

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. LOPE ESTRANA, DEFENDANT AND APPELLANT.

G.R. No. 5751. September 06, 1910

Ponente: TRENT, J.

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TRENT, J.:

The complaint filed in this case is as follows:

"That on the 26th of July, 1909, in the municipality of Bacolod, Province of Negros Occidental, Philippine Islands, the said Lope Estrana, having been duly sworn as a witness in the Court of First Instance of the said province in criminal case No. 1055, entitled "United States vs. Gil Gamao et al.,"[1] for murder, illegally, maliciously, willfully, and falsely testified and declared, under oath, that on the 15th day of May, 1909, one Dionisio Tambolero came to his house in Japitan, within the jurisdiction of the municipality of, Escalante, in said province, at about 7 p. m. on the said 15th day of May, 1909, and that he remained in the house of the said accused (Lope Estrana) until the following day; when, as a matter of fact, and as the accused, Lope Estrana, well knew, the said Dionisio Tambolero was not at Japitan on the said 15th day of May, 1909; all of which was in violation of the statutes in such case made and provided."

The accused was arraigned, plead not guilty, tried, convicted, and sentenced to be confined in the Insular penitentiary, for the period of one year and one day, and "to hereafter be incapable of holding any public office or of giving testimony in any court of the Philippine Islands," and to pay the costs of the cause. He appealed to this court.

The Roman Catholic priest in charge of the parish in the town of Escalante, Province of Occidental Negros, was fatally wounded on the night of May 15, 1909, and died about 5 a. m. on the following morning. Subsequently thereto criminal case No. 1055, wherein the United States was plaintiff and Gill Gamao et al. were defendants, charged with the assassination of the said priest, was instituted in the Court of First Instance in the said province. The appellant, Lope Estrana, was called as a witness for the defense in said criminal case and after being duly sworn according to law, testified, among other things, that he was then living in the barrio of Japitan, jurisdiction of the said town of Escalante, and that one Dionisio Tambolero came to his house in the said barrio about 7 p. m. on May 15, 1909, and remained there all night, leaving about 5 a. m. on the following morning. The prosecuting officers, believing this testimony to be false, filed a complaint against the appellant, charging him with the crime of perjury. On the trial of this case in the court below the appellant again testified that the said Tambolero passed the night of May 15, 1909, at his house, and called as witnesses to corroborate him on this point his wife and stepson who did in fact corroborate the testimony of the appellant, in that the said Tambolero came to the appellant's house and passed the night of May 15 there, but they could not specifically state the hour he left the following morning.

Dionisio Tambolero testified in this case that he did not know exactly where the defendant's house is situated in the barrio of Japitan and that he never was. at any time in the house of the defendant in the said barrio; that on the morning of the 15th of May, 1909, he went to the church in Escalante, heard mass, and returned to his house in

the said town of Escalante; that at about 4 o'clock in the afternoon he returned to the sacristia, arriving there about 5 o'clock that afternoon, had a conversation with Natalio Inson about certain baptisms which had taken place on that afternoon, and that on leaving the sacristia he went to the store of one Jose Nieva and remained there until about 6.30 or 7 o'clock in the evening; that on leaving this store he returned to his own house and later went to the house of his compadre; that he and his family did not sleep in his own house on the night of May 15 on account of it being used for the storage of tobacco, but that they did sleep in the next house, which was owned by an employee of his; that the next morning, when he was informed by a policeman named Clemente Magallon of what had happened to the priest on the night before, he went direct to the convent, arriving there a few minutes after 5 o'clock; that within one-half hour after he arrived at the convent Gregorio Tudanca gave him some money and sent him to a Chinese store to buy nails to be used in making a casket for the deceased priest.

