

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. GERARDO SOLON ET AL., DEFENDANTS AND APPELLANTS.

G.R. No. 22942. February 07, 1925

Ponente: JOHNSON, J.

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JOHNSON, J.:

This appeal has been brought to reverse a judgment of the Court of First Instance of Cebu, finding the appellants, Gerardo Solon, Francisco Solon and Roberto Solon, guilty of the offense of rape, and sentencing each of them to undergo imprisonment for seventeen years, four months and one day, reclusion temporal, with the accessories prescribed by law, and requiring each of them to pay one-third of the costs.

On and prior to March 13, 1924, the appellant, Gerardo Solon, was a policeman in the City of Cebu and on the date stated had been assigned to duty in the court of the justice of the peace, a circumstance which left him at liberty during much of the day, as the justice of the peace held no session in the afternoon. At about 4 p. m. on the date stated, the said Gerardo Solon, accompanied by his two brothers-in-law, Francisco Solon and Roberto Solon, also appellants in this case, met one Lucrecia Mitallas, a married woman, of the age of 20, on the road near the Golf Club in Cebu. Upon approaching the woman Gerardo Solon told her that she should consider herself under arrest as her husband lacked a cedula certificate. Though she recognized Solon as a policeman from the fact that he carried a revolver, Lucrecia was loath to undergo arrest on so frivolous a charge and made resistance. Gerardo Solon thereupon, assisted by his companions, compelled Lucrecia to come along with them. Arriving at the corner of the street leading to the Osmeña Fountain, Gerardo Solon caused a passing truck to stop, and the three placed the woman upon it and she was carried away. The truck continued its course until it arrived at a bridge near the River Lahug, where it stopped and the three appellants transferred the woman to a two-wheeled vehicle, known as tartanilla, which happened to come along at that moment. In this vehicle the accused conducted Lucrecia to a garden near the Osmeña Fountain where they alighted, after which they took her to an unoccupied house in secluded surroundings about a half kilometer away.

But this time it was getting late, and after the victim had been placed on the floor, each of the three accused violated her in turn,—an act which was repeated by each of them before 9 o'clock at night. After a sleepless night and at about 4 o'clock the next morning the appellants conducted the woman back to the spot where they had captured her and there left her to make her way home. In the course of the night Francisco Solon took from Lucrecia's fingers two rings which he did not return, of the value of P14.

The incident of the making of the supposed arrest by Gerardo Solon, assisted by his two companions, was seen by two other persons whom we consider credible witnesses, namely Benito Mabini and Filomena Lardino. It appears from their testimony that Lucrecia resisted arrest and cried for help, but no one gave her assistance in view of the fact that she appeared to be in the custody of an officer of the law. With respect to the revolting acts which occurred in the lonely house where the appellants kept her during the night, the injured woman herself is the sole

witness; but her testimony, connected with her condition at the time she was released and the effect of the incident upon her mentality, leaves no room to doubt that she had passed through the fearful ordeal above described.

Soon after the appellants had disappeared and as Lucrecia was directing her way home, she first met Benito Mabini, who had seen her as she was carried off in the late afternoon of the previous day. To him Lucrecia related what had occurred to her. Mabini at once carried her to the house of the lieutenant of the barrio, who in turn conducted her to her home in Banilad and delivered her to her husband, Ceferino Codera. Benito Mabini noted the fact that Lucrecia was much upset at the time he found her, even to the extent of seeming to be on the verge of going crazy,—a condition entirely different from that which he had observed in her the evening before.

Upon arrival at home Lucrecia told her husband what had happened, and complained of headache. At this time she was pale and her dress was torn in front. Her talk was also somewhat incoherent, as if her head were turned. In the days that succeeded she ceased to concern herself with household duties and became sick and distracted to the point that she exhibited little or no reasoning power and appeared to be devoid of shame. At the end of five days her husband called in Doctor Ylanan, who treated her for a time; and it was the middle of July before she recovered her reason and regained her health. At the time of the trial her faculties appeared to be fully restored.

