

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. CELERINO COLOCAR, DEFENDANT AND APPELLANT.

G. R. No. 40871. November 10, 1934

Ponente: VICKERS, J.

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VICKERS, J.:

This is an appeal from the following decision of Judge Serviliano Platon in the Court of First Instance of Mindoro:

"Esta acusado Celerino Colocar del delito de incendio cometido, segun la querella enmendada, como sigue:

" 'The undersigned Provincial Fiscal accuses Celerino Colocar of the crime of arson, committed as follows:

" 'That on or about the 2d day of May, 1933, in the municipality of Calapan, Province of Mindoro, Philippine Islands, and within the jurisdiction of this court, the said accused, did wilfully, unlawfully and feloniously set fire to a fish-net and a banca, belonging to Mauricio Ahorro, thereby destroying the said fish-net, valued at three hundred fifty pesos (P350), and partially damaging the banca to the amount of thirty pesos (P30).

" 'Contrary to article 322, paragraph 3, of the Revised Penal Code, and with the aggravating circumstance No. 10 of article 14 of said Code, because the defendant has been previously punished for an offense to which the law attaches a greater penalty.'

"Son hechos probados por la acusacion que, a eso de la una de la madrugada del 2 de mayo de 1933, Pacifico Inato desde la playa vio que se estaba quemando un chinchorro colocado en una banca que estaba en el mar cerca de la playa, inmediatamente con un flashlight alumbrf enfocando a la persona que se hallaba en dicha banca quien, asustada por la luz del flashlight, dio media vuelta, miro en direccion a 61 y reconocio que aquella persona era el acusado, el cual por el susto se echo a correr, pasando por la proa de la banca. Pacifico, creyendo que el chinchorro y la banca que se quemaban eran de su comadre se hacia dicha banca y al ver que no son de su comadre, y temiendo que se le imputara que fue 41 quien los quemo, se retiró a su casa. En la misma hora de la una, Estanislao Acha y Francisco Avenilla, remeros y Pescadores de Mauricio Ahorro quienes, por orden de este, durmieron en la playa, se despertaron y vieron que se estaba quemando el chinchorro y, al dirigirse ambos a la banca para apagar el fuego, encontraron al acusado que caminaba apresuradamente, proeedente de la banca. Acha y Avenilla, despues de haber apagado el fuego, avisaron a Mauricio Ahorro, dueno de dichos chinchorro y banca que se habian quemado.

"No es objeto de discusion ni controversia que la banca fue parcialmente destrufda por el fuego como el chinchorro, y el valor de los danos causados a dicha banca y chinchorro ge han estimado en P880.

"El acusado niega haber quemado el chinchorro y la banca; que desde las 9.30 de la noche se puso a dormir y no bajo de su casa en toda la noche; que no es cierto que Francisco Avenilla habia dormido en la playa, pues este, en la noche de autos estaba tan borracho que quedo dormido al lado de la casa de Meliton y desde alli fue llevado a su casa a las 10, y a eso de las 5 de la manana segufa durmiendo aun; que Pacifico Inato en la noche de autos estaba enfermo, pues estaba imposibilitado a caminar por tener bus pies hinchados.

"Esta defensa de coartada interpuesta por el acusado no desvirtua ni enerva las declaraciones terminantes de los testigos de la acusacion que vieron al acusado salir casi corriendo de la banca donde estaba el chinchorro que, como se ha dicho, se habia quemado. El movil que indujo al acusado a quemar el chinchorro como la banca se debe a que Mauricio Ahorro dijo a Eulogio Mendoza que dicho acusado dejaba de ser encargado del chinchorro, hecho que le disgusto tanto que dicho acusado dijo ademas que hasta sus hijos dejarian de ser Pescadores de dicho Ahorro.

"El hecho enjuiciado es constitutivo del delito de incendio previsto y penado en el parrafo 3.º del articulo 322 delCodigo Penal Revisado.

"Por tanto, el Juzgado declara al acusado Celerino Colocar culpable fuera de toda duda racional del delito de que se le acusa y le condena a dos (2) años, once (11) meses y once (11) días de prision correccional, a indemnizar al ofendido en la cantidad de P380, sufriendo en caso de insolvencia la prision subsidiaria correspondiente, a las accesorias de ley y al pago de las costas procesales."