According to the testimony of this witness he did not leave the town of Escalante at any time during the night of May 15, 1909. He was in the sacristia of the church at 4 o'clock on the afternoon of May 15, and was at the convent the following morning just a few minutes after 5 o'clock. The testimony of this witness as to the time he was at the sacristia on the afternoon of the 15th of May is corroborated by the testimony of Natalio Inson, and his testimony with reference to the time he went to the convent on the following morning is corroborated in every particular by the testimony of Gregorio Tudanca, Celedonia Samonte, and Vicente Olmedo, all of whom testified positively that they saw the said Tambolero at the convent about 5 o'clock on the morning of the 16th of May assisting in the preparation of the body of the deceased priest for interment. So it has been conclusively established that Dionisio Tambolero did not go to the house of the appellant in the barrio of Japitan on May 15, neither did he spend the night of the 15th of May in the appellant's house. Considering the distance from the appellant's house to the town of Escalante, which requires at least two and one-half hours, either by land or water, and the difficulties to be encountered in making this journey, it was a physical impossibility for Tambolero to have left the house of the appellant at the time stated by him (the appellant) and to have arrived at the convent at the time he appeared there to assist in the burial of the priest. The appellant, Lope Estraña, did therefore knowingly and intentionally testify falsely, under oath, before a legally constituted tribunal, when he swore that Tambolero passed the night of May 15 in his (appellant's) house.

The prosecution in this case is based on the said false testimony of the appellant given in criminal case No. 1055. It may be inferred that Dionisio Tambolero was a material witness for the prosecution in said criminal case No. 1055. If said Tambolero did, in fact, testify as a witness for the prosecution in that case, the record of the case at bar fails to disclose what his testimony was. Tambolero did not state that he was a witness in the said murder case (No. 1055), neither did he make any reference to what he knew, if anything, about the commission of that murder; but on the contrary, reading his testimony alone, it would appear that he knew nothing about the facts surrounding the commission of that crime, as he stated that after leaving the Chinese store he went to his own house, slept in the house of one of his employees, and was informed the following morning¹ by a policeman that the murder had been committed. The only reference to the testimony of Tambolero in said murder case appears in the appellant's brief, wherein his counsel states that "In said case (referring to criminal case No. 1055) a witness for the prosecution, called Dionisio Tambolero, testified that on the night of May 15, 1909, when the murder was committed he saw Mauricio Gamao, with a bolo in his hand, come out of the lower part of the convent." (Mauricio Gamao was one of the defendants charged with the assassination of the priest in case No. 1055.) If this statement of counsel for the appellant be accepted as true, then Tambolero did testify that he saw one of the defendants in that case (No. 1055) on the night of the murder leaving the lower part of the convent with a bolo in his hand. This statement of counsel will be considered later.

Counsel for the appellant insists that the court below should have dismissed this case for the reason that the facts alleged in the complaint do not constitute the crime of perjury as defined and punished by Act No. 1697, basing

his contention on the ground that in order to sustain a conviction under said Act it was necessary to show that the appellant had testified twice about a certain matter, his latter testimony being contradictory of his former, and as he had only testified once he should have been charged with the crime of false swearing (falso testimonio), under the provisions of Chapter VI of the Penal Code.

Section 3 of Act No. 1697 is as follows:

"Any person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the Philippine Islands authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand pesos and by imprisonment for not more than five years; and shall, moreover, thereafter be incapable of holding any public office or of giving testimony in any court of the Philippine Islands until such time as the judgment against him is reversed."

This section specifically provides that any person who has taken an oath before a competent tribunal that he will testify truly, or that any written testimony by him subscribed is true, willfully and contrary to such oath, states or subscribes to any material matter which he does not believe to be true, is guilty of perjury. This section does not impliedly require as an essential element of the crime of perjury that a defendant who is prosecuted for having violated these provisions should have testified twice in any case or in any investigation, his second testimony being contradictory of his first, but he can be charged and convicted of the crime of perjury if he willfully testifies, under oath, as provided in said section, to any material matter which he does not believe to be true.