It should be stated that if Gerardo Solon had made the arrest in good faith, it was his duty to have conducted the woman to the municipal building, where the charge leading to the arrest would have been registered in usual course. Upon this occasion the records show that no arrested person had been conducted on the date mentioned by Gerardo Solon to the municipal building, and the proof shows that during the afternoon and night stated he was altogether absent from police headquarters. The proof furthermore shows that when the husband, Ceferino Codera, was first informed that his wife had been arrested, he went to the municipal building to make inquiries for her, and when nothing could be there learned, spent much of his time during the night in searching for her in other places.

Owing to the serious condition of the injured woman, no steps were taken to prosecute the appellants until about July 24, 1924, when an affidavit sworn to by her was placed in the hands of the fiscal, alleging that she had been violated and robbed as above stated. On the same date this affidavit, accompanied by an information, signed by the fiscal, was placed in the hands of Judge Adolph Wislizenus. Being impressed with the gravity of the charge, his Honor caused the woman to be brought before him, when the affidavit previously verified was read over to her. A detailed oral examination was also made, in which she was questioned under oath. In the course of this examination she confirmed her affidavit and added other details in response to questions directed to her. Thereupon, finding that the proof was sufficient to justify the belief that the three appellants were probably guilty of the crime charged, his Honor issued an order of arrest, with the result that the three appellants were taken into custody and arraigned for trial. There is some confusion in the record as to just when the arraignment took place. On page 17 of the expediente there is an indication that the arraignment took place upon the 30th day of July, 1924. There is also an indication on the same page that it did not take place until after the first day of August, 1924, while on page 18 of the expediente it appears that the arraignment took place upon the 31st day of July, 1924, and that the cause was set down for trial on the 4th day of August, 1924, at 7.30 a. m., whereas on page 91 of the expediente it appears that the cause was called for trial on the 31st day of July, 1924, when all of the parties appear to have been present. On the same day the attorney for the defendants presented a petition that the cause be remitted to the court of the justice of the peace in order that a preliminary examination might be had. The fact that the defendants were arraigned upon the 31st day of July, 1924, is confirmed by an order of the trial court which appears on page 18 of the expediente. The record shows that at the time of the arraignment the defendants plead not guilty.

From the foregoing facts it is difficult to determine whether the motion praying that the record be returned to the

court of the justice of the peace for a preliminary examination was made before or after the arraignment. Whether said motion was made before or after the arraignment, is of some importance for the reason that if it was not made before the arraignment or before the plea of the defendants was entered, it would indicate that they have waived their right to a preliminary examination, and for that reason the court a quo would have been justified in denying the said motion. The lower court, however, denied said motion upon the ground that a preliminary examination had already been conducted by him. To the denial of that motion the attorney for the defendants duly excepted, and the cause proceeded to trial, with the result indicated in the first paragraph above.

After the cause had been brought to this court on appeal, the attorneys for the defendants presented a motion praying that the cause be dismissed on the ground that no preliminary investigation had been had, which motion was denied on the 7th day of October, 1924, by the following order: "Upon consideration of the motion of the attorneys for the defendants-appellants, praying, for the reasons therein stated, that said case be dismissed; it appearing on page 92 of the transcript that a preliminary investigation was had in the Court of First Instance, motion denied without prejudice to the right of the attorneys for the accused to discuss that question again in their brief."

The appellants in their first assignment of error again raised the question concerning their right to a preliminary examination, insisting that they had not been given a preliminary examination, and therefore had been tried and convicted without due process of law. Upon that assignment of error a majority of the justices decided that the appellants had been given a preliminary examination and the first assignment of error was without foundation. Upon the question of whether or not the appellants had been given a preliminary examination as stated by the lower court, it may be said: First, that the complaint in the present cause was presented in the Court of First Instance of the Province of Cebu on the 24th day of July, 1924; second, that the complaint was accompanied by an affidavit signed by Lucrecia Mitallas, which reads as follows:

"Lucrecia Mitallas, married, 20 years of age, resident of the barrio of Banilad, Cebu, being first duly sworn, deposes and says:

