

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. MANUEL ABUYEN. Y ELAIS, DEFENDANT AND APPELLANT.

G.R. No. 30664. February 02, 1929

Ponente: VILLA-REAL, J.

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VILLA-REAL, J.:

Manuel Abuyen y Elais appeals to this court from the judgment of the Court of First Instance of Manila in which he was convicted of the crime of frustrated qualified theft, having confessed, and sentenced to one month and one day arresto mayor, and to the additional penalty of ten years, for habitual delinquency, with the accessories of the law, and the costs of the action.

In support of his appeal the appellant assigns the following alleged errors as committed by the trial court in its judgment, to wit:

"The trial court erred:

"1. In convicting the defendant without having informed him before arraignment of his right to appear with counsel, and in not having asked him if he desired the court to name an attorney to defend him if he was unable to employ one himself.

"2. In sentencing the defendant to the additional penalty of ten years' imprisonment and in considering the habitual delinquency without having first required the Attorney-General to prove it, or, at least, to present the cases wherein it appears that the defendant had been really and truly convicted of the same crime of theft, in accordance with the provisions of Act No. 3397.

"3. In sentencing the defendant to the penalty of one month and one day of imprisonment, and in reaching the conclusion that the value of the stolen article is twenty pesos.

"4. In sentencing the defendant to an additional penalty of ten years as an habitual delinquent, and in not holding that Act No. 3397 is unconstitutional because it inflicts cruel and unusual punishment.

"5. In imposing upon the defendant an additional penalty of ten years for the crime of frustrated theft, which is not provided for in section 1 of Act No. 3397, even supposing it to be constitutional."

As to the first assignment of error, while it is true that it is the duty of the trial court to ask the defendant who appears without counsel whether he desires counsel to be assigned to defend him before he is arraigned, pursuant to section 17: of General Orders No. 58, it not appearing, as it does not appear positively proven, that the trial court failed to inform the defendant-appellant of his aforesaid right, it must be presumed that the court below complied with its duty, in accordance with the provision of paragraph 14, of section 334 of the Code of Civil Procedure.

Touching the second assignment of error, the information alleges that the defendant has been thrice convicted of

the crime of theft, and that he is an habitual delinquent in accordance with the provisions of Act No. 3397. Section 1 of said law defines who an habitual delinquent is and reads as follows: "Any person who within a period of ten years from the date of his release or of his last conviction by the courts of this country of the crimes of robo, hurto, estafa, embezzlement, or forgery, or of a violation of the laws against vagrancy or prostitution, is found guilty of any of said crimes a third time, or oftener." As this is a definition of the law, it is presumed the defendant knew it, and in pleading guilty to the crime charged in the information, though frustrated, he admitted all the facts alleged therein and relieved the prosecution of the obligation of proving that he had thrice been convicted of the crime of theft, and that for the fourth time he has committed the same crime of theft within the period of ten years from the date when he was set at liberty, or since his last conviction of said crime by the courts of this country.

With respect to the third assignment of error, the information having alleged that the value of the article stolen is P20, and the defendant having confessed his guilt, he also admitted that the value of the article stolen is as alleged in the information, thus relieving the prosecution of the obligation of proving said value.

The question of constitutional law raised in the fourth assignment of error has already been decided by this court in the cases of *People vs. Nayco* (45 Phil., 167), and *People vs. Sierra*, G. R. No. 28516,[1] contrary to the appellant's contention.

