

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. CANUTO BERNAL, DEFENDANT AND APPELLANT.*G. R. No. 44988. October 31, 1936*

Ponente: IMPERIAL, J.

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The accused was charged with the crime of theft, the information alleging that, aside from the presence of the aggravating circumstance of nocturnity, the accused is an habitual delinquent because he had been convicted, prior to the commission of the offense at bar, thrice of the same crime of theft. The accused pleaded not guilty, but the court, after trial, found him guilty as charged, and sentenced him to four (4) months and one (1) day of arresto mayor, to pay the accessories of the law, to return the three stolen roosters to Mariano de Leon or to indemnify the latter the value thereof in the sum of P3, and to pay the costs. As an habitual delinquent, because previously convicted three times of the same crime of theft, he was sentenced to an additional penalty of seven (7) years of prision mayor.

The facts are not disputed by the defense. It has been established that late in the evening of October 11, 1935, the accused, without the owner's consent, took three gamecocks belonging to Ellas Piamonte valued at P50, and three other roosters belonging to Mariano de Leon valued at P3. Only two of the gamecocks of Elias Piamonte, valued at P30, were recovered. It has equally been established that the accused had been thrice convicted of the crime of theft: The first time on April 25, 1935 by the justice of the peace court of San Pablo, Laguna; the second time on June 24, 1935, by the same justice of the peace court, and the third time on October 19, 1935, by the justice of the peace court of Tanauan, Batangas.

The defense assigns only one error of law in the judgment, to wit, in finding the accused an habitual delinquent under subsection (6) of paragraph 5 of article 62 of the Revised Penal Code, and in imposing upon him the penalty therein provided. It contends that the applicable provision is that found in subsection (a) of the aforesaid codal paragraph and article, because in truth and according to the decisions, the accused has no more than two prior convictions, the third being the one at bar. Elaborating on this contention, the defense alleges that the conviction on October 19, 1935, for the crime of theft should not be counted against the accused because it took place after the commission of the offense at bar on the 11th of the said month and year. The Solicitor-General in his brief agrees with the defense, and recommends that the penalty fixed in subsection (a) of paragraph 5 of article 62 of the Revised Penal Code be imposed upon the accused. We hold that the third conviction, having taken place after the commission of the last offense with which the accused is now charged, should not be reckoned with in determining habitual delinquency and the additional penalty to be imposed, upon the authority of the decisions of this court in *People vs. Santiago* (55 Phil., 266), *People vs. Ventura* (56 Phil., 1, 5), and *People vs. Reyes* (G. R. Nos. 43904, 43905, October 18, 1935 [62 Phil., 9661]).

The aggravating circumstance of recidivism should be taken into account in the commission of the crime of theft in view of the established fact that the accused was thrice convicted of the said crime prior to the trial of this case on November 4, 1935 (art. 14, par. 9, Revised Penal Code). For this reason, the penalty imposable should be six

(6) months and one (1) day of prision correccional. As an habitual delinquent, because he was twice convicted of the crime of theft prior to the commission of the offense at bar (art. 62, last paragraph of the Revised Penal Code), he should be sentenced to the additional penalty of three (3) years of prision correccional pursuant to subsection (a) of paragraph 5 of the said article.

The question arose, in the course of our deliberation on this case, of whether or not in instances where the accused turns out to be an habitual delinquent the aggravating circumstance of recidivism, when alleged and proved, should be taken into account in fixing the penalty applicable for the commission of the principal offense, independently of the additional penalty provided by law for habitual delinquency. It has been urged that said aggravating circumstance should not be so considered, otherwise it would be twice held against the accused inasmuch as it is necessarily taken into account in ascertaining whether he is a habitual delinquent or not. The majority of the court hold to the contrary view, namely, that recidivism should be reckoned with; hence, the accused is sentenced to the minimum of "the maximum penalty fixed by law.

In resolving this question as above set out, the majority of the court gave heed to the following considerations:

First: This is not the first time that the question has been submitted to the consideration of the court. In *People vs. Melendrez* (59 Phil., 154), and *People vs. Espina* 62 Phil., 607), we have already held that in cases similar to the one at bar, the aggravating circumstance of recidivism should be taken into consideration, notwithstanding the allegation and proof that the accused were habitual delinquents and should accordingly be sentenced to the additional penalty provided by law; and

Second: It is not correct to assume that recidivism is twice taken into account when the accused is declared an habitual delinquent and when it is deemed to aggravate the crime in fixing the principal penalty to be imposed, because recidivism as an aggravating circumstance modifying criminal liability is not an inherent or integral element of habitual delinquency which the Revised Penal Code considers as an extraordinary and special aggravating circumstance.