In the case of *The United States vs. Concepcion* (13 Phil. Rep., 424), the defendants were inspectors of the election board in the municipality of Calibo, Province of Capiz, in the election for Delegates held on the 31st of July, 1907. The defendants were accused and convicted for having violated the provisions of the Election Law, in that they refused to inscribe the name of one Esteban Leocario without just cause. The point in controversy in said case was whether or not Esteban Leocario appeared before the inspectors (the accused) in order to have his name registered in the electoral list. The accused were convicted of having violated the provisions of the Election Law and on appeal to this court the sentence and judgment of the lower court was affirmed. The defendants having testified in that case that the said Esteban Leocario did not appear before them on the day alleged, to have his name registered as an elector, the prosecution filed a complaint against the said defendants charging them with the crime of perjury. The fact in controversy in both cases was only one, namely, the appearance or nonappearance of Esteban Leocario before the election inspector. The defendants having been convicted of the crime of perjury, they appealed, and this court, in passing upon the questions involved, said (pp. 425, 429) :

"The important question in the case, however, is whether this offense is to be punished by the provisions of the Penal Code, articles 318 and following, or whether these articles have been impliedly repealed by section 3 of Act No. 1697. If the case falls within the provisions of the Penal Code and those provisions are still in force, the judgment must be reversed, because this case for perjury was tried and decided in the court below before the termination of the case in which the false testimony was given.

* * * * *

"Our conclusion is that the articles of the Penal Code relating to perjury have been repealed, and that the crime is now defined and punished by section 3 of Act No. 1697."

So the reason given by counsel for the appellant as to the sufficiency of the allegations in the complaint is untenable, but there is a good reason why the complaint is insufficient in law, and that is that there is no allegation

in this complaint that the testimony of the appellant in criminal case No. 1055 was material to the issues involved in said case. This question apparently escaped the attention of the trial court, the prosecuting officers, and counsel for the appellant. It is not mentioned anywhere in the record, nor in the briefs filed in this court.

As we have said, the appellant willfully and contrary to the oath which he had taken, testified in said criminal case No. 1055 that Tambolero came to his house about 7 p. m. on May 15 and remained there until 5 a. m. of the next day. This testimony was false, but the record does not disclose (aside from the statement of counsel before mentioned) whether or not this false testimony did affect, or could have in any way affected, the questions involved in said murder case.

It is now necessary to determine whether or not the appellant is guilty of the crime of perjury under section 3 of Act No. 1697, above quoted (the provisions of the Penal Code with reference to false testimony having been repealed by Act No. 1697), when it is not alleged in the complaint, nor does it appear from the record, that the false testimony given by the appellant in said criminal case No. 1055 was material to the issues involved therein.

In the absence of a statute to the contrary, it is well settled that an indictment for perjury must show conclusively that the testimony given or assertion made by the defendant and charged to be false was material to the issue on the trial on which he was sworn or it will be fatally defective. This may be done either by a direct allegation that it was material, or by the allegation of facts from which 'its materiality will appear. (30 Cyc 1433, and U. S. vs. Singleton, 54 Fed. Rep., 488; IT. S. vs. Cowing, 25 Fed. Cas., No. 14880, 4 Cranch C. C, 613; Hembree vs. State, 52 Ga., 242; State vs. Anderson, 103 Ind., 170; State vs. Gibson, 26 La. Ann., 71; State vs. Williams, 60 Kan., 837; People vs. Ah Bean, 77 Cal., 12; Gibson vs. State, 47 Fla., 16; State vs. Cunningham, Q\$ Iowa, 94; People vs. Collier, 1 Mich., 137; Wood vs. People, 59 N. Y., 117; Buller vs. State, 33 Tex. Cr., 551, and numerous other cases cited.)

No objections to the sufficiency of the complaint were made in the court below, and it is now well settled that it is not error for this court to refuse to sustain such objections taken for the first time on appeal when the fatal defects in the complaint are supplied by competent proof. (Serra vs. Mortiga, 204 U. S., 470, reported in 11 Phil. Rep., 762.)

The complaint in the case at bar is fatally defective for the want of an allegation that the testimony, alleged to be false, was material to the issues involved in the murder case. Our statute (section 3 of Act No. 1697, *supra*) specifically makes materiality an essential element of the crime of perjury and without this the crime can not legally exist. As no objection to the sufficiency of the complaint was raised this fatal defect could have been supplied by competent testimony on the trial.

