

FELICIANO B. GARDINER, AS ACTING PROVINCIAL FISCAL OF PAMPANGA, PETITIONER, VS. HONORABLE PEDRO MAGSALIN, JUDGE OF FIRST INSTANCE OF PAMPANGA, ET AL., RESPONDENTS.

G.R. No. 48185. August 18, 1941

Ponente: OZAETA, J.

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OZAETA, J.:

This is an original petition for the writ of mandamus to compel the respondent judge to admit the testimony of Catalino Fernandez, one of the accused in criminal case No. 6598, to prove the alleged conspiracy between him and his five coaccused, respondents herein.

It appears that on October 30, 1940, the herein petitioner, as Acting Provincial Fiscal of Pampanga, filed an information against the said Catalino Fernandez and the herein respondents Pedro Yalung, Eugenio Villegas, Maximo Manlapid, Magno Icban, and Rufino Maun, charging them with having conspired together to kill, and that they did kill, one Gaudencio Vivar, with evident premeditation.

Upon arraignment Catalino Fernandez pleaded guilty and his five coaccused, not guilty. At the trial of the latter, the former was called by the fiscal as his first witness, to testify to the alleged conspiracy. Upon objection of counsel for the defense, the respondent judge did not permit the witness Catalino Fernandez to testify against his coaccused, on the ground that he being a conspirator, his act or declaration is not admissible against his coconspirators until the conspiracy is shown by evidence other than such act or declaration, under section 12, rule 123 of the Rules of Court. A written motion for reconsideration, supported with lengthy argument, was filed by the fiscal to no avail. Hence the present petition for mandamus.

The only question raised here is the interpretation of section 12 of rule 123, which reads as follows:

"Sec. 12. Admission by conspirator.—The act or declaration of a conspirator relating to the conspiracy and during its existence, may be given in evidence against the coconspirator after the conspiracy is shown by evidence other than such act or declaration."

That is not a new rule of evidence. It is a re-enactment of paragraph 6, section 298 of the old Code of Civil Procedure, which provided that after proof of a conspiracy, the act or declaration of a conspirator relating to the conspiracy may be given in evidence. This rule has a well-settled meaning in jurisprudence, but apparently the respondents completely missed it. It is one of the exceptions to the "res inter alios" rule. It refers to an extrajudicial declaration of a conspirator—not to his testimony by way of direct evidence. For illustration, let us suppose that after the formation but before the consummation of the alleged conspiracy between Catalino Fernandez and his five coaccused, the former borrowed a bolo from a friend, stating that he and his coaccused were going to kill Gaudencio Vivar. Such act and declaration of Fernandez could not be given in evidence against his coaccused unless the conspiracy be proven first. The testimony of Fernandez's friend to the effect that Fernandez borrowed his bolo and told him that he (Fernandez) and his coaccused were going to kill Gaudencio Vivar would be admissible against Fernandez, but not against his coaccused unless the conspiracy between them

be proven first. It is admissible against Fernandez because the act, declaration, or omission of a party as to a relevant fact may be given in evidence against him (section 7, rule 123). But, without proof of conspiracy, it is not admissible against Fernandez's coaccused because the act and declaration of Fernandez are *res inter alios* as to his coaccused and, therefore, cannot affect them. But if there is conspiracy, each conspirator is privy to the acts of the others; the act of one conspirator is the act of all the coconspirators.

To further explain the rule in the language of the jurisprudence on the subject, we add:

"* * * The evidence adduced in court by the coconspirators as witnesses are not declarations of conspirators, but direct testimony to the facts to which they testify. Aside from the discredit which attaches to them as accomplices, their evidence is entirely competent to establish the facts to which they testify. The rule for which counsel contends is applicable only when it is sought to introduce extrajudicial declarations and statements of coconspirators" (*People v. Steelik*, 187 Cal. 361, 203 P. 78, 84.)

"There is no rule requiring the prosecution to establish a conspiracy in order to permit a witness to testify what one or all of several accused persons did; and evidence adduced by coconspirators as witnesses, which is direct evidence of the facts to which they testify, is not within the rule requiring a conspiracy to be shown as a prerequisite to its admissibility. * * *" (22 C. J. S. 1293; see also 2 Wharton's Criminal Evidence, 1189; *Cox and others v. State*, 8 Tex. Cr. App. 254, 303, 34 Am. Rep. 746; *White v. State*, 60 Tex. Cr. R. 559, 132 S. W. [2d] 518; *Bannister v. State*, 112 Tex. Cr. R. 158, 15 S. W. [2d] 629; *Bland v. State*, 89 S. W. [2d] 996, 998.)

Let the writ of mandate issue as prayed for by the petitioner, with costs. So ordered.

Abad Santos, Diaz, Moran, and Horrilleno, JJ., concur.

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