

THE PEOPLE OP THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. EMILIO SANCHEZ Y MERCADO, DEFENDANT AND APPELLANT.

G. R. No. 37054. December 23, 1932

Ponente: BUTTE, J.

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BUTTE, J.:

The appellant was convicted in the Court of First Instance of Manila for the crime of robbery and sentenced to three years, eight months and one day of prision correctional and to indemnify J. W. Flannery in the sum of P25 and A. J. Wise in the sum of 20 centavos, and to pay the costs. He was also sentenced to an additional penalty of three years for habitual delinquency. No member of this court doubts that the appellant was properly found guilty of the offense charged. The only question to be considered relates to the penalty to be assessed.

The facts of this case bring the offense under the provisions of article 293 and article 294, paragraph 5, of the Revised Penal Code, the prescribed penalty being prision correctional to prision mayor in its medium degree, that is to say, from three years, eight months and one day to six years and ten months. But the Attorney-General calls attention to the aggravating circumstances of nocturnity and recidivism and recommends that the penalty which the law prescribes in such a case must be in its maximum degree, that is, from six years, ten months and one day to ten years. We concur in this view and assess the original penalty at six years, ten months and one day.

Coming now to the question of the additional penalty for habitual delinquency applicable in this case, article 62, paragraph 5 (a), of the Revised Penal Code provides:

"En caso de ser convicto por tercera vez, el culpable sera castigado con la pena sefialada por la ley al delito de que fuese ultimamente convicto y con la pena adicional de pri- sion correccional en sus grados medio y maximo * * *" that is to say, from two years, four months and one day to six years. The additional penalty imposed by the court below falls within said limits and is affirmed.

The Attorney-General, however, argues that the additional penalty for habitual delinquency should be in the maximum degree, that is, from four years, nine months and eleven days to six years, his argument being that the principal penalty having been imposed in the maximum degree, the additional penalty must be in the same degree. We do not concur in this view of the law.

In the case of *People vs. Tanyaquin* (alias *Arcadio Rico*), No. 37124, promulgated October 28, 1932,[1] we had occasion to consider article 62, paragraph 5, of the Revised Penal Code, and we indicated there our view that mitigating and aggravating circumstances, as defined in articles 13 and 14 of the Revised Penal Code, must be taken into consideration in determining the degree of the principal penalty and be given the definite effects prescribed in the Revised Penal Code. But said mitigating and aggravating circumstances do not determine the degree of the additional penalty to be imposed for habitual delinquency. Additional penalties for habitual delinquency under article 62, paragraph 5, are to be imposed according to the sound discretion of the court within the limits fixed by said article.

Mitigating and aggravating circumstances being part of the circumstances of the whole case, must certainly be taken into consideration, but not in the sense that they determine by force of law what the degree of the additional penalty shall be. The additional penalty is determined by the rule of reasonableness, upon a just appreciation of all the facts and circumstances of the case. To the criticism that such a discretion is uncontrolled and arbitrary, the answer is that it is not and need not be any more so than in case of other powers, executive, legislative, and judicial, that must be left to the discretion of competent men who have taken a solemn oath to perform their duty faithfully.

Habitual delinquency is not a crime in itself, capable of exact definition. It is only a factor in determining a total penalty. It is impossible to lay down any mechanical criteria for fixing the additional penalty for habitual delinquency within the limits fixed by article 62, paragraph 5. All the facts and circumstances brought to light at the trial should be taken into account; and if after the guilt of the accused is established, the court wishes to have information as to the antecedents of the accused or other personal facts not appearing in the record so that it may the better determine what is a just and proper additional penalty, we see no reason why the court may not require such additional evidence to enable it to act more intelligently in determining the additional penalty.

The judgment of the court below* is affirmed with costs de oficio. So ordered.

Street, Villa-Real, Abad Santos, Hull, Vickers, and Imperial, JJ., concur.

DISSENTING

AVANCEÑA C. J., with whom concurs VILLAMOR, J. :

I dissent for the reasons stated in my dissenting opinion in case No. 37124,[1] entitled "The People of the Philippine Islands vs. Arcadio Tanyaquin".

[1] Page 426, ante.

[1] Page 430, ante.

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