Under the last subsection of paragraph 5 of article 62 of the Revised Penal Code, a person shall be deemed to be habitually delinquent, if within a period of ten years from the date of his release or last conviction of the crime of robbery, theft, estafa, or falsification, he is found guilty of any of said crimes a third time or oftener. Paragraph 9 of article 14 of the Revised Penal Code defines recidivism by stating that it is committed by a person who, at the time of his trial for one crime, shall have been previously convicted by final judgment of another crime embraced in the same title of the Code. Defining reiteration or habituality, paragraph 10 of the same article provides that it is committed when the offender has been previously punished for an offense to which the law attaches at an equal or greater penalty or for two or more crimes to which it attaches a lighter penalty. Reflecting on these definitions it will be seen that recidivism, viewed as an aggravating circumstance, is not a factor or element which necessarily forms an integral part of habitual delinquency. It will be noted that the elements as well as the basis of each of these circumstances are different. For recidivism to exist, it is sufficient that the accused, on the date of his trial, shall have been previously convicted by final judgment of another crime embraced in the same title. For the existence of habitual delinquency, it is not enough that the accused shall have been convicted of any of the crimes specified, and that the last conviction shall have taken place ten (10) years before the commission of the last offense. It is necessary that the crimes previously committed be prior to the commission of the offense with which the accused is charged a third time or oftener.

In view of the foregoing, the appealed judgment is modified, and the accused-appellant is found guilty of the crime of theft charged in the complaint and sentenced to six (6) months and one (1) day of prision correccional, to return to the offended parties the stolen and unrecovered roosters, or in default thereof to indemnify Elias Piamonte in the sum of P20 and Mariano de Leon in the sum of P3, with the corresponding subsidiary

imprisonment in case of insolvency, and to an additional penalty of three (3) years of prision correccional, with the costs in both instances. So ordered.

Avanceña, C. J., Villa-Real, Diaz, and Laurel, JJ., concur.

CONCURRING IN PART AND DISSENTING IN PART

ABAD SANTOS, J., :

I agree that the appellant is guilty of the crime of theft, but I am constrained to dissent once more from the opinion of the majority in so far as it holds that, in the imposition of the penalty prescribed by law for the crime committed by the appellant, the aggravating circumstance of recidivism should be taken into consideration. My views on this point have already been set forth in my opinion filed in the case of *People vs. Melendrez* (59 Phil., 154), but they will perhaps bear further elaboration.

I maintain that, upon the facts of this case and the law applicable thereto, the aggravating circumstance of recidivism should not be taken into consideration in the imposition if the penalty prescribed by law for the crime of which the appellant has been found guilty. Article 14, paragraph 9, of the Revised Penal Code, defines a recidivist as follows:

"A recidivist is one who, at the time of his trial for one crime, shall have been previously convicted by final judgment of another crime embraced in the same title of this.

And article 62, paragraph 5 (c), of the same Code, defines a habitual delinquent as follows:

"For the purposes of this article, a person shall be deemed to be 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 falsification, he is found guilty of any of said crimes, a third time or oftener."

It seems clear from the provisions of law above quoted that if, within a period of ten years from the date of his release or last conviction of the crime of robo, hurto, estafa, or falsification, a person be found guilty of the same crime for the second time, he would be deemed a recidivist; and if he be found guilty for the third time or oftener, he would be deemed a habitual delinquent. The law determines the effect to be given to one previous conviction, and it also determines the effect of two or more previous convictions. One previous conviction merely constitutes the generic aggravating circumstance prescribed by article 14, paragraph 9, while two or more previous convictions qualify the crime. The previous convictions enter into the third or subsequent offense to the extent of aggravating it, and increasing the punishment. In other words, such previous convictions constitute an essential element of the aggravated offense. "The previous conviction enters into the second or third offense to the extent of aggravating it, and increasing the punishment; and, where it is sought to impose the greater penalty for a second or third offense, the previous conviction or convictions, like every other material fact, must be distinctly alleged in the indictment. 'When the statute imposes a higher penalty upon a second and a third conviction, respectively, it makes the prior conviction of a similar offense a part, of the description and character of the offense intended to be punished; and therefore the fact of such prior conviction must be charged as well as proved. It is essential to an indictment that the facts constituting the offense intended to be punished should be averred.' And in like manner, when a statute, besides imposing a higher penalty upon a second or third conviction than upon the first, provides that any person convicted of two or more offenses upon the same indictment shall be subject to the same punishment as if he had been successively convicted on two indictments, still the second and third offenses must be alleged in the indictment to be second and third offenses in order to warrant the increased punishment." (Clark's Criminal Procedure, p. 204, cited with approval in *People vs. Nayco*, 45 Phil., 167.)

