

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLANT, VS. PASCUAL FAJARDO, DEFENDANT AND APPELLEE.*G.R. No. 43466. May 25, 1938*

Ponente: IMPERIAL, J.

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In criminal case No. 9730 of the Court of First Instance of Laguna Pascual Fajardo was convicted of the crime of damage to property through reckless imprudence and sentenced to pay a fine of P270.10 and the costs. He appealed to this court, but his appeal was dismissed for the reason that no brief was submitted within the reglementary period. Judgment was entered against him and the record was returned to the lower court. When the judgment was to be executed, it was found that the accused was insolvent, for which reason the sheriff returned the writ unsatisfied. The clerk of court informed the provincial fiscal to this effect and the latter replied that the accused should suffer the corresponding subsidiary imprisonment although he was not so sentenced in the judgment. The clerk of court reported the case to the court which, by order of March 13, 1935, held that the accused could not be compelled to suffer subsidiary imprisonment because he was not so sentenced in the judgment, and ordered his release, which was carried out. The fiscal appealed from said order.

The legal question confronting us is whether an accused who has been sentenced only to pay a fine may be compelled to undergo subsidiary imprisonment, in the manner prescribed by law, in case he is found insolvent because he has no property with which to pay. The Solicitor-General strongly maintains the affirmative and, in a nutshell, argues that, under article 39 of the Revised Penal Code, the subsidiary imprisonment need not be imposed in the judgment and may be automatically served if the offender is found to be insolvent. We do not agree with this contention.

The first paragraph of article 39 of the Revised Penal Code reads as follows:

"Art. 39. Subsidiary penalty.—If the convict has no property with which to meet the pecuniary liabilities mentioned in paragraphs 1st, 2nd and 3rd of the next preceding article, he shall be subject to a subsidiary personal liability at the rate of one day for each 2 pesos and 60 centavos, subject to the following rules:

Article 78 of Chapter V of the same Code, in its pertinent part, which deals with the execution and service of penalties, provides:

"Art. 78. When and how a penalty is to be executed.—No penalty shall be executed except by virtue of a final judgment.

"A penalty shall not be executed in any other form than that prescribed by law, nor with any other circumstances or incidents than those expressly authorized thereby."

It is a fundamental principle consecrated in section 3 of the Jones Law, the Act of Congress of the United States of America approved on August 29, 1916, which was still in force when the order appealed from was made, that no person may be deprived of liberty without due process of law. This constitutional provision was in a sense

incorporated in article 78 of the Revised Penal Code prescribing that no penalty shall be executed, except by virtue of a final judgment. As the facts show that there is no judgment sentencing the accused to suffer subsidiary imprisonment in case of insolvency to pay the fine imposed upon him, because the said subsidiary imprisonment is not stated in the judgment finding him guilty, it is clear that the court could not legally compel him to serve said subsidiary imprisonment. A contrary holding would be a violation of the laws aforementioned. That subsidiary imprisonment is a penalty, there can be no doubt, for, according to article 39 of the Revised Penal Code, it is imposed upon the accused and served by him in lieu of the fine which he fails to pay on account of insolvency. There is not a single provision in the Code from which it may be logically inferred that an accused may automatically be made to serve subsidiary imprisonment in a case where he has been sentenced merely to pay a fine and has been found to be insolvent. Such would be contrary to the legal provisions above-cited and to the doctrine laid down in *United States vs. Miranda* (2 Phil., 606, 610), in which it was said: "The judgment of the lower court fails to impose subsidiary imprisonment in case of insolvency for indemnification to the owner of the banca, but only imposes subsidiary punishment as to costs. In this respect the judgment is erroneous and should be modified."

We, therefore, conclude that an accused who has been sentenced by final judgment to pay a fine only and is found to be insolvent and could not pay the fine for this reason, cannot be compelled to serve the subsidiary imprisonment provided for in article 39 of the Revised Penal Code.

In view of the foregoing, we affirm the order appealed from, without costs. So ordered.

Villa-Real, Abad Santos, Diaz, Laurel, and Concepcion, JJ., concur.

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