

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. VICTORIANO ASEBUQUE, DEFENDANT AND APPELLANT.

G.R. No. 2786. November 21, 1907

Ponente: CARSON, J.

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CARSON, J.:

The defendant was convicted in the Court of First Instance of Iloilo of the crime of aiding and abetting a band of brigands, as denned and penalized in section 4 of Act No. 518, amended bj Act No. 1121, of the Philippine Commission. He was sentenced to imprisonment for fifteen years "with hard labor," together with the accessory penalties prescribed by law and to the payment of the costs of the trial. The evidence of record conclusively established that, some time in the month of May, 1904, the accused sold some fifty rifle cartridges for 50 cents each to four brigands called Taleon, Ader, Bias, and Agapito, members of a notorious band of brigands known as "Toribio's band;" that he sold these cartridges knowing the purchasers to be members of the said band; and that in doing so he unlawfully aided and abutted a band of brigands by furnishing them with ammunition in violation of the provisions of the above-cited acts of the Commission.

Counsel for the defense filed the following assignments of errors:

- "1. The court erred in proceeding with the trial of this accused without having first held a preliminary investigation.
- "2. The court erred in proceeding with the trial, the accused not having been arraigned or pleaded to the information.
- "3. The court erred in finding the accused guilty beyond a reasonable doubt of the crime charged in the information.
- "4. The court erred in overruling the motion of the defendant for an extension of time for the purpose of securing the presence of certain witnesses.
- "5. The court erred in sentencing the accused to fifteen years' imprisonment with hard labor and to the payment of the costs of the proceedings.
- "6. The court erred in failing to acquit the accused of the crime charged in the information."

The first assignment of errors appears to be based upon the fact that there is no affirmative showing in the record that a preliminary trial was in fact had. It might be sufficient answer to point out that this court has frequently held that the record of the preliminary investigation and trial in criminal cases is not a necessary part of the record which should be brought here upon appeal. (TJ. & v«. Capisonda, 1 Phil. Rep. 575; U. S. vs. Abuan, 2 Phil. Rep., 130.) The mere fact that it does not affirmatively appear, from the record on appeal, that a preliminary investigation and trial was had is not sufficient in itself to establish the allegation by defendant's counsel that no such preliminary investigation and trial was held; we would be justified, therefore, in disregarding the contention of counsel on appeal, based upon this unsupported allegation.

But, granting that it affirmatively appeared that the accused did not have a preliminary investigation and trial, his right thereto must be taken to have been waived, in view of the fact that he does not appear to have made any objection, based upon that ground, to proceeding with the trial in the court below. The right to a preliminary examination is a personal privilege, and one which may be waived by the accused. (Encyclopaedia of Pleading and Practice, vol. 16, p. 828, and large number of cases there cited.)

The allegation that the accused was tried without arraignment and plea, upon which the second assignment of errors is based, also rests upon the mere fact that, at the time when the appellant's brief was submitted, the record did not affirmatively disclose the fact that the accused had been arraigned and had pleaded not guilty of the offense charged in the information. This defect in the record has since been cured by the Attorney-General by filing with the record a duly certified copy of the minutes of the proceedings in the trial court, wherein the arraignment and plea of the accused are affirmatively set out. In support of the third assignment of errors, counsel for the defense vigorously contends that the evidence of record is not sufficient to establish beyond a reasonable doubt that the persons who bought the rifle cartridges from the accused were members of "Toribio's band," or that that band was a band of brigands, or that the accused knew that "Toribio's band" was a band of brigands, or that the accused knew that the persons who purchased the cartridges were members of that band.

That Taleon was a member of "Toribio's band" and that that band was a band of brigands was conclusively established by the testimony of various witnesses, who declared that they had seen Taleon, in company with Toribio and his band, carrying arms and taking an active part in the operations of the band. One witness, H. W. Coutermarsh, a lieutenant of Constabulary, swore that he knew Taleon and Toribio as members of a band of brigands operating in Alimodian and Maasin; that he knew of a number of robberies committed by them; that Toribio was the chief of the band and Taleon, Ader, Bias, and Agapito were subofficers; that he had had several encounters with the band, and, on one or two occasions, held conferences with its chiefs and subchiefs.

That the band was a band of brigands is proven, by the testimony of this latter witness and a number of others who positively swore that they knew "Toribio's band" to be a band of brigands, and, in response to questions as to how they knew that fact, stated that the band went about, throughout the district in which they lived, armed with some twenty-five or thirty rifles; that they assaulted a number of barrios on various occasions, and that on these occasions they committed many robberies of carabaos, chickens, rice, and other personal property. Counsel for the defense insists that these statements are not sufficient to sustain the findings of the trial court. He seems to think that, if the witnesses had been more closely examined, it might have appeared that their assertions, as to the character of the band and the robberies which they attributed to it, were mere hearsay. There is nothing in the record to indicate that the statements of the witnesses were not made of their own knowledge; the defense had an opportunity at the trial to develop the truth by proper cross-examination; and if the testimony of the witnesses for the prosecution was mere hearsay, it would not have been difficult for defendant's counsel to make that fact appear of record at the trial.

As to the fact that the accused sold the ammunition, knowing that the purchasers were members of a band of brigands, the record discloses, first, that "Toribio's band" was a notorious band of brigands operating for several years prior to the sale of the ammunition, in the neighborhood wherein the accused lived; second, that Taleon, who was in command of the party that bought the cartridges, was a member and subchief of that band; that Taleon was well known personally to the accused, and that in conversation with each other Taleon addressed the accused as godfather or protector; that when the ammunition in question was sold Taleon and his party were armed with rifles; that the accused well knew that the sale of this ammunition was unlawful and warned those who were present to say nothing about it; that the accused, while he denied that he knew the two robber chiefs, Toribio and Taleon, admitted that he had heard them talked about in the neighborhood; that the accused was a

lieutenant of the barrio wherein he lived and a man of some intelligence. It having been conclusively proven that the accused did in fact sell ammunition to certain members of Toribio's notorious band, we think that, in the light of the foregoing facts, there can be no reasonable doubt of the fact that the accused knew he was selling the ammunition to members of a brigand band. He himself absolutely denies that he sold the ammunition, but that he did so is conclusively established by the testimony of the witnesses for the prosecution, and there is nothing in the evidence introduced by the defense to raise any reasonable doubt as to the truth of the facts on which the foregoing conclusions are based. The action of the court, upon which the fourth assignment of error is based, was in no wise prejudicial to the rights of the accused. During the trial counsel for the defense asked for a continuance for the purpose of presenting certain witnesses; as a basis for his motion, he set out the facts which he expected to prove by the said witnesses when called; with the consent of court counsel for the prosecution formally admitted all the facts which it was proposed to prove by the absent witnesses, and, with this admission before us, we are unable to see how the failure to call these witnesses could in any wise prejudice the rights of the accused.

What has been said as to the third assignment of error is sufficient answer to the fifth and sixth assignments, except in so far as it is alleged that the court erred in imposing upon the accused accessory penalties and enforced labor. The imposition of accessory penalties and hard labor is not in terms prescribed in the provisions of the act which penalizes the offense of which the accused was convicted. We do not think, therefore, that they should have been set out in the decision. Modified by the omission of so much thereof as prescribes accessory penalties and hard labor, the sentence of the trial court is affirmed, with the costs of this instance against the appellant. So ordered.

Arellano, C. J., Torres, Mapa, Johnson, Willard, and Tracey, JJ., concur.

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