"That at or about 5 o'clock in the evening of March 13, 1924, having gone out to buy rice in the City of Cebu, on arriving at a place near the 'Golf Club' she was arrested by the policeman Gerardo Solon, who was armed with a revolver, and was in company with Francisco alias Quico and one Mentong, under the pretext that her husband had no cedula; and once arrested, she was taken by one of said men into a truck of the municipality which was used for the transportation of gravel, and upon arriving at the place known as 'Fuente Osmeña' (Osmeña Fountain), the aforesaid persons carried her to a house that was far away from the road, and there, through force, threat and intimidation, said accused lied with her one after another against her will, and afterwards took away her two gold rings, which she wore on her fingers, valued at P14; that the accused did not let her alone until 1 o'clock in the morning of the following day; that notwithstanding her cries, the chauffeur of that truck did not do anything; that she does not know the name of said chauffeur.

"Cebu, July 23, 1924.

[THUMB MARK]

"LUCRECIA MITALLAS

"Subscribed and sworn to before me this 24th day of July, 1924.

"Provincial Fiscal of Cebu"

third, that upon a consideration of the information which had been signed by the prosecuting attorney of said province, the Honorable Adolph Wislizenus, judge, dictated the following order:

"This day, July 24, 1924, an information was filed in court by the prosecuting attorney, to which there was attached an affidavit signed by the offended party, Lucrecia Mitallas, and the court, after reading the information, personally cross-examined her in detail about the contents of her affidavit, and she answered the questions under oath, ratifying fully her sworn declaration given before the prosecuting attorney, and adding other details elucidated by the questions. The court finds that the evidence, is sufficient, and therefore it is ordered that an order of arrest be issued against Gerardo Solon, a municipal policeman of Cebu, against Francisco (alias) Quico, herein accused with an unknown surname, against one Mentong, accused herein with an unknown surname, and one Indong, accused herein with an unknown surname, in order that they may be brought to this court to answer the charge against them.

"It is hereby ordered that a copy of the information be delivered to the chief of police of the municipality of Cebu in order that he may ascertain the surname of the accused by the name of Francisco (alias) Quico, the surname of the one named Mentong and also the surname of the other named Indong, it having been shown by the evidence introduced herein that the said Indong was the chauffeur of an automobile truck that, passed by the place at the hour and on the date in question, and the truck driven by him was one used for placing gravel on the road, that is, on the road near the Golf Club of the municipality.

"It is hereby ordered that a copy of the information and of this order be delivered to Honorable Arsenio Climaco, governor of the province, for such proceedings as may be proper as regards Gerardo Solon, municipal policeman of Cebu.

"Cebu, Cebu, July 24, 1924.

(Sgd.)

"ADOLPH WISLIZENUS

"Judge, Twentieth Judicial District"

Upon said order by the court a quo of July 24, 1924, the defendants were duly arrested and brought before the court, where the proceedings briefly related above took place.

The question to be decided is whether or not the Honorable Wislizenus, Judge of First Instance of Cebu, has held a preliminary investigation in this case, pursuant to his order of July 24, 1924, hereinbefore set out. First of all, it

is well to remember that section 13 of General Orders No. 58 provides:

"Sec. 13. When a complaint or information alleging the commission of a crime is laid before a magistrate, he must examine, on oath, the informant or prosecutor and the witnesses produced, and take their depositions in writing, causing them to be subscribed by the parties making them. If the magistrate be satisfied from the investigation that the crime complained of has been committed, and that there is reasonable ground to believe that the party charged has committed it, he must issue an order for his arrest. If the offence be bailable, and the defendant offer a sufficient security, he shall be admitted to bail; otherwise he shall be committed to prison."

In August, 1901, Act No. 194 was enacted giving jurisdiction to justices of the peace and municipal presidents to make preliminary investigations in cases of criminal offenses. Section 2 of this Act prescribes the manner in which the preliminary investigation is to be held, providing among other things that the witnesses, including the complainants, shall be examined under oath and their testimony taken in writing which must be signed by the witness giving the testimony.

Act No. 1450 repealed that part of Act No. 194 that requires the testimony of the witnesses to be taken in writing, with the exception of the case wherein the accused in a preliminary investigation of a crime should choose to testify in his behalf, in which case, his testimony shall be taken in writing and signed by him or certified by the justice of the peace, in the event that the accused should refuse to sign it.

