

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MARCELO AQUINO ET AL., DEFENDANTS AND APPELLANTS.

G.R. No. 4500. September 08, 1908

Ponente: CARSON, J.

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CARSON, J.:

The appellants were charged with the crime of robbery in an armed band (robo en ouadrilla) upon the following information filed by the provincial fiscal on the 28th of June, 1907:

"The undersigned charges Marcelo Aquino, Toribio Limos, and Ignacio Varela with the crime of robbery in a gang, committed as follows:

"That at about 2 o'clock in the morning of the 10th of April, 1907, in the barrio of Rimos, pueblo of Luna, Province of La Union, the above-named accused, in company with other unknown individuals, willfully, illegally, feloniously, and with arms, entered the dwelling of one Bonifacia Raso, and, with intent of profiting thereby and by means of violence and intimidation, took possession of personal property of Doroteo Barroso and of the said Bonifacia Raso, of the total value of 2,338 pesetas; Doroteo Barroso was bound and thrown down with his face to the floor; this deed, which constitutes the offense punished in No. 5 of article 503 of the Penal Code, was executed within the jurisdiction of this Court of First Instance and against the statute."

Both of the appellants were convicted of the crime with which they were charged, and both and each of them were sentenced to nine years of presidio mayor, with the accessory penalties prescribed in article 57 of the Penal Code, to the restitution to the owners of the stolen goods or the payment of their value, and to the payment of a proportionate share of the costs of the trial.

Counsel for the appellants contends that the judgment of conviction and sentence should be reversed because, as he alleges, first, the accused were brought to trial without a preliminary investigation of the facts alleged in the information; second, it does not appear that they were arraigned or given an opportunity to enter their formal plea; third, the information is defective in that it fails to charge specifically the crime of robbery in an armed band (robo en cuadrilla) of which the accused were convicted; fourth, the evidence adduced at the trial fails to establish the identity of the appellants with the unknown persons who committed the crime charged in the information.

It appears from the record that two preliminary trials (one upon a complaint filed by Doroteo Barroso, and the other upon an information filed by the provincial fiscal) were had in the court of the justice of the peace of the municipality of Luna, and that the charges were dismissed in both cases, the court being of opinion that the evidence did not sustain a finding that there was probable cause to believe that the accused were guilty of the offense charged; that a third complaint was submitted by an official of the Constabulary to the justice of the peace of the provincial capital and that no action was taken upon that complaint; that finally the fiscal of the province filed the above set out information in the Court of First Instance, and that under his directions this information was forwarded to the justice of the peace of San Fernando, the capital of the province, who held a preliminary investigation thereon, found that there was probable cause to believe that the accused were guilty as charged, and

remanded them for trial to the Court of First Instance; that later upon this information the accused were tried and convicted, and that thereafter the trial judge set aside his judgment of conviction *ex proprio motu*, and granted the accused a new trial; that upon this new trial the accused were again convicted and sentenced; and that it is from this final judgment and sentence that the appeal in this case was entered.

It thus appears that the accused were in fact given a preliminary investigation upon the information upon which they were tried in the court of the justice of the peace of the provincial capital. The counsel contends that this preliminary proceeding was invalid because it does not appear that the judge of the trial court expressly ordered reference of the, information to the justice of the peace of San Fernando, in accordance with the provisions of Act No. 1627. No objection appears to have been made to this proceeding either in the court of the justice of the peace or in the trial court, nor did the accused raise any objection at the trial upon the ground now raised for the first time upon appeal, that they were not given a preliminary trial. Under these circumstances, we are of opinion that they must be taken to have waived any other preliminary investigation than that which was accorded them in the court of the justice of the peace of San Fernando, and to have waived those defects in the preliminary proceedings which are now indicated by the counsel upon appeal. It has been uniformly held, not only by this court but by the various courts of the United States, that when provision is made for the preliminary trial of accused persons by a justice of the peace, this right is one which may be waived by the accused (*People vs. Tarbox*, 115 Cal., 57; 47 Pac. Rep.—Idaho—945; 46 Nebr., 631; 83 Wis., 486; *People vs. Harris*, 103 Mich., 473; 25 Fla., 675; 45 Hun., 34; *U. S. vs. Cockrill*, 8 Phil. Rep., 742; *U.S. vs. Asebuque*, 9 Phil. Rep. 241); and this court has frequently held that where the accused fails to object to proceedings upon the ground that he has had no preliminary investigation, he must be taken to have waived his right thereto, and can not raise an objection upon this ground for the first time upon appeal. (*U. S. vs. Asebuque*, 9 Phil. Rep., 241; 54 Kan., 206; 44 Neb., 417.)

