

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MANUEL TAMBUNTING, DEFENDANT AND APPELLANT.

G. R. No. 16513. January 18, 1921

Ponente: STREET, J.

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STREET, J.:

This appeal was instituted for the purpose of reversing a judgment of the Court of First Instance of the city of Manila, finding the accused, Manuel Tambunting, guilty of stealing a quantity of gas belonging to the Manila Gas Corporation, and sentencing him to undergo imprisonment for two months and one day, of *arresto mayor*, with the accessories prescribed by law; to indemnify the said corporation in the sum of P2, with subsidiary imprisonment in case of insolvency; and to pay the costs.

The evidence submitted in behalf of the prosecution shows that in January of the year 1918, the accused and his wife became occupants of the upper floor of the house situated at No. 443, Calle Evangelista, in the city of Manila. In this house the Manila Gas Corporation had previously installed apparatus for the delivery of gas on both the upper and lower floors, consisting of the necessary piping and a gas meter, which last mentioned apparatus was installed below. When the occupants at whose request this installation had been made vacated the premises, the gas company disconnected the gas pipe and removed the meter, thus cutting off the supply of gas from said premises.

Upon June 2, 1919, one of the inspectors of the gas company visited the house in question and found that gas was being used, without the knowledge and consent of the gas company, for cooking in the quarters occupied by the defendant and his wife; to effect which a short piece of iron pipe had been inserted in the gap where the gas meter had formerly been placed, and piece of rubber tubing had been used to connect the gas pipe in the kitchen with the gas stove, or plate, used for cooking.

At the time this discovery was made, the accused, Manuel Tambunting, was not at home, but he presently arrived and admitted to the agent of the gas company that he had made the connection with the rubber tubing between the gas pipe and the stove, though he denied making the connection below. He also admitted that he knew he was using gas without the knowledge of the company and that he had been so using it for probably two or three months.

The clandestine use of gas by the accused in the manner stated is thus established in our opinion beyond a doubt; and inasmuch as the *animo lucrandi* is obvious, it only remains to consider, first, whether gas can be the subject of larceny and, secondly, whether the quantity of gas appropriated in the two months, during which the accused admitted having used the same, has been established with sufficient certainty to enable the court to fix an appropriate penalty.

Some legal minds, perhaps more academic than practical, have entertained doubt upon the question whether gas can be the subject of larceny; but no judicial decision has been called to our attention wherein any respectable court has refused to treat it as such. In *U. S. vs. Genato* (15 Phil., 170, 175), this court, speaking through Mr.

Justice Torres, said " * * * the right of the ownership of electric current is secured by articles 517 and 518 of the Penal Code; the application of these articles in cases of subtraction of gas, a fluid used for lighting, and in some respects resembling electricity, is confirmed by the rule laid down in the decisions of the supreme court of Spain of January 20, 1887, and April 1, 1897, construing and enforcing the provisions of articles 530 and 531 of the Penal Code of that country, articles identical with articles 517 and 518 of the code in force in these Islands." These expressions were used in a case which involved the subtraction and appropriation of electrical energy and the court held, in accordance with the analogy of the case involving the theft of gas, that electrical energy could also be the subject of theft. The same conclusion was reached in *U. S. vs. Carlos* (21 Phil., 553), which was also a case of prosecution for stealing electricity.

The precise point whether the taking of gas may constitute larceny has never before, so far as the present writer aware, been the subject of adjudication in this court, but the decisions of Spanish, English, and American courts all answer the question in the affirmative. (See *U. S. vs. Carlos*, 21 Phil., 553, 560.)

In this connection it will suffice to quote the following from the topic "Larceny," at page 34, Vol. 17, of *Ruling Case Law*:

"There is nothing in the nature of gas used for illuminating purposes which renders it incapable of being feloniously taken and carried away. It is a valuable article of merchandise, bought and sold like other personal property, susceptible of being severed from a mass or larger quantity and of being transported from place to place. Likewise water which is confined in pipes and electricity which is conveyed by wires are subjects of larceny."

As to the amount and value of the gas appropriated by the accused in the period during which he admits having used it, the proof is not entirely satisfactory. Nevertheless we think the trial court was, justified in fixing the value of the gas at P2 per month, which is the minimum charge for gas made by the gas company, however small the amount consumed. That is to say, no person desiring to use gas at all for domestic purposes can purchase the commodity at a lower rate per month than P2. There was evidence before the court showing that the general average of the monthly bills paid by consumers throughout the city for the use of gas in a kitchen equipped like that used by the accused is from P18 to P20, while the average minimum is about P8 per month. We think that the facts above stated are competent evidence; and the conclusion is inevitable that the accused is at least liable to the extent of the minimum charge of P2 per month. The market value of the property at the time and place of the theft is of course the proper value to be proven (17 R. C. L., p. 66) ; and when it is found that the least amount that a consumer can take costs P2 per month, this affords proof that the amount which the accused took was certainly worth that much. Absolute certainty as to the full amount taken is of course impossible, because no meter was used; but absolute certainty upon this point is not necessary, when it is certain that the minimum that could have been taken was worth a determinable amount.

It appears that before the present prosecution was instituted, the accused had been unsuccessfully prosecuted for an infraction of section 504 of the Revised Ordinances of the city of Manila, under a complaint charging that the accused, not being a registered installer of gas equipment, had placed a gas installation in the house at No. 443, Calle Evangelista. Upon this it is argued for the accused that, having been acquitted of that charge, he is not now subject to prosecution for the offense of theft, having been acquitted of the former charge. The contention is evidently not well-founded, since the two offenses are of totally distinct nature. Furthermore, a prosecution for violation of a city ordinance is not ordinarily a bar to a subsequent prosecution for the same offense under the general law of the land. (*U. S. vs. Garcia Gavieres*, 10 Phil., 694.)

The conclusion is, that the accused is properly subject to punishment, under No. 5 of article 518 of the Penal Code, for the gas taken in the course of two months at the rate of P2 per month. There being no aggravating or

attenuating circumstance to be estimated, it results that the proper penalty is two months and one day of arresto mayor, as fixed by the trial court. The judgment will therefore be affirmed, with costs against the appellant, it being understood that the amount of the indemnity which the accused shall pay to the gas company is P4, instead of P2, with subsidiary imprisonment for one day in case of insolvency. So ordered.

Mapa, C. J., Araullo, Malcolm, and Villamor, JJ., concur.

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