THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. SOTERO BEBMEJO ET AL., DEFENDANTS. SOTERO BERMEJO, EUGENIO DIOPITA, FEDERICO BRAVO, AND FLORENCIO PRUNDA, APPEL...

G.R. No. 21718. September 27, 1924

Ponente: JOHNSON, J.

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JOHNSON, J.:

On the 28th day of May, 1923, a complaint was filed in the court of the justice of the peace of the municipality of Saravia, Province of Occidental Negros, charging the above-named defendants with the crime of robbery in a band, alleged to have been committed on the night of May 25, 1923. The justice of the peace, after a preliminary examination, found that there was cause for believing that the defendants committed the crime charged in the complaint, and forwarded the case to the Court of First Instance of said province for further proceedings.

On the 21st day of June, 1923, the prosecuting attorney of the Province of Occidental Negros filed against the above- named defendants an information charging them with the crime of robo en cuadrilla. On July 5, 1923, the prosecuting attorney filed against them an amended information, as follows:

"That on or about the night of May 25, 1923, in the barrio of Alicante, municipality of Sarabia, Occidental Negros, Philippine Islands, and within the jurisdiction of this court, the above named accused, conspiring together and forming a band of more than three (3) individuals, all armed with deadly weapons and committing violence and intimidation against persons and force upon things, did willfully, unlawfully, and criminally, enter the house of Rita Dequiña, by scaling, that is, penetrating thereinto through the window, and once inside, they opened with a false key the drawer that there was there, stealing and taking away with intent of gain and against the will of the owner, the aforesaid Rita Dequiña, several personal properties valued at P398 plus the sum of P400 in cash, thus causing damage to said Rita Dequiña in the total sum of P798, equivalent to 2,990, pesetas.

"Contrary to article 508 of the Penal Code with the aggravating circumstance of nocturnity."

At the opening of the trial the court, upon motion of the prosecuting attorney, with the express conformity of counsel for the defendants, ordered that separate proceedings be instituted against one of said defendants, Dionisio Prunda, who, on account of his doubtful mental state was under observation of the district health officer, and that the trial should proceed with respect to the other defendants. Accordingly, Dionisio Prunda was excluded, and the court proceeded with the trial of Sotero Bermejo, Eugenio Diopita, Federico Bravo, and Florencio Prunda.

At the close of the trial, and after a thorough study of the evidence for the prosecution and the defense, the Honorable Ed. Gutierrez David, judge, found them guilty of a violation of article 502 in relation with article 503, paragraph 5, and articles 504 and 505 of the Penal Code, with the aggravating circumstance of nocturnity, and sentenced each of them to suffer ten years of presidio mayor, with the accessory penalties of article 57 of the Penal Code; to indemnify jointly and severally the offended person in the sum of 5P624 and each to pay

one-fourth part of the costs. From that sentence the defendants appealed.

Counsel for appellants makes two assignments of error:

I. The lower court erred in ordering separate trial for Dionisio Prunda, upon request of the provincial fiscal and not of his attorney in open court, and consequently the sentence is null and void.

II. The lower court erred in sentencing the defendants to ten years of presidio mayor.

Counsel expressly admits the guilt of the appellants (p. 48, rollo). The findings of facts of the trial court will, therefore, be left undisturbed.

There is no merit in the first assignment of error. From the record it appears that at the opening of the trial the provincial fiscal, having in mind the interests of the appellants, and in view of the fact that one of their codef endants, Dionisio Prunda, was under observation of the district health officer on account of his doubtful mental condition, moved that the trial should proceed with respect to the appellants, and that separate proceedings be instituted against Dionisio Prunda. Counsel for the defendants expressed his conformity to the motion by saying: "Sin objecion" Thus, it appears that separate trial was held of the appellants, with the express conformity of their counsel, for their own benefit, and in order "not to prejudice their rights." As a matter of fact, there has been absolutely no impairment of the rights of the appellants by reason of this separate trial.

Counsel for appellants, arguing the second assignment of error, contends that the appellants should be punished under article 503, paragraph 5, of the Penal Code, inasmuch as, according to the evidence for the prosecution, the robbery has not been committed by a band, in view of the fact that only three of the robbers were armed at the time of the commission of the crime; to wit, Florencio Prunda, with a dagger; Sotero Bermejo, with a bolo; Eugenio Diopita, with a bolo; and that nowhere in the record does it appear that Federico Bravo was armed. Counsel evidently overlooked the affidavits made by the defendants before the justice of the peace of Saravia (Exhibits I, J, and K, pp. 29-33, rec), duly admitted in evidence, in all of which it appears that Federico Bravo was armed with a revolver at the time of the robbery. This contention is, therefore, untenable.

Counsel further contends that the lower court should have taken into consideration the degree of instruction and education of the defendants as a mitigating circumstance, under the provisions of article 11 of the Penal Code as amended. In the case of United States vs. Tampacan (19 Phil., 185), we held that "it is always within the discretion of the court as to whether or not the provisions of article 11 should be applied. * * *" In view thereof, we abstain from interfering with the discretion exercised by the lower court in regard to the application of said provisions in the present case.

In view of all of the foregoing, we are of the opinion and so decide, that the errors alleged by the appellants were not committed by the lower court, and that the sentence imposed by the lower court should be and is hereby affirmed, with costs. So ordered.

Street, Malcolm, Avanceña, Villamor, Ostrand, and Romualdez, JJ., concur.

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