

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. GABRIEL RIVERA Y CORPUS (ALIAS GABRIEL CARAY), DEFENDANT AND APPELLANT.

G. R. No. 32494. March 12, 1930

Ponente: ROMUALDEZ, J.

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ROMUALDEZ, J.:

The defendant appeals from the judgment of the Court of First Instance of Manila convicting him of larceny and sentencing him to three years, six months and twenty-one days of presidio correccional, to suffer the accessories of law, to pay an indemnity in the amount of P54.80 with subsidiary imprisonment in case of insolvency, and costs; plus sixteen years of imprisonment for habitual delinquency.

Counsel de officio contends that the defendant is not guilty of said crime and should not be sentenced to suffer said penalty.

The evidence establishes conclusively that the defendant is guilty of the crime charged. Although no one testified to having seen him taking "the stolen articles, the circumstances of the case constitute conclusive, although indirect, proof that the defendant is the author of the larceny.

The trial judge correctly declined to find the defendant guilty of robbery, in view of the lack of proof as to the manner in which said defendant entered the house. And the court below was likewise right in finding him guilty of larceny although the information alleged robbery, because that crime is necessarily included in this more serious one; it was a proper case for the application of section 29, General Order No. 58, and the doctrine laid down by this court in *United States vs. Birueda* (4 Phil., 229).

As to habitual delinquency, the defendant admitted having been theretofore convicted four times: thrice of larceny, and once of robbery on February 20, 1923. The crime herein charged having been committed on October 4, 1929, falls within the ten-year period fixed by Act No. 3397.

In regard to the penalty, the crime established is penalized by article 518, No. 4, Penal Code, as amended by Act No. 3244, in connection with article 520 of said Code. It should be noted that in applying Act No. 3244, the Spanish text must prevail, as was held by this court in *People vs. Lopez* (G. R. No. 26572)^[1] pursuant to Act No. 2717, in view of the fact that, as stated in said case, Spanish was the language used by the House which finally passed said Act No. 3244 amending the Penal Code.

Therefore, the proper penalty for the appellant is presidio correccional in its medium degree to presidio mayor in its minimum degree, which, in the absence of any modifying circumstance must be imposed in its medium degree. Wherefore, the sentence appealed from is modified with respect to the principal penalty, and the appellant is hereby sentenced to suffer four years, two months and one day of presidio correccional. In all other respects, the sentence is affirmed with costs of both instances against the appellant. So ordered.

Johnson, Malcolm, Villamor, Ostrand, Johns, and Villa-Real, JJ., concur.

[1] Promulgated August 9, 1927, not reported.

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