Appellant's attorney makes the following assignments of error:

"I. The trial court erred in giving full credit to the testimonies of the witnesses for the prosecution, particularly those of Pacifico Inato and Estanislao Acha.

"II. The trial court erred in finding that it has been proven that the appellant was the one who set fire to the fish-net and the banca of Mauricio Ahorro.

"III. The trial court erred in finding the appellant guilty of the crime charged against him in the complaint, and in sentencing him to suffer two years, eleven months, and eleven days of prision correccional."

The errors assigned raise only questions of fact depending on the credibility of the witnesses, and after reading their testimony, we find no reason for disturbing the findings of the trial judge.

The offense committed by the defendant is punished by article 322, No. 3, of the Revised Penal Code with prision correccional in its minimum and medium periods, the damage being more than P200 but not more than P1,000. The penalty imposed by the trial judge was the minimum of the maximum degree, but it does not appear from the decision what aggravating circumstance was taken into account. The evidence shows that the defendant took advantage of the nighttime to set fire to the fish-net and banca.

It was alleged in the amended information that the crime was committed with the aggravating circumstance No. 10 of article 14 of the Revised Penal Code, because the defendant had been previously punished for an offense to which the law attaches a greater penalty. It was proved at the trial that the defendant was convicted of robbery on November 28, 1916, and was sentenced to suffer three years, six months, and twenty-one days of presidio correccional and to indemnify the offended party in the sum of P100, and that on appeal to this court he was sentenced on October 6, 1917 to suffer three years, six months, and twenty days of presidio correccional and to indemnify the offended party in the sum of P100. Robbery and arson are both included in Title X of the Revised Penal Code, and they were included in the same title in the Penal Code, both being crimes against property. The accused was therefore a recidivist, because at the time of his trial in the present case he had been previously convicted by final judgment of another crime embraced in the same title of the Revised Penal Code.

The Solicitor-General states in his brief that the aggravating circumstance of recidivism must be considered, and although the penalty imposed by the lower court is justified by reason of the aggravating circumstance of nocturnity, we deem it advisable to consider the question of whether or not the recidivism of the appellant should be taken into account, in view of the fact that his conviction for robbery took place sixteen years prior to the trial of the present case.

Article 89 of the Revised Penal Code provides that criminal liability is totally extinguished by the death of the convict, the service of the sentence, amnesty, absolute pardon, prescription of the crime, prescription of the penalty, and by the marriage of the offended woman, as provided in article 344 of the Code.

Article 90 provides that crimes punishable by death, reclusion perpetua or reclusion temporal shall prescribe in twenty years; those punishable by other afflictive penalties shall prescribe in fifteen years; those punishable by a correctional penalty shall prescribe in ten years, with the exception of those punishable by *arresto mayor*, which shall prescribe in five years; that the crime of libel or other similar offenses shall prescribe in two years, the offenses of oral defamation and slander by deed in six months, and light offenses in two months; that when the penalty fixed by law is a compound one the highest penalty shall be made the basis of the application of the rules contained in the first, second and third paragraphs of this article.

It is suggested that in view of the foregoing provisions of law the former conviction of the accused, which took place sixteen years prior to the trial of the present case, should not be taken into consideration as an aggravating circumstance. We cannot admit the force of this argument. It is true that if the accused had not been prosecuted for robbery within ten years from the date when the crime was committed, it would have prescribed, but he was prosecuted within that period and convicted, and we do not find anything in the law which authorizes us to disregard that fact. Until the Legislature provides otherwise, recidivism must be taken into account as an aggravating circumstance, no matter how many years have intervened.

The corresponding provision of the Penal Code in force in Spain, as amended by the Royal Decree of November 14, 1925, relating to recidivism, is quite different from the Revised Penal Code. It reads as follows: "Hay reincidencia cuando al ser juzgado un culpable por un delito estuviere ejecutoriamente condenado por otro comprendido en el mismo titulo de esteCodigo o en la misma ley especial, siempre que la pena seialada al delito castigado anteriormente sea superior o igual a la que este asignada al delito que se pena o, por lo menos, contenga aqu&la alguno de los grados integrantes de esta.

"Los efectos de la reincidencia, como circunstancia agravante, cesaran cuando haya pasado el tiempo necesario para la prescripcion del delito que sirva para apreciarla.