The materiality of a matter sworn to must be established by evidence and can not be left to the presumption or inference. (30 Cyc, 1443, and Nelson vs. State, 32 Ark., 192; Mackin vs. People, 115 111., 312; State vs. Aikens, 32 Iowa, 403; Wood vs. People, 59 N. Y., 117; Garrett vs. State, 37 Tex. Cr., 198.)

The term "material matter" means the main fact which was the subject of the inquiry, or any circumstance which tends to prove that fact, or any fact or circumstance which tends to corroborate or strengthen the testimony relative to the subject of the inquiry, or which legitimately affects the credit of any witness who testifies. (In re Franklin County, 5 Ohio S. & C. Pi. Dec, 691; 7 Ohio, N. P., 450; People vs. Greenwell, 5 Utah, 112, 13 Pac, 89.)

By the common law perjury is the willful and corrupt taking of a false oath, lawfully administered in a judicial proceeding or the course of justice in regard to a matter material to the issue or point of inquiry. (30 Cyc, 1399, and cases cited therein.)

This definition of perjury, as modified by statute, may be more accurately defined to be the willful and corrupt assertion of a falsehood, under oath or affirmation administered by authority of law, in a material matter, the offense being enlarged and made to extend to other false oaths than those taken in the course of judicial proceedings. (30 Cyc, 1400, and cases cited.)

In the case of *The State vs. Hattaway* (10 Am. Dec, 580) one Shackleford having been indicted for stealing a cow and afterwards discharged, brought an action against the prosecutor for malicious prosecution. In this action Hattaway was called as a witness and testified that Shackleford purchased the cow in question from one Carter, and that he was present at the time. Being asked where he lived at the time, he said, "Near Carter's; perhaps within 100 yards;" whereas it was proved that he did not live in the State. The perjury assigned was his false testimony as to where he lived. The trial court instructed the jury that the testimony was not material so as to constitute perjury, but the jury thought otherwise and found the defendant guilty. The defendant then moved to set aside the verdict as contrary to the law, and the court in passing upon this motion said (p. 581) :

"It seems to be agreed by all the writers on criminal law, that one ingredient in the crime of perjury is that the oath relate to some matter material to the question in issue: * * * There can be no doubt but that an extra-judicial oath, or one relating to a matter utterly immaterial, or even an impious oath, taken in idle conversation, may be as offensive in the eye of heaven as the most solemn oath taken in a court of justice. But there are many offenses against morality and religion which are not cognizable in courts of justice. For such offense, a man is answerable only to his God, and not to the laws of his country. * * *

"There is no offense the general character of which is better understood than that of perjury; and no point better settled, perhaps, than that the oath must relate to some fact material to the issue."

There is a distinction between perjury and false swearing; the one is stubborn and corrupt while the other is simply not true, lacking the elements which go to constitute the crime of perjury. (*Miller vs. State*, 15 Fla., 577.)

Section 3 of Act No. 1697 is a copy, with the necessary changes only, of section 5392 of the Revised Statutes of the United States. This section (5392) is as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The essential parts of this section (5392) and section 3 of Act No. 1697 are exactly the same. It is also true that section 3 of our perjury law is practically the same as that of nearly all of the States of the Union wherein materiality is made, by statute, an element of the crime.

An essential element of the offense created by the statute (section 5392, Rev. Stat.) is the materiality of the matter charged to have been falsely stated. (*U. S. vs. Landsberg*, 23 Fed. Rep., 585.)

In some jurisdictions the prosecution of perjury is continued until the proceeding in which the perjury is alleged to have been committed has been ended, but under our law (Act No. 1697) it is not necessary that the proceeding in which the perjury was committed should be terminated before prosecution for that crime is commenced. (*U. S. vs. Concepcion*, supra.) The contrary rule obtained for prosecutions under the provisions of the Penal Code. (*U. S. vs. Opinion*, 6 Phil. Rep., 662; and *U.S. vs. Adolfo*, 12 Phil. Rep., 296.)

