

**THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. TIENG PAY,
DEFENDANT AND APPELLANT.***G. R. No. 17333. October 03, 1921*

Ponente: JOHNSON, J.

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On the 10th day of November, 1919, one of the assistant prosecuting attorneys of the City of Manila presented a complaint in the Court of First Instance, charging the defendant with a violation of section 2 of Act No. 2381. The complaint alleged that on or about the 6th day of November, 1919, in the City of Manila, Philippine Islands, the said accused did, then and there, willfully, unlawfully, and feloniously, have in his possession and under his control 200 grams of opium, a prohibited drug, contrary to law.

Upon said complaint the defendant was arrested, arraigned, plead not guilty, was tried, found guilty of the crime charged in the complaint, and sentenced to be imprisoned for a period of six months and to pay a fine of P300 and, in case of insolvency, to suffer subsidiary imprisonment in accordance with the provisions of the law, and to pay the costs. From that sentence he appealed to this court.

The appellant alleges that the lower court committed the following errors:

(1) In admitting a record for the purpose of showing that the defendant had theretofore been convicted of a similar offense, without giving him an opportunity to examine said record; (2) in admitting proof tending to show that he was guilty of a former conviction of the same offense, without showing that the decision in the former case was final; (3) in admitting proof of former conviction, when former conviction was not charged in the complaint; and (4) in imposing upon him the penalty of six months of imprisonment and a fine of P300. With reference to the first and second alleged errors, the record shows that just before the prosecuting attorney closed his proof, he offered in evidence, as proof, expediente No. 18100 of the Court of First Instance of the City of Manila, admitting at the same time that an appeal was then pending in the Supreme Court in said cause. No proof was presented nor admitted, showing that a final decision had been rendered in said cause (No. 18100). Said expediente was evidently presented by the prosecuting attorney for the purpose of showing the existence of an aggravating circumstance in accordance with paragraph 18 of article 10 of the Penal Code. Whether or not said expediente was admissible at all in evidence under the complaint in the present case, will be discussed later. It certainly, however, was not admissible for the purpose of showing the existence of an aggravating circumstance, for the very reason that the prosecuting attorney, at the time he offered it, stated to the court that an appeal was then pending in the Supreme Court in said cause. Said paragraph 18 of article 19 of the Penal Code defines a recidivist as "one who, at the time of his trial for one crime, shall have been convicted by final judgment of another crime embraced in the same title of this Code."

It may be argued that said paragraph 18 of article 10 of the Penal Code is not applicable to the present case for the reason that the defendant was charged under a special law (Act No. 2381). It may be added, however, that said paragraph 18 was not quoted for the purpose of showing its applicability but for the purpose of having a definition

of who is a recidivist. Section 2 of Act No. 2381 uses the word "recidivist." Said section provides that "in case of recidivism incident to the commission of a second or subsequent offense," then the penalty shall be increased. Evidently, the Legislature did not intend to give a different meaning to "recidivism" in Act No. 2381 than the generally accepted and defined meaning of the word "recidivist." Certainly, the Legislature did not mean to increase the penalty of a person charged with a crime, who had theretofore been convicted of another crime, unless and until there had been a final judgment in the former case.

Evidently, the lower court used the evidence referred to for the purpose of increasing the penalty, for the reason that the lower court made special reference to the fact that the defendant had theretofore been convicted of a similar offense. By reason of the fact that no proof was presented showing that the defendant was, in fact, a recidivist under the definition above given, the court improperly admitted, as proof, the record in cause No. 18100.

And moreover, the lower court admitted said record (cause No. 18100) without giving the defendant an opportunity to examine the same, which is another reason why the same should not have been admitted for the purpose of increasing the penalty. The defendant had a perfect right to examine said record, and it should not have been admitted in evidence without affording him that opportunity.

The lower court also admitted another expediente (No. 14213 of the Court of First Instance of the City of Manila). It is admitted in the record that that expediente (No. 14213) was a case against another defendant, by the name of Tan Tuan, who was not even a defendant in the present case. The record does not show why that expediente was admitted in evidence. Objection to the admissibility of said two expedientes (Nos. 18100 and 14213) was duly made and erroneously overruled by the lower court.

With reference to the third assignment of error, to wit: That the court erroneously admitted proof of recidivism when recidivism was not charged in the information, it may be said (a) that the law requires that in every criminal case in courts of record a written complaint of the charges must be presented; (b) that that complaint must contain a full and complete description of the crime charged, reciting the essential facts; (c) that the same must be read to the accused; and (d) that no evidence should be adduced during the trial of the cause which does not directly or indirectly tend to prove some of the essential allegations of the complaint. Any evidence presented which does not directly or indirectly tend to prove some of the facts alleged in the complaint should be rejected by the court. Otherwise, and under any other rule, a defendant might be charged with one crime and convicted of a very different and dissimilar crime, which, of course, cannot be sanctioned under a government of law. In the present case, the lower court admitted evidence of recidivism against the objection of the defendant, without the same having been alleged in the complaint. It must follow, therefore, that the court committed an error in admitting such evidence-

With reference to the fourth error assigned, in view of what we have just said, the conclusion cannot be escaped that the severe penalty imposed by the lower court was induced by the belief that the defendant was a recidivist. Eliminating the proof to which we have made reference above, and it must be eliminated because it was erroneously admitted, there is no proof in the record that the appellant is a recidivist.

It may be added, further, that, no doubt, the severe penalty imposed by the lower court was due to the belief that the defendant was found in the possession of 200 grams of opium, whereas, as a matter of fact, the only proof in the record concerning the amount of opium found in his possession was an admission by the defendant himself. His admission was that he had 20 grams of opium, and not 200 grams.

Inasmuch, therefore, as it clearly appears from the record that the lower court imposed the severe penalty upon an erroneous view of the evidence presented, and considering that the opium found in the defendant's possession was

of a small amount, we are of the opinion that the sentence of the lower court should be modified. (U. S. vs. Ng Tuy, 33 Phil., 261.)

Therefore, the sentence of the lower court is hereby modified, and it is hereby ordered and decreed that the defendant be sentenced to be imprisoned for a period of three months and to pay a fine of P300 and, in case of insolvency, to suffer subsidiary imprisonment in accordance with the provisions of the law, and to pay the costs. So ordered.

Araullo, Street, Avancena, and Villamor, JJ., concur.

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