The second assignment of error would appear to be based upon an oversight of counsel for the appellants. Upon page 62 of the record of the second trial, it is expressly set out that "the accused upon arraignment pleaded not guilty." This trial was had, as counsel himself admits, upon the above set out information, dated the 28th of June, 1907, and the fact alleged by counsel that it does not affirmatively appear that the accused were affirmatively arraigned upon the complaints filed in the court of the justice of the peace, which were dismissed, is of course of no importance.

The third assignment of error wherein it is alleged that the information is defective in that it fails to charge specifically the crime of robbery in an armed band, is sufficiently answered by a reading of the above set out information. The argument of counsel appears to be directed to the defects in the complaint originally filed in the court of the justice of the peace which appears on page 24 of the record, but as he himself admits, on page 5 of his brief, the trial in the Court of First Instance was had upon the above set out information, dated June 28, 1907, which appears on page 34 of the record. This information expressly charges "that the accused (three in number) in company with others unknown, entered with arms the house of Bonifacia Raso," where the crime was committed, and this would seem to be sufficient compliance with the provisions of the statute.

The contention of counsel for the appellants as to the failure of proof of identification of the accused with the persons who committed the robbery set out in the information is based upon the fact that the proof of identity rests substantially upon the testimony of the witness Paula Costes, who, counsel alleges, must have been so frightened at the time that the offense was committed that her capacity to recognize and identify the persons who committed the crime should not be accepted without some doubt. We think, however, upon a careful examination of her testimony, that it is conclusive and satisfactory, and taken together with the other evidence of record, leaves no room for doubt as to the guilt of the accused. The witnesses, however, saw only three members of the gang who committed the robbery, the others remaining outside the house, and the evidence therefore fails to establish the

allegations of the complaint that the gang was composed of more than three armed persons.

The judgment of the trial court that the accused were guilty of the crime of robbery in an armed band (robo en cuadrilla) must therefore be reversed, and this court should and does hereby find both the appellants guilty of the crime of simple robbery as defined in paragraph 5 of article 503, committed at night and in the house of the offended party. These facts should be taken into consideration as aggravating circumstances in accordance with the doctrine laid down in the case of the United States vs. Leyba (8 Phil. Rep., 671), and the sentencia of the supreme court of Spain of December 24, 1890. There being no extenuating circumstances, the penalty prescribed should be imposed in its maximum degree, and the penalty imposed by the trial court being within the limits of the maximum degree of the penalty prescribed by the Penal Code for the crime of which we have convicted the accused, we impose upon these appellants the same penalty with the costs against the appellants.

It should, perhaps, be observed that the penalty prescribed in article 508 for the robbery of an amount greater than 1,250 pesetas, committed with arms in an inhabited house, in one of the modes set out in that article, is higher in degree than that which is herein imposed upon the appellants who were charged with and convicted of the crime of robbery with violence and intimidation to the person, as defined and penalized in paragraph o of article 503 of the Penal Code; and although the evidence adduced at the trial would seem to sustain a finding that the crime actually committed would fall under the definition of the crime of robbery penalized in article 508, nevertheless we have not considered in this case whether upon the facts proven, the, penalty prescribed in article 508 could be imposed had the facts been sufficiently alleged in the information, because the information in this case fails to allege that the robbery was committed in one of the modes which are indicated in that article as a requisite to the commission of the crime therein penalized. So ordered.

Arellano, C. J., Torres and Mapa, JJ., concur.

Willard and Tracey, JJ.

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