Section 37 of Act No. 1627 provides that the jurisdiction of the justices of the peace to hold preliminary investigations in all cases involving crimes committed within their municipalities and which are within the jurisdiction of the Court of First Instance, shall not prevent the Judge of First Instance to exercise said jurisdiction.

Upon the question of preliminary investigations the Supreme Court has established the following doctrines:

"The purpose of the preliminary investigation as required by section 13 of General Orders, No. 58, is to determine whether a warrant of arrest should issue on the information filed by the prosecution, and therefore the absence of the accused during the course of such investigation cannot be assigned as error, since in the very nature of things the accused is seldom present while it is held." (U. S. vs. Mendoza, 4 Phil., 124.)

" * * * Such, and no other, is the purpose of sections 13 and 14 of General Orders, No. 58. They require that a preliminary investigation be held by the court for the purpose only of inquiring as to whether there is reasonable ground either to order the arrest of the party charged or to direct that he be released from confinement in case he has been held in detention for the commission of an alleged crime." (U. S. vs. McGovern, 6 Phil., 621.)

"Whether certain facts constitute probable cause is a judicial question and must be determined by the judge or by the justice of the peace issuing a warrant of arrest. The determination as to whether or not probable cause exists is one step in the proceedings in which the person charged has no right to participate or to be present.

* * * * *

"The object of a preliminary investigation, or a previous inquiry of some kind, before an accused person is placed upon trial, is to secure the innocent against hasty, malicious, and oppressive prosecutions, and to protect him from an open and public accusation of crime, from the trouble, expenses and anxiety of a public trial, and also to protect the State from useless and expensive prosecutions.

* * * * *

"When a preliminary examination, under the provisions of General Orders, No. 58, is conducted by a judge or by a justice of the peace in this jurisdiction, either within or without the City of Manila, the accused has a right to be present and to be heard by himself and by counsel and to present witnesses in his behalf. But such rights are not conferred upon him by Act No. 612 when the investigation is held by a justice of the peace. Rights

conferred upon accused persons to participate in the preliminary investigations concerning themselves, depend upon the provisions of law by which such rights are specifically secured rather than upon the phrase 'due process of law.'" (U. S. vs. Grant and Kennedy, 18 Phil., 122.)

"Inasmuch as the law does not require that the declarations of witnesses made in a preliminary investigation must be in writing, when it is necessary that the record shall show the details of such proceedings had before a justice of the peace, it is sufficient that the latter declare under oath the evidence given by the witnesses, and it is not necessary that the notes taken with respect to the declarations be exhibited and made part of the case." (U. S. vs. Morandarte, 23 Phil., 358.)

"The general provisions contained in section 13 of General Orders No. 58 are very definite. They provide that when a complaint is laid before a magistrate, he must make a preliminary investigation, and if he is satisfied that the crime complained of has been committed and that there is reasonable ground to believe that the party charged has committed it, he must take the action the law requires.

* * * * *

"The law having explicitly recognized and established that no person charged with the commission of a crime shall be deprived of his liberty or subjected to trial without prior preliminary investigation that shall show that there are reasonable grounds to believe him guilty, there can be no doubt that the accused who is deprived of his liberty, tried and sentenced without the proper preliminary investigation having been made in his regard, is convicted without due process of law." (U. S. vs. Banzuela and Banzuela, 31 Phil., 564.)

"The right of an accused person not to be brought to trial except when remanded therefor as the result of a preliminary examination before a committing magistrate, or, within the City of Manila, not to be brought to trial except in pursuance of like proceeding or the proceeding substituted therefor by law, is a substantial one. Its denial, over the objection of the accused, is prejudicial error, in that it subjects the accused to the loss of life, liberty or property without due process of law." (U. S. vs. Marfori, 35 Phil., 666.)

