

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE VS. ELPIDIO BAWASANTA Y DESERTO (ALIAS ELPIDIO BAUASANTA Y DISIERTO), DEFENDANT AND APPELLANT.

G. R. No. 45467. June 30, 1937

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

The appellant was charged with the crime of theft in the municipal court of the City of Manila. He pleaded not guilty, and after trial, was sentenced to one month and one day of imprisonment, to the additional penalty of four years, two months, and one day of imprisonment, and to indemnify the offended party in the sum of P13, with subsidiary imprisonment in case of insolvency. The information filed against him reads:

"That on or about the 26th day of November, 1936, in the City of Manila, Philippine Islands, the said accused conspiring and confederating together and helping each other did then and there willfully, unlawfully, and" feloniously, with the intent of gain and without the consent of the owner thereof take, steal, and carry away the following personal property belonging to Andres Zavalla, to wit:

"One black leather pocket book, two folds, rather new, valued at P5 containing P8 cash consisting of one P5 bill and 3-P1 bills—P8 and the other personal papers, to the damage and prejudice of the said owner in the total sum of P13.

"That the said accused Elpidio Bawasanta y Deserto (alias Elpidio Bauasanta y Disierto), is a habitual delinquent within the purview of rule 5, article 62, Revised Penal Code, with the following record: on August 29, 1935, he committed the crime of theft, on February 8, 1936, he was convicted of that count by final judgment of the Court of First Instance of Manila to serve 2 months and 1 day of imprisonment and to pay P6 indemnity; and on December 5, 1935, he committed another crime of theft and on April 20, 1936, he was convicted by final judgment of the municipal court of Manila to serve 1 month and 1 day of imprisonment and to pay P11.70 indemnity, the date of his last release being May 19, 1936."

The defendant appealed to the Court of First Instance of Manila, where he voluntarily pleaded guilty, and was there sentenced to one month and one day of arresto mayor, to the additional penalty of four years, two months, and one day of prison correctional, as a habitual delinquent, to indemnify the offended party in the sum of P13, with subsidiary imprisonment in case of insolvency, and to pay the costs. The defendant again appealed from this judgment.

I. On this appeal the defendant questions the imposition of the additional penalty only. He contends that it should be eliminated because under the allegations of the information his two previous convictions should be considered as only one, inasmuch as between the commission of the first and that of the second, less than four months had elapsed, and moreover, the second offense was committed before his conviction of the first. In support of his contention he cites the doctrines laid down in *People vs. Santiago* (55 Phil., 266), and *People vs. Ventura* (56 Phil., 1). In this the Solicitor-General concurs in his brief and recommends that the additional penalty be eliminated entirely. It is held that the contention of the defense is well-founded and finds support in the cited

cases.

II. The Solicitor-General contends that in fixing the penalty for the crime last committed, the aggravating circumstance of recidivism should be taken into account under article 14, No. 9, of the Revised Penal Code, and that the same should not be offset by the mitigating circumstance of plea of guilty because the latter does not exist under article 13, No. 7, of the said Code. The defense contends that the mitigating circumstance exists because the defendant voluntarily pleaded guilty when the case was heard in the Court of First Instance of Manila on appeal. Article 13, No. 7, of the Revised Penal Code which takes into account the mitigating circumstance of voluntary plea of guilty requires that the plea be made in court before the presentation of the evidence for the prosecution. The facts disclose that the defendant voluntarily pleaded guilty on appeal to the Court of First Instance of Manila, after entering the plea of "not guilty" in the municipal court and after the prosecution has presented its evidence, wherefore, it is held that the mitigating circumstance aforesaid does not exist and cannot be properly taken into account in favor of the defendant.

III. In reaching the foregoing conclusion, we have not overlooked the circumstance that in the Court of First Instance of Manila the case was tried anew, and as new trial was held under section 2473 of the Revised Administrative Code, from which it may be argued that the accused voluntarily pleaded guilty before the prosecution presented its evidence. It must be borne in mind, however, that a trial de novo means a new trial in the same manner, with the same effect, and upon the same issues as the case was tried in the lower court, in accordance with the rules of practice in the appellate court (*Sandlin vs. State* [1910], 3 Okla. Cr., 578; *State vs. Fort* [1909], 164 Ala., 578; *Crisostomo vs. Director of Prisons*, 41 Phil., 368), and does not mean that all the proceedings in the lower court have thereby been wiped out so as to preclude the ascertainment of whether the defendant voluntarily pleaded guilty in the lower court for the purposes of determining the existence of this mitigating circumstance.

IV. The offense committed by the defendant is penalized by article 309, No. 5, of the Revised Penal Code, with *arresto mayor* in all its period, and in the absence of any mitigating circumstance to offset the aggravating circumstance of recidivism, the penalty should be imposed in the maximum period, that is, from four months and one day to six months.

In view of the foregoing, the appealed judgment is modified, the defendant and appellant is found guilty of theft described in the information, with the aggravating circumstance of recidivism, and he is sentenced to four months and one day of *arresto mayor*, with the accessories of the law, to indemnify the offended party in the sum of P13, with subsidiary imprisonment in case of insolvency, and to pay the costs of both instances. So ordered.

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

ABAD SANTOS, J., dissenting in part:

I am of the opinion that the appellant is entitled to have considered in his favor the mitigating circumstance of having pleaded guilty in the Court of First Instance.

The fact that he went to trial in the municipal court upon a plea of not guilty should have no influence upon the trial had in the Court of First Instance, The law expressly provides that the perfection of an appeal to the Court of First Instance shall operate to vacate the judgment of the municipal court, and the action, when duly entered in the Court of First Instance, shall stand for trial de novo upon its merits in accordance with the regular procedure in that court, as though the same had never been tried and had been originally there commenced. (Admin. Code, sec. 2473.)

It has been said that a trial de novo means a trial anew of the entire case, as if no action had been instituted in the

justice's court. (Peters vs. Holder, 40 Okla., 93; 136 Pac, 400.) Nothing can be clearer than that if the present action were originally commenced in the Court of First Instance, the plea of guilty entered by the appellant would constitute a mitigating circumstance.

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