Where materiality is made by statute, as in Act No. 1697, an essential element of the crime of perjury, the doctrine

of the courts that it, must be shown by competent proof that the false testimony was material to the issues involved, is settled beyond question. This doctrine pervades the entire adjudged law on the subject. "Wherever we move in this department of our jurisprudence we come in contact with it. We can no more escape from it than from the atmosphere which surrounds us."

Aside from the statement of counsel in his brief, heretofore referred to, the prosecution has failed to establish the legal guilt of the accused of the crime of perjury, inasmuch as it has not been proven in any manner that the false testimony of the appellant was material in the murder case.

We shall now determine in what way, if any, the said statement of counsel can affect the guilt of the accused. As we have said, he has not committed a crime (if this statement of counsel does not affect the result) for which he can be punished under the law in force in this jurisdiction. In order to sustain a conviction based on a fatally defective complaint, the defects must be supplied by competent proof. Counsel in his printed brief in this court states that the witness Tambolero testified in said murder case that when the murder was committed he saw one of the defendants come out of the lower part of the convent with a bolo in his hand. This is not a confession, as there is a marked difference between a confession and such a statement, but this is purely a statement by counsel made in the appellate court. It is more than probable that the appellant himself knows nothing of this statement; no doubt he has never seen the brief filed in this case. So such a statement made for the first time on appeal is not competent proof to establish the guilt of the appellant when such guilt must depend solely upon the said statement. Counsel for appellant was not authorized by his client to make this statement.

In the case of Sweet Clayton vs. State (4 Tex. App., 515), George Spears and Sweet Clayton were indicted in the district court of Uvalde, Texas, for the crime of conveying, or causing to be conveyed, into the jail of Uvalde County, certain instruments for the purpose of aiding two prisoners to make their escape. A motion for the arrest of the judgment was made in the court of appeals, based on the ground of the insufficiency of the indictment. The court did not sustain the contention of counsel for the defendants, but on its own motion reversed the judgment on another ground which was not raised by counsel and which referred to the admission made by defendant's counsel, and in passing upon this question the court, speaking through Mr. Justice White, said (p. 518) :

"The charge of the court, which was otherwise unexceptionable, presents an error which will necessitate a reversal of the case. In the fourth subdivision of the charge the jury are told that 'it is admitted by the defendant's counsel that John Woods and Lark Clayton were prisoners, legally confined in the county jail of Uvalde County, on an accusation of felony, to wit, theft of a cow.' As was said in the case of Nels vs. The State: 'The prisoner's counsel had no authority to make any statement or admission to supply the place or have the force of evidence against him. No confession of theirs could bind or affect him. Their admissions could not in law prejudice or affect his rights; nor could they be in any wise jeopardized by the assumption of any grounds whatever upon which his defense may have been placed by his counsel. Whether those grounds were correct or incorrect, true or false, was wholly immaterial. That was not the question for the consideration of the jury, whose duty it was to decide the question of the guilt or innocence upon the law as given them by the court, and the evidence as given by the witnesses, irrespective of any admissions by the prisoner's counsel, or any grounds upon which they may have rested his defense.' "

In this case, defendant's counsel no doubt admitted in open court, at the time the defendants were on trial and in their presence, that the said Woods and Clayton were prisoners legally confined. It does not appear that the defendants made any objections to the said admission. Notwithstanding all these facts the court reversed the judgment solely for this reason.

In the case at bar we do not find it necessary to go as far as the Texas court did, for the reason that the statement of counsel for the appellant was not made in the trial court and this record fails to disclose whether said statement

was made in the presence of the accused; but it does conclusively show that the same was made for the first time in the printed brief on appeal. So such a statement can not be accepted as competent proof to supply the fatal defects in the complaint and form the basis upon which a conviction can be entered.

Our conclusions are, therefore, that the appellant is not guilty of the crime of perjury for the reasons above set forth. The judgment is reversed and the appellant acquitted, with costs de oficio.

Arellano, C. J., Torres, Johnson, and Moreland, JJ., concur.

[1] Appeal pending.

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