trial. Upon the filing of such application, the judge shall direct that assessors be provided, and that the parties forthwith appear before him for the selection of the assessors. The assessors shall be selected from the list provided for in the preceding section (now in accordance with section 2477, Act No. 2711), and shall be selected in the following manner etc., etc." Section 2477 of Act No. 2711 provides that "the aid of assessors in the trial of any civil or criminal action in the court of the justice of the peace, the municipal court, or the Court of First Instance, within the city (Manila), may be invoked in the manner, provided in the Code of Civil Procedure (section 154). It shall be the duty of the municipal board to prepare one list of the names of twenty-five residents of the city best fitted by education, natural ability, and reputation for probity to sit as assessors in the trial of actions in the municipal court and the court of the justice of the peace, and a like lists of persons to sit as assessors in the trial of actions in the Court of First Instance. The board may, at any time, strike any name from the list so prepared, by reasons of death, permanent disability, or unfitness of the persons named; and in case names are so stricken out other names shall be added in their place, to be selected as in this section provided. Parties desiring to avail themselves of the use of assessors in the municipal court or the court of justice of the peace shall proceed as provided in sections 58 to 62, inclusive, of the Code of Civil Procedure, and the method of summoning assessors and the compensation and oath and duties of assessors shall be as provided in those sections. Parties desiring to avail themselves of the use of assessors in the Court of First Instance shall proceed as provided in sections 154 to 161, inclusive, of the Code of Civil Procedure; and the method of summoning assessors, in forcing their attendance, excusing them from attendance, their compensation, oath, duties and effect of dissent from the opinion of the judge shall be as provided in the last named sections."

Said section 154 in its relation with section 2477 provides a specie of jury trial for the defendants in criminal and civil cases in the city of Manila, when a demand therefor is made by the defendant. By the terms of said section assessors are only appointed when one or both of the parties shall apply therefor in writing to the judge. The parties may therefore waive their right to assessors, and if they do not demand the appointment, they of course waive their right thereto. The necessity or advisability of having assessors is left to the discretion of the parties. Either or both may exercise the right to have assessors appointed. But when the demand is made, for the appointment of assessors in the form prescribed by the law, has the judge any discretion to deny it? Said section (154) provides that "upon the filing of such application the judge shall direct that the assessors be provided."

It would be difficult to draw a law in which the terms could be made more mandatory. We are of the opinion that when the Legislature said that the court shall direct etc., it did not intend that the judge might, could or should appoint; that the Legislature, considering the purpose of the law, meant exactly what it said—that the judge upon proper application shall appoint.

But it is argued (a) that the request for the appointment of the assessors in the present case was not made in time and (6) that it was made purely for the purposes of delaying the trial of the case. With reference to the first argument an examination of section 154 shows that no provision is made relating to the time when the request for the appointment of assessors must be made. Manifestly the request must be made before the trial begins or otherwise it will be deemed that the parties have waived their rights to assessors. The request for the appointment of the assessors should be made at the earliest convenient time so as not to hinder or delay the trial or to unnecessarily inconvenience the progress of the work of the court.

With reference to the second argument it is stated in its support that the petitioner herein had requested an adjournment of the trial on at least two occasions before he requested the appointment of assessors. The records show that said adjournments were granted by the court. Had said requests not been granted and had the defendant been forced to a trial he might then have demanded the appointment of assessors. Certainly there was no occasion to demand assessors until he knew whether a trial was to take place at that time. The records show that the time of the trial was finally fixed for September 2, 1919; that on the morning of the first of September, the attorney for the defendant presented his request for the appointment of assessors. The attorney for the petitioner stated in open court that he did not know that his client desired assessors until the night of the day before he presented his request. It is thus seen that the request under these circumstances was made opportunely. Had the court acted promptly upon the request there would have been no occasion for the delay of the trial on the date fixed therefor (September 2). The delay was due to no fault of the petitioner herein. It is stated that the respondent judge offered to appoint assessors from an incomplete list, and it is argued by the respondents that the petitioner should have selected the assessors from said defective list and for that reason is not entitled to the remedy now prayed for. We think that argument is without merit. While the petitioner might have consented to the selection of assessors from an incomplete list, the prosecuting attorney might not have so consented. The assessors are not selected from the prepared list by the attorney for the defendant alone (section 154, Act No. 190). While the assessors might have been selected from an incomplete list, with the consent of all parties concerned, the law (section 2477, Act No. 2711) evidently gives the defendant, if he insists, the right to have a completed list from which to make his choice of assessors.