There is no doubt that an accused in the provinces, outside of the City of Manila with regard to which Act No. 612 provides otherwise, is entitled to a preliminary investigation in accordance with Section 13 of General Orders No. 53 and Act No. 194, as amended by Acts Nos. 1450 and 1627. It is, however, necessary to distinguish between an investigation held by a justice of the peace and one made by a Judge of First Instance. In the former, the preliminary investigation embraces two proceedings: First, an investigation for the purpose of determining whether or not an order of arrest should be issued; and, second, one which is held after the accused is arrested by virtue of a warrant of arrest and placed at the disposal of the justice of the peace. In the latter case, that is, when the investigation is held by the Judge of First Instance of the province where the crime was committed, there is but one proceeding and that is the one prescribed by section 13 of General Orders No. 58, that is to say, the making of an investigation necessary for determining whether or not a crime was committed and whether or not there are reasonable grounds to believe that the accused has committed it, in which event the Judge of First Instance will issue a warrant of arrest for the detention of the accused and, if the crime is of the kind that admits of bail and the accused offers one which is sufficient, he will be set free under bail, otherwise, he should be committed to prison in order that the proper action may be carried through all its proceedings.

An examination of section 13 of General Orders No. 58 and Act No. 194, shows the difference between the proceedings provided for in said statutes. Section 13 of General Orders No. 58 does not require but one single proceeding in the preliminary investigation, whereas Act No. 194 prescribes two proceedings in said preliminary investigation, as above stated.

Without determining the reason for this difference, we are of the opinion, and so hold, that the investigation held by the Honorable Wislizenus, as may be inferred from his aforesaid order of July 24, 1924, is a sufficient

compliance with section 13 of General Orders No. 58 and, therefore, the appeal is groundless in so far as the refusal of the trial court to hold a new preliminary investigation is concerned.

With reference to the assignments relating to the sufficiency of the evidence, we are of the opinion that the guilt of the appellants is shown beyond possibility of doubt. The alleged hostile attitude of the trial judge, to which reference is made in the sixth assignment of error, even if such attitude were manifested, does not in our opinion constitute reversible error.

There was present in the offense, as to all of the accused, the aggravating circumstance that advantage was taken of superior strength and that the offense was deliberately augmented by unnecessary wrongs; and, as to Gerardo Solon, that advantage was taken of his public position. Francisco Solon is shown to be guilty of robbery in the taking of two rings of the value of P14. The trial judge therefore committed no error in finding the appellants all guilty of rape, but in view of the part that Gerardo Solon played in the commission of the crime and the aggravating circumstances attributable to him, we think that his Honor would have done well to have fixed the penalty at the extreme maximum allowed by law, that is to say, twenty years, reclusion temporal. Francisco Solon should also have been awarded the punishment appropriate to the offense of robbery.

For the reasons stated, the judgment as regards Roberto Solon is affirmed; as to Gerardo Solon the period of imprisonment will be increased to twenty years, reclusion temporal. The judgment against Francisco Solon for rape will be affirmed; but he will be sentenced, in addition to the penalty for rape, to undergo imprisonment for the offense of robbery for three years, eight months and one day, presidio correccional, with the accessories prescribed by law, and to indemnify the injured party in the amount of P14, with subsidiary imprisonment in case of insolvency. Each of the appellants will pay his proportional part of the costs. So ordered.

Malcolm, Villamor, and Ostrand, JJ., concur.

DISSENTING

JOHNS, J., with whom concurs ROMUALDEZ, J.:

We all agree that on the merits, the defendants are guilty of the crime charged, but in our opinion they did not have the preliminary investigation which the law requires, and for such reason the case should be reversed and remanded.

The record is conclusive that the only investigation which was ever made of the crime was made by the Judge of the Court of First Instance, and that such investigation was made before the defendants were arrested, and that they were arrested as a result of that investigation. That no formal investigation was ever made by anyone after the defendants were arrested. That was substantial error.

The apparent confusion in the practice is caused by the indiscriminate and interchangeable examinations which are made before the arrest with those which should be made after the arrest.

Section 1 of Act No. 194 provides:

" * * * It shall be the duty of every justice of the peace, when written complaint under oath has been made to him that a crime has been committed within his municipality and there is reason to believe that any person has committed the same, which complaint the justice believes to be well founded, or when he has knowledge of facts tending to show the commission of a crime within his municipality by any person, to issue an order for

the arrest of the accused and have him brought before the justice of the peace for such preliminary examination.