As to the fifth assignment of error, the crimes of robbery, theft, estafa and falsification mentioned in Act No. 3397, which prescribes additional penalties for habitual delinquents, are all defined and penalized in the Penal Code, and for the purposes of the aggravation of the penalty on account of the presence of the aggravating circumstance of recidivism, the Supreme Court of Spain, in its judgment of March 12, 1889, held that the commission of said crimes whether in the frustrated or attempted form may be taken into account for that purpose. The Philippine Legislature, composed mostly of practicing attorneys, is acquainted with the Penal Code in force in these Islands, as well as with the jurisprudence of the Supreme Court of Spain, and of this court upon the matter; therefore, in referring to said crimes in Act No. 3397 without making any distinction as to degrees of commission, it did so taking into account the jurisprudence upon the matter. And its intention could not have been otherwise, because if the purpose of the law is to render more effective social defense and the reformation of multi-recidivists who, with the short terms of imprisonment to which they had been sentenced for the crimes they had previously committed, far from mending their ways have only perfected themselves in the commission of the same crimes, thus becoming a constant menace to society, and the crime which they commit again, be it an attempt or frustration, reveals the persistence in them of the inclination to wrongdoing, and of the perversity of character that had led them to commit the previous crimes. If this is so, and if he who commits a crime, whether it be attempted or frustrated, subjectively reveals the same degree of depravity and perversity as one who commits a consummated crime, not to apply to him the law on habitual delinquency would be to thwart its purposes and to expose society to a constant menace from such delinquents who, when they resolve to commit a crime, certainly do not propose not to go beyond an attempt or a frustration, but rather to consummate it.

This interpretation does not run counter to the general rule that penal laws are to be strictly construed, for this rule has an exception, namely, that it is not to be permitted to thwart the clear and manifest intention of the legislator. Sutherland, in his work entitled "Statutes and Statutory Construction," vol. II, page 985, paragraph 5S0, states the following:

"In *State vs. Small*, the court, referring to the rule of strict construction of penal statutes, says: 'By this rule nothing more is meant than that penal statutes shall not, by what may be thought their spirit and equity, be extended to offenses other than those which are specifically and clearly described and provided for. The reason of the rule is that the law will not allow of constructive offenses or arbitrary punishments. * * * This rule of strict construction does not exclude the application of common sense to the terms made use of in the act. Even

a penal statute should not be so construed as to work a public mischief, unless required by words of explicit and unequivocal import. Effect must be given to the intent of the legislature clearly apparent upon the face of the statute, although such construction seem contrary to the exact letter of the statute."

In the case of *People vs. Raymond* (96 N. Y. Rep., 41), the New York Court of Appeals, speaking through Justice Finch, in general terms of the scope of laws on habitual delinquency, stated:

"That the accused has already been convicted of a felony or an attempt to commit one, or of a 'petit larceny,' shows that punishment has done him no good; that no reformation was effected; that he is a persistent criminal, toward whom mercy is misplaced; and by reason of this character of the man, thus shown by his conduct, greater severity of punishment is prescribed. The reason is the same whether both crimes are of similar character, or of the same grade, or not. Both are crimes, and the perpetration of the second, however different, shows such a persistence in evil, such a continued criminality, as to justify and make prudent a severer penalty than should be inflicted upon a first offender. If we adopted the construction¹ sought, a prisoner might have been convicted of many felonies, and yet by judicious changes from one to another, or running up or down the different grades, escape entirely the penalty of a second offense."

For the foregoing considerations, we are of opinion and so hold, that the provisions of Act No. 3397 on habitual delinquency are applicable to the crimes therein enumerated, which are defined and penalized in the Penal Code, not only when consummated, but also when only attempted or frustrated.

The crime committed by the defendant-appellant is frustrated qualified theft defined in the first paragraph of article 517, and punished in paragraph 5 of article 518, as amended by Act No. 3244 in connection with article 520, paragraph 3, of the Penal Code, the culprit having been a recidivist more than twice. The penalty provided by article 518, paragraph 5, of the Penal Code for the consummated crime of theft, is *arresto mayor* in its full extent. And for the frustrated crime, the penalty next lower in degree, i. e., a fine, should be imposed in accordance with the provision of article 65 of the same Code. Inasmuch as the defendant-appellant has been twice a recidivist, the penalty next higher in degree to the fine, i. e., *arresto mayor* in its full extent, must be imposed in accordance with the aforesaid article 520 of the said Code. As there is no circumstance to be considered which modifies the criminal liability, said penalty must be imposed in its medium degree, i. e., two months and one day to four months *arresto mayor*.

By virtue whereof, and in accordance with the recommendation of the Attorney-General, the defendant-appellant is hereby sentenced to two months and one day *arresto mayor*, and to the additional penalty of ten years, in accordance with Act No. 3397, with costs against the appellant. So ordered.

Johnson, Malcolm, VilLamor, Ostrand, and Rommldez, JJ., concur.

Johns, J., dissents.

[1] Promulgated April 21, 1928, not reported.

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