By way of interlude it may be stated that it must not be understood that we have decided now that the jurisdiction of this court can always be invoked when the demand for assessors is clearly and manifestly made for the purposes of delay only. Neither do we deem it necessary nor important at this time to discuss the law, nor the regulations relating to jury trials in other jurisdictions. From all of the foregoing our conclusions are:

- That the provisions of section 154 of Act No. 190 in relation with section 2477 of Act No. 2711 relating to

the appointment of assessors is mandatory; and

- When such demand is made the parties to the litigation have the right to select the assessors from a completed list of assessors unless the interested parties otherwise agree. The parties interested are the prosecuting attorney in the present case and the defendant or his attorney.

Therefore, the remedy prayed for is hereby granted without any findings as to costs. So ordered.

Arellano, C.J., Torres, Araullo, and Avanceña, JJ., concur.

DISSENTING

MALCOLM, J.,

I dissent, and am of the opinion that the writ prayed for should be denied. My reasons follow:

The right to invoke the aid of assessors in the trial of actions in the Philippine Islands is not granted either directly or indirectly by any portion of Philippine Organic Law. It is a creature of statute and must, consequently, be exercised within the prescriptions laid down by the law. In actual practice, the right to assessors has been asked in but few cases, and in such instances has proved of little efficacy.

Section 2477 of the Administrative Code in authorizing the right to assessors for the city of Manila, makes applicable the pertinent provisions of the Code of Civil Procedure. Section 154 of the Code provides that, "Either party to an action may apply in writing to the judge for assessors to sit in the trial. Upon the filing of such application, the judge shall direct that assessors be provided, and that the parties forthwith appear before him for the selection of the assessors. * * *" The effect of the ruling of the Court is to insert after the word "application" the phrase "at any time before the trial begins" while the construction I favor would interpolate Rule 9 of the Rules of the Courts of First Instance of the Philippine Islands.

Section 28 of the Judiciary Organization Act (No. 136) and section 6 of the Code of Civil Procedure, authorize the Supreme Court to prepare rules which "when duly made and promulgated and not in conflict with the laws of the United States or the Philippine Islands shall be binding and must be observed." Agreeable to this broad grant of power, the Supreme Court provided in Rule 9 of the Rules of Courts of First Instance above referred to that "when no other provision is made by law no action shall be taken on any motions or applications unless it appears that the adverse party had notice thereof three days before the time set for the hearing thereof." The meaning of this rule, in conjunction with section 154 of the Code of Civil Procedure is, that if a party to an action desires assessors to sit in the trial, he must file his application three days before the time set for the hearing, giving notice to the adverse party.

Under the decision of the majority, what would happen? Counsel desiring to delay the trial of his case could wait until the case is called, when suddenly a request can be made for the aid of assessors. The trial will then have to be postponed until such assessors can be secured. Under this dissent, what would happen? The party who desires assessors gives notice of his application, just as he does on any other motion or application, three days before the time set for the case, which means that on the day assigned both the parties and the court will be prepared to provide assessors without upsetting the calendar of the court.

The majority decision says, "Neither do we deem it necessary nor important at this time to discuss the law nor the regulations relating to jury trials in other jurisdictions." On the contrary, I think it important for, jury trials being guaranteed by constitutional provisions, the insistence of the courts that statutory provisions or rules of courts providing that a party desiring a jury trial must file a notice to the effect that a jury will be demanded a certain number of days before the trial and that the right to a jury is lost if not demanded within the time prescribed, has

even more weight when a right merely permitted by statute is in view. (See generally 24 Cyc, 162-165, citing numerous cases.)

For the reasons above stated, I repeat that in my judgment the writ should not be granted.

Writ granted:

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