

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. AGRIPINO MACASAET, DEFENDANT AND APPELLANT.*G.R. No. 4432. October 15, 1908*

Ponente: MAPA, J.

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It was proven at the trial that the accused had been selling native wine at retail without the license required by the law. The evidence consists of the testimony of two witnesses whom we consider worthy of credit. One of them, William Bigger, sergeant of the Ninth Cavalry, United States Army, declares that he bought wine from the defendant on four different occasions, and that the last time was between the 1st and the 5th of September, 1907, on which occasion the accused gave him half a bottle of wine, for which he paid the latter 35 or 40 centavos, Philippine currency. This last purchase was made in the presence of the other witness, James B. Jelks, a corporal of the same regiment of cavalry, who saw the former witness receive the bottle of wine from the defendant and pay its price to the latter.

The accused in testifying at the trial, said nothing tending to overcome the declarations of the witness Bigger regarding the first purchases of wine which the latter declares he made from the former, for which reason the testimony of the said witness on this point is competent. With regard to the sale effected in the earlier part of September, the accused expressly admits the material fact of having delivered wine to the witness, but he states that he gave it to him as a mere gift without receiving any payment for it. That wine, according to the accused, was the rest of the wine he had ordered that afternoon in order to entertain the doctor who was attending his sick daughter. The doctor, or rather the medical student, as he really is, to whom the accused refers, confirms the fact that the latter sent for some wine in order to entertain him, and it was also so declared by the person who purchased the wine by order of the accused. This, however, even supposing that it were true, would not be in conflict with the declarations of the Government witnesses, inasmuch as the accused might have sold to Sergeant Bigger the wine which remained after entertaining the doctor.

It is true that the above-mentioned person, who bought the wine for the doctor, states moreover that he witnessed the act of the accused in offering and delivering the wine to Sergeant Bigger, and that the latter did not pay anything for it; but it seems to us that the contrary declaration of Bigger himself and his companion is the more probable, since there is nothing in the record that may explain satisfactorily the alleged gift of the wine in question. The explanation given by the accused, that he offered and gave the bottle of wine to Bigger gratuitously because the latter asked him to sell him on credit a box of cigars, which he refused to do, seems to us somewhat artificial in denial of the report made by the former, that the wine was sold and not given as a gift, which is much more probable and credible, inasmuch as the accused had already sold wine to Bigger on previous occasions, as declared by the latter in the trial without opposition. Moreover, it does not appear to be plausible or logical that the accused was obliged to give or that he did give as a present, half a bottle of wine to Bigger, simply because he did not want to sell on credit a box of cigars to the latter.

The fact that the accused had been selling native wine at retail without the necessary license constitutes a violation

of section 66, in relation with section 68, subsection 5, of the Internal Revenue Law, and the judgment appealed from, in so far as it sentences the said accused to the payment of a fine of P300 and the costs of the trial, and directing him to obtain the required license, is in accordance with the law, and should, therefore, be affirmed.

The judgment also sentences the accused to imprisonment for five months in case of insolvency with respect to the fine imposed, and to pay the costs. This imprisonment is subsidiary in its nature, inasmuch as the accused is to suffer the same only in the case of nonpayment of the fine and the costs. In the case at bar, the law does not authorize such subsidiary imprisonment, which is, therefore, illegal. The above-mentioned section 66 of the Internal Revenue Law, in its paragraph No. 1, prescribes alternatively the penalty of a fine of not less than 200 nor more than P2,000, or imprisonment not exceeding six months, and in paragraph No. 2, a fine of not more than P1,000, or imprisonment not exceeding six months, or both penalties in the discretion of the court. The imprisonment is prescribed in both paragraphs as a principal penalty, and in this manner only should it be imposed. The fine alone being imposed, imprisonment can not be inflicted subsidiarily in case of insolvency, because the law in question does not so provide.

It seems that the judge below imposed the subsidiary imprisonment in view of the provisions of Act No. 1732, section 1 of which provides that "when a fine is imposed as a whole or any part of the punishment for any criminal offense made punishable by any Act or Acts of the Philippine Commission, the court shall also sentence the guilty person to suffer subsidiary imprisonment until the fine is satisfied," This act can not be applied to the present case, inasmuch as it went into effect only on the 1st day of November, 1907, and the trial only took place on September of the same year. It is a well-settled doctrine that penal statutes can not be made retroactive, except in the case they are favorable to the accused. In conformity with said doctrine, article 21 of the Penal Code provides that "no crime or misdemeanor shall be punished by a penalty which was not established by law prior to its commission."

The judgment appealed from is affirmed, except that part thereof which sentences the accused to five months' imprisonment in case of insolvency with respect to the fine and the costs, which is hereby reversed, with the costs of this instance against the said accused. So ordered.

Arellano, C. J., Torres, Carson, Willard, and Tracey, JJ. concur.

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