

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. GOW CHIONG, DEFENDANT AND APPELLANT.

G.R. No. 7175. September 05, 1912

Ponente: JOHNSON, J.

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JOHNSON, J.:

From the record it appears that on the 14th day of February, 1911, the prosecuting attorney of the city of Manila presented the following complaint against the defendant, charging him with the crime of unfair competition:

"That at various times between the first day of January, 1910, and the 31st day of December, 1910, at the city of Manila, Philippine Islands, the said defendant did, then and there, willfully, unlawfully, and deceitfully, in the sale of sherry wine, give to said sherry wine the general appearance of the sherry wine manufactured by Diez Hermanos of Jerez, Spain, and dealt in by Messrs. Ed. A. Keller & Co. Ltd. of the city of Manila, in bottles in which said sherry wine was contained and the devices and words thereon, and in other features of their appearance, which would be likely to influence purchasers to believe that the said sherry wine so offered for sale and so sold by said defendant was that manufactured by said Diez Hermanos and dealt in by said Ed. A. Keller & Co. Ltd., and clothed the said sherry wine so sold by said defendant with such appearance for the purpose of deceiving the public and of defrauding the said Ed. A. Keller & Co. Ltd. of its legitimate trade. All contrary to the statutes in such cases made and provided."

Upon this complaint the defendant was arrested and duly arraigned, and pleaded "not guilty."

After hearing the evidence adduced during the trial of the cause, the Honorable A. S. Crossfield, judge, made the following findings of fact from such evidence:

"That the defendant purchased a distillery the first of the year 1910, but discontinued the distillery, and purchased wine and bottles sold upon the market; that the sherry obtained by him was bottled in the ordinary bottle known as a quart bottle, and the label placed upon the bottles in the early time of his bottling the sherry was very similar to the labels used and designated in the trade-mark of Ed. A. Keller & Co.; that the defendant was called by the prosecuting attorney, and answering the call came to the office of the prosecuting attorney, and was there advised that his putting up sherry in the shape he did was unfair competition with the trade-mark of Ed. A. Keller & Co.; that he was warned by the prosecuting attorney to desist, but that immediately afterwards he commenced putting up some sherry and using bottles with labels upon them much more closely resembling the trade-mark of Ed. A. Keller & Co. than before, particularly in the kind of silk tassel upon the neck of the bottle; that while this silk tassel was not a part of the trade-mark of Ed. A. Keller & Co., it had been used by them for a great many years in connection with the trade-mark, and anyone, without very close examination, would have been deceived by the similarity in appearance of the bottles of sherry put up by the defendant and sold by Ed. A. Keller & Co. with trade-mark label upon it."

Upon the foregoing findings of fact Judge Crossfield found the defendant guilty of the crime charged in said complaint and sentenced him to pay a fine of one thousand pesos, and in case of insolvency to suffer subsidiary imprisonment until said fine was paid, and to pay the costs.

From that sentence the defendant appealed, and made the following assignments of error:

"I. The trial court erred in failing to dismiss the complaint for duplicity.

"II. The trial court erred in convicting the accused of the charges of the complaint, based upon section 7 of Act No. 666t without specifically finding (1) that it appeared from the evidence beyond a reasonable doubt that there was an 'actual intent' on the part of the accused 'to deceive the public, and to defraud' Ed. A. Keller & Co. of their legitimate trade.

"III. The court erred in finding that anyone, without very close examination, would have been deceived by the similarity in appearance of the bottles of sherry put up by the defendant and that sold by Ed. A. Keller & Co. vr ith its trade-mark label upon it.

"IV. The trial court erred in finding as a fact that the accused used labels similar to those of Ed. A. Keller & Co., in bottling o£ sherry.

"V. The court a quo erred in sentencing accused to subsidiary imprisonment in default of payment of the one thousand pesos fine imposed in the sentence of the court."

With reference to the first assignment of error, to wit, that the complaint was objectionable upon the ground of duplicity, it may be said (1) that so far as the record shows no objection whatever was made to the sufficiency of the complaint or to said duplicity in the court below. We have in a number of cases decided that objections as to the sufficiency of a complaint would not be considered when raised for the first time on appeal. (U. S. vs. Mabanag, 1 Phil. Rep., 441; U.S. vs. Cajayon, 2 Phil. Rep., 570; U. S. vs. Mack, 4 Phil. Rep., 291; U. S. vs. Sarabia, 4 Phil. Rep., 566; Mortiga vs. Serra et al. 5 Phil. Rep., 34; (See also 204 U. S., 470, and 11 Phil. Rep., 762); U. S. vs. Paraiso, 5 Phil. Rep., 149; (See also case of Paraiso, 207 U. S., 368, and 11 Phil. Rep., 799) ; U. S. vs. Aldos, 6 Phil. Rep., 381; U. S. vs. Kusebio, 8 Phil. Rep., 574; U. S. vs. Flores, 9 Phil. Rep., 47, 48; U. S. vs. Kosel, 10 Phil. Rep., 409; U. S. vs. Lampano, 13 Phil. Rep., 409; U. S. vs. Palacio, 16 Phil. Rep., 660.)

Inasmuch therefore as no objection was made to the complaint in the court below, we find no reason for modifying the sentence of the lower court based upon the first assignment of error above noted. Moreover, even granting, without admitting, that the complaint does state more than one cause of action, from an examination of the proof and the sentence of the lower court it will appear that it was the intention of the lower court only to find the defendant guilty of one crime, to wit, unfair competition.