"En ningtin caso se estimara la circunstancia agravante de reincidencia cuando el reo haya delinquido antes de cumplir diez y seis afios; y nunca podran ser apreciadas como determinantes de reincidencia, cuando se trate de reos mayores de diez y seis afios, las condenas que les haya sido impuestas por delitos cometidos antes de cumplir dicha edad." (2 Viada [5th ed.], 292.)

It is expressly provided in the Spanish law, as amended, that the effects of recidivism as an aggravating circumstance shall cease when the time necessary for the prescription of the crime has elapsed.

Article 62, No. 5, relating to habitual delinquency, provides that for the purposes of this article a person shall be deemed to be a habitual delinquent, if within a period of ten years from the date of his release or last conviction of the crimes of robo, hurto, estafa, or falsificacion, he is found guilty of any of said crimes a third time or oftener. It is suggested that by analogy a prior conviction should not be regarded as an aggravating circumstance unless the second conviction takes place within ten years from the date of the first conviction. This contention is untenable. In the provision quoted relating to habitual delinquency the period of ten years is fixed by the law itself, and the penalty for habitual delinquency in the case of the four crimes specified in the law is an additional penalty. This court has held in the case of *People vs. Melendrez* (59 Phil., 154), that in the case of said crimes recidivism is to be taken into account as an aggravating circumstance in fixing the principal penalty, although the prior convictions of the accused make him a habitual delinquent.

Finally, it may be observed that even if this were a case of reiteracion under No. 10 of article 14 of the Revised

Penal Code, as alleged in the information, the present Code does not authorize us to disregard the former conviction, because the second paragraph of the corresponding provision in the Penal Code (article 10, No. 17), providing that this circumstance shall be taken into consideration by the courts according to the circumstances of the offender and the nature and effects of the crime, has not been included in the Revised Penal Code.

The defendant is sentenced to suffer an indeterminate sentence of not less than six months of arresto mayor and not more than two years, eleven months, and eleven days of prision correccional, and to indemnify the offended party in the sum of P380, with the corresponding subsidiary imprisonment in case of insolvency. As thus modified, the decision appealed from is affirmed, with the costs against the appellant.

Street, Hull, Butte, Goddard, and Diaz, JJ., concur.

AVANCENA, C. J., dissenting in part:

I do not agree with the majority opinion in so far as it holds that recidivism is an aggravating circumstance. Between the appellant's trial for the crime with which he is now charged and his previous conviction, 16 years have intervened.

Article 14, subsections 9 and 10, of the Revised Penal Code, relative to recidivism and previous conviction, is a reproduction of article 10, subsections 17 and 18 of the old Penal Code, and both are taken from article 10, subsections 17 and 18 of the Penal Code which was in force in Spain prior to the year 1925. In a decision of April 28, 1896, the Supreme Court of Spain, interpreting this article with reference to previous conviction, in a case where the intervening period between the trial of the last crime and the previous conviction was ten years, declared, among other grounds, that the aggravating circumstance of previous conviction should not be taken into consideration for the reason that it increases the penalty for the new crime in consideration of a certain moral and legal relation of the latter to the former, which shows criminal propensities or greater perversion, and in the said case the time intervening between the two offenses was considered so long that it cuts or interrupts such relation.

In the year 1925, the above stated article was "by royal decree amended in Spain, by providing that the circumstances of recidivism and previous conviction shall not be taken into consideration in cases where the time necessary for the prescription of the offense, and upon which said circumstances are based, shall have intervened between the previous conviction and the last crime charged. With such amendment, it is noted that the said legislative act ratified the aforesaid jurisprudence of the Supreme Court of Spain and furthermore definitely established the length of time which cuts and interrupts the relation between the previous conviction and the crime charged.

The said amendment was not adopted in the Revised Penal Code. However, the same criterion which inspired such amendment is disclosed in the Revised Penal Code which, in penalizing habitual delinquency (article 62, subsection 5), requires and fixes at not more than 10 years the intervening period between the previous conviction and the crime charged. However, at all events, in the absence of an express provision fixing such period, at least there is the doctrine that, with respect to previous conviction, 10 years is sufficient to interrupt and cut the relation between both crimes.

MALCOLM, VILLA-REAL, ABAD SANTOS and IMPERIAL, JJ.:

We concur in the dissenting opinion of the Chief Justice.

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