"The order of arrest shall be directed and delivered to any officer authorized by law to make arrests, signed by the justice of the peace, shall contain the name of the accused, if known, and the offense with which he is charged. * * *"

After the arrest is made on a formal warrant, section 2 provides:

"When the accused is brought before the justice of the peace, it shall be his duty to inform the accused of the charge, give him an opportunity to examine the complaint and the affidavits, if any, of all other witnesses in support thereof * * *. If the accused shall deny his guilt then it shall be the duty of the justice of the peace to make preliminary investigation of the charge as speedily as may be consistent with right and justice, but in any event he must begin such investigation within three days of the time the accused was brought before him unless the accused or complainant shall ask for delay in order that witnesses may be obtained, or for other good and sufficient reason, in which event a continuance for a reasonable time may be allowed * * *. Upon conclusion of the evidence of the other witnesses, the accused may testify under oath, if he so desires, in which case he may be cross-examined as any other witness. His evidence shall be reduced to writing and signed by him * * *. Upon the conclusion of the preliminary investigation, if the justice of the peace is of the opinion that there is reasonable cause to believe that an offense has been committed and that the accused is guilty thereof, he shall so declare and shall adjudge that the accused be remanded to jail for safekeeping to await the action of the judge or Court of First Instance, unless he give bail for his appearance if the case be bailable, as provided in General Order Number Fifty-eight. On the other hand, if the justice of the peace be of the opinion that no crime has been committed, or that there is no reasonable ground to believe the accused guilty thereof, the justice of the peace shall order the discharge of the accused. Such discharge, however, shall not operate as a final acquittal of the accused, but he may be again arrested and prosecuted for the same offense."

Section 37 of Act No. 1627 provides:

"Every justice of the peace, including the justice of the City of Manila, shall have jurisdiction to conduct preliminary investigations of all crimes and offenses alleged to have been committed within his municipality and cognizable by Courts of First Instance, but this shall not exclude the proper judge of the Court of First Instance or of a municipal court from exercising such jurisdiction. * * *"

In legal effect, the majority opinion holds that if an investigation is made by the Court of First Instance previous to the arrest, that the defendant is not entitled, as a matter of right, to an investigation after his arrest. That contention is not legally sound. It will be noted that in section 37 above quoted, that in all of such matters a municipal court has equal and concurrent rights with a Court of First Instance.

It is very apparent that section 37 is copied in substance from similar laws in all of the States of the United States and of the United States itself. The same thing is true as to Act No. 194, which is almost a literal copy from such laws. While it is true that under section 37, the authority conferred to make such investigation is conferred upon municipal courts and the Courts of First Instance, it is equally true that in the making of such investigations, the Courts of First Instance and the municipal courts are sitting and acting as magistrates with like powers and duties as those of a justice of the peace. Such is the uniform law and practice, both state and federal, in all of the States of the United States and the Government itself.

In holding that a Court of First Instance does not have to make an investigation after the arrest is made, the court is driven to the absurd conclusion that a municipal court outside of Manila would not have to make such an investigation. That, in legal effect, would nullify all of the provisions of Act No. 194. The fact that under section 37 the same power that is conferred upon a Court of First Instance to make an investigation is also conferred upon

any municipal court outside of Manila clearly shows that, in conducting such an investigation, both the Courts of First Instance and the municipal courts are sitting and acting as magistrates, with concurrent and like powers and duties as those of a justice of the peace. Otherwise Act No. 194 is a nullity, and the municipal court of any province could hold a defendant to await the action of the Court of First Instance without any preliminary examination after his arrest. That was never the purpose and intent of the law.

The law should be construed to mean that when a Court of First Instance or a municipal court orders the arrest of a defendant, before any regular term of court, that such courts are acting and sitting as magistrates, and that all of their proceedings should conform in substance to the provisions of Act No. 194, and that after the arrest is made, the defendant has a legal right to a preliminary investigation into the merits of the charge and to be heard by both his counsel and witnesses before he is finally bound over to await the action of the Court of First Instance.

I am authorized to say that Justice Street concurs in this dissent.

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