The same view is expressed by Viada in commenting on article 533 of the Penal Code of Spain "Tratase aqui del hurto cualificado, cuya criminalidad ha creido conveniente agravar el legislador, y, por lo tanto, castigar con penas mas severas, cuando por los objetos sobre que recae, o por el lugar en que se comete, o por las circunstancias personales del culpable o sus relaciones con el perjudicado, se demuestra la mayor perversidad del primero en la comision de semejante delito. Algunas de estas circunstancias, como la de ejecutarse el delito en lugar sagrado, la de intervenir abuso de confianza y la de ser el culpable reincidente, son ya de por sf circunstancias agravantes genericas de todo delito en que concurren (ntims. 19,10 y 18 del articulo 10). Aquf son algo mas; son circunstancias constitutivas, esenckfies de los delitos previstos en este articulo, y por lo tanto, con arreglo al 79, no cabe apreciarlas al efecto de aumentar la pena en aquel senalada, la que debera imponerse siempre en el grado medio, a no concurrir cualquiera otra de las circunstancias generates de agravacion del art. 10 que no sea de las expresadas, en cuyo caso procederia la aplicacion de la pena en el grado maximo con arreglo al num. 3.º del art. 82; o a no mediar alguna circunstancia atenuante, pues entonces deberia imponerse al culpable la pena en el grado minimo, en conformidad a lo dispuesto en el num. 2.º del precipitado art. 82." (Viada, 5th ed., vol. 6, p. 289.)

In *United States vs. Campo* (23 Phil, 368), this court held that the existence of the generic aggravating circumstances need not be alleged in a complaint or information, but if proven at the trial, they must be taken into consideration ra imposing the penalty. On the other hand, a qualifying circumstance must be alleged and proved in order that the same may be taken into consideration. It has also been held that once a circumstance has been treated as a qualifying circumstance, it may not again be taken into consideration as a generic aggravating circumstance.

"In those cases wherein, under the provisions of the Penal Code, the legal designation or characterization of an offense is modified by an allegation set forth in the complaint or information showing that such offense had been marked with one of the above-mentioned generic aggravating circumstances, this aggravating circumstance when alleged and proven is treated as a qualifying circumstance, and in that event, having once been taken into consideration for the purpose of giving to the acts committed by the convict a legal qualification or characterization higher than they would otherwise have had, it should not be again taken into consideration as an aggravating circumstance marking the commission of this higher offense" (*Italics ours.*)

In *People vs. Nayco*, *supra*, this court held that to convict the accused as an habitual delinquent, the previous convictions, like any qualifying circumstance, must be alleged and proved.

Article 533 of the Penal Code of Spain provides:

"El hurto se castigara con las penas inmediatamente superiores en grado a las respectivamente senaladas en los dos articulos anteriores:

* * * * *

"3.º Si fuere dos o mas veces reincidente."

Commenting on this article Viada eays:

"Cuestion 60. Comete uno un delito de hurto, y resulta haber sido penado anteriormente tres veces por delito de la misma especie: ¿cabe en este caso apreciar la circunstancia de esa triple reincidencia, primero como qualificativa, para elevar la pena al grado inmediatamente superior, tomando para ello dos de las tres reincidencias, y segregar la tercera como agravante generica, para imponer al culpable dicha pena superior en el grado maximo? El Tribunal Supremo ha resuelto la negativa, fundandose en que con arreglo a lo prescrito en el art. 533, numero 3.º la pena del delito de hurto debe ser la inmediatamente superior en grado a la respectiva del 531, cuando su autor fuere dos o mds veces reincidente; siendo evidente, por lo tanto, que las tres

expresadas reincidencias, y aun cualquiera otras que hubiese ademas, no pueden constituir sino una sola circunstancia cualificativa, cuyo efecto es unicamente el de elevar la pena al grado superior inmediato; y que la Sala sentenciadora, al dividir y separar esas tres reincidencias, aplicando dos de ellas, la una como circunstancia cualificativa y la otra como generica o comun, infringe la disposicdn legal dltimamente citada, a la vez que la circunstancia 18.a del art. 10 y la regla 3.a del referido C6digo Penal." (S. de 21 de diciembre de 1872, Gaceta de 16 de febrero de 1873. Viada, 5th ed., vol. 6, 317.)

It will be observed that the reason for not taking into consideration the second conviction as a generic aggravating circumstance in the imposition of the penalty prescribed under article 533 of the Penal Code of Spain, is because the third or subsequent conviction, together with the previous ones, constitutes but a single qualifying circumstance. The same may be said in relation to article 62, paragraph 5, of the Revised Penal Code. The third or subsequent conviction, combined with the previous ones, constitutes but a single qualifying circumstance. In other words, the second conviction—which generally goes to make up the generic aggravating circumstance of recidivism—is necessarily included in the number of convictions required to establish habitual delinquency.

RECTO,J.:

I concur in the foregoing dissenting opinion of Justice Abad Santos.

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