With reference to the second assignment of error above noted, to wit, that the lower court committed an error in finding the defendant guilty of the crime charged in the complaint without finding as a fact beyond a reasonable doubt that there was an "actual intent on the part of the accused to deceive the public and to defraud Ed. A. Keller & Co. of their legitimate trade," it may be said that the lower court found the defendant guilty of the crime charged in the complaint, and that the complaint charges that the defendant did willfully, unlawfully, and deceitfully, in the sale of sherry wine give to the same the general appearance of sherry wine manufactured by Diez Hermanos and sold by Ed. A. Keller & Co., for the purpose of deceiving the public and of defrauding the said Ed. A. Keller & Co. of its legitimate trade. Reading the positive part of the decision of the lower court together with the facts alleged in the complaint, it clearly appears that the lower court found that the defendant did with actual intent attempt to deceive the public and to defraud Ed. A. Keller & Co. of their legitimate trade. This actual intent to defraud further appears from the fact that the attention of the defendant was called to the fact that he was unlawfully infringing upon the rights of the trade-mark of Diez Hermanos, by the prosecuting attorney of the city of Manila, and that he thereafter immediately made some alteration in the labels theretofore used by him, and used another more similar to that used by Diez Hermanos than the first one. We are of the opinion that from a careful reading of the record it will clearly appear that the defendant did, with actual intent, try to deceive the

public and to defraud Ed. A. Keller & Co. of their legitimate trade. It is believed that the various exhibits (A, B, C, D, E, and F) presented by the prosecuting attorney, cannot be examined without producing the conviction that the defendant did actually attempt to defraud Ed. A. Keller & Co. of their legitimate trade in the sale of sherry wine for which they held a trademark. From an examination of the reasons given by the attorney for the appellant in support of the second assignment of error, and the argument of the Attorney-General in answer thereto, and in view of what this court has said in the cases of Jonas Brook Brothers vs. Froelich & Kuttner (8 Phil. Rep., 580); U. S. vs. Manuel (7 Phil. Rep., 221); Nelle vs. Baer, Senior & Co. (5 Phil. Rep., 608), we are of the opinion that the error complained of does not exist. In the case of Jonas Brook Brothers vs. Froelich & Kuttner, supra, it was held that:

"Any one who sells goods packed or labeled or otherwise prepared in such a manner as to induce intending purchasers to believe that the goods are of a make or origin other than the true one, or who clothes the goods with a certain appearance for the purpose of deceiving the public, is deemed guilty of unfair competition as defined by section 7 of Act No. 666. The intention to deceive may be inferred from the similarity of the goods as packed and offered for sale, and an action will lie to restrain such unfair competition, and for damages."

In the present case it not only appears that the bottles used by the defendant for containing his wine were very similar in shape to the bottles used by Diez Hermanos, but the labels and everything attached to the outside of the bottle as appears from the exhibits presented shows clearly that the defendant intended to give the public to understand that the sherry wine which he was selling was that of Diez Hermanos. Not only did the bottles and the labels used by the defendant appear to be of the same sherry wine as that sold by Ed. A. Keller & Co. Ltd., but the boxes in which the bottles were packed, as appears from the evidence, were also similar to the boxes used by Ed. A. Keller & Co. in importing the sherry wine which they sold. Upon the whole record we find no reason for modifying the sentence of the lower court based upon this second assignment of error.

With reference to the third assignment of error, we are of opinion that what was said in relation to the deceit under the second assignment of error, sufficiently answers this third assignment of error also.

With reference to the fourth assignment of error, we think that what was said in answer to the second assignment of error answers this one also.

In the fifth assignment of error the appellant claims or contends that the lower court committed an error in imposing upon the defendant subsidiary imprisonment. From a reading of the sentence of the lower court it will appear that the lower court imposed upon the defendant subsidiary imprisonment at the rate of two and one half pesos per day until the fine of one thousand pesos should be fully paid. The law does not permit subsidiary imprisonment to the extent imposed by the lower court. Act No. 1732 of the Philippine Commission provides for subsidiary imprisonment for criminal offenses made punishable by any Act or Acts of the Philippine Commission.

Paragraph (b) of section 1 of said Act No. 1732 provides:

"In case the sentence of the court imposes both fine and imprisonment, the subsidiary imprisonment shall not exceed one-third of the term of imprisonment imposed by such sentence, and in no case shall such subsidiary imprisonment exceed one year."

It will be noted that this paragraph does not apply to the present case, for the reason that in the present case a fine only was imposed.

Paragraph (c) of section 1 of said Act provides that:

"In case the sentence of the court merely imposes a fine, the subsidiary imprisonment shall not exceed six months."

In the present case a fine only was imposed. Therefore the subsidiary imprisonment shall not exceed six months. According to the decision of the lower court, to wit, that the defendant should suffer subsidiary imprisonment until the full amount of the fine was paid, it will be noted that in order to pay the sum of one thousand pesos at P2.50 per day, it would require four hundred days, or a period of more than one year, whereas the law in cases like the present only permits subsidiary imprisonment to the extent of six months. Therefore that part of the sentence of the lower court imposing subsidiary imprisonment at the rate of P2.50 per day until the fine is paid, is hereby reversed.

Upon a full consideration of all of the facts adduced during the trial of the cause, and the law applicable thereto, we are of the opinion that the sentence of the lower court should be modified, and it is hereby ordered that the defendant and appellant be sentenced to pay a fine of one thousand pesos, and in case of insolvency to suffer subsidiary imprisonment at the rate of P2.50 per day, which subsidiary imprisonment shall in no case exceed a period of six months, and to pay the costs.

Arellano, C. J., Mapa, Carson, and Trent, JJ., concur.

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