

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. CAYETANO RAFAEL ET AL., DEFENDANTS, AND APPELLANTS.

G.R. No. 7380. September 18, 1912

Ponente: JOHNSON, J.

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JOHNSON, J.:

These defendants were charged with a violation of Act No. 1757. The complaint presented against them contained the following accusations:

"That on or about the afternoon of August 1 of the present year, 1911, and in the jurisdiction of this municipality of Iloilo, Philippine Islands, the said accused, Cayetano Rafael, Perseveranda Lopez, Victor Discipulo, Victoriano Rafael and Guillermo Juanesa did intentionally, maliciously and criminally play, making bets in money, the game of chance called monte; in violation of the law."

During the trial of the cause, the complaint was dismissed against Cayetano Rafael for the reason that there was no proof to connect him with the commission of the alleged crime, with costs de oficio.

At the close of the trial and after hearing the evidence, the Honorable James S. Powell, judge, found each of the other four defendants guilty of the crime charged, and sentenced each of them to pay a fine of P300, and each to pay one-fifth part of the costs, and, in case of insolvency, to suffer subsidiary imprisonment.

From that sentence Perseveranda Lopez and Victoriano Rafael only appealed.

In this court the appellants make the following assignments of error:

- "1. It was error to admit as evidence for the prosecution the exhibits presented by the fiscal.
- "2. It was error to overrule the motion of the defense that the official record of the justice of the peace regarding the declarations made by the witnesses in the preliminary investigation of this case be annexed to the papers in this cause.
- "3. It was error to sentence the accused to pay the excessive fine of P300 each.
- "4. It was error to find that the accused played monte with bets of money in the house of Cayetano Rafael, and that they are guilty of the crime charged."

With reference to the first assignment of error, the policeman who arrested the defendants at or about the time when they were found gambling in the house of Cayetano Rafael, took possession of tally-sheets, lead pencils, and other things which they believed had been used in connection with the game of monte, which the defendants had been playing. If it is true that these objects had been used in connection with the gambling game, they would be admissible in evidence, after having been properly identified. A careful reading of the decision of the lower court, however, indicates that he based his conclusion that the defendants were guilty of the crime charged upon the fact that the defendants had actually been caught in the act of gambling and that he gave no credit whatever to the exhibits in question. In other words, the lower court found that there was sufficient evidence to prove, beyond

a reasonable doubt, that the defendants were playing at a prohibited game at the time in question without any reference to these exhibits. The mere fact that the tally-sheets, lead pencils and other things had been found at the time the defendants were seen gambling, could in no way furnish additional proof that two or three witnesses presented by the prosecution had actually seen the defendants engaged in playing the prohibited game of monte. Generally there is certain paraphernalia used in playing the prohibited game of monte. This paraphernalia, however, is not a necessary part of the game. It is only a convenience. When the particular paraphernalia is found, however, it of itself may furnish some evidence, although not conclusive, that the parties using it had been playing the prohibited game. But when there were eyewitnesses to the playing of the prohibited game, the existence of the paraphernalia could only be corroborative. It was not shown during the trial of the cause that the tally-sheets, lead pencils, etc., which were found at the time and place where the defendants were gambling, had actually been used in connection with the prohibited game. The fiscal evidently presented them as evidence, simply for the purpose of corroborating the statements of the witnesses who swore positively that they had seen the defendants gambling. All of said exhibits might well be eliminated from the record without affecting the positive and direct proof presented at the trial, showing that the defendants had, beyond a reasonable doubt, been engaged in playing the prohibited game of monte. We are of the opinion that, even though it be admitted that said exhibits were inadmissible in evidence, the fact that they were admitted in no way prejudiced the defendants.

With reference to the second assignment of error, it will be noted by reference to section 13 of General Orders, No. 58, and section 2 of Act No. 194, that in every preliminary examination conducted by a justice of the peace, the declarations of the witnesses shall be reduced to writing and signed by the witnesses. Neither General Orders, No. 58, nor said Act No. 194 requires the justice of the peace, in any case, to forward these declarations to the Court of First Instance. Section 13 of Act No. 1627 amends section 2 of Act No 194 and relieves the justice of the peace who conducts a preliminary examination from the necessity of taking down in writing the testimony of the witnesses, except the declaration of the accused himself. Said section 13 of Act No. 1627 provides that in a criminal case appealed to the Court of First Instance, as well as in preliminary investigations where the accused is bound over to the Court of First Instance, the justice of the peace shall forward to the provincial fiscal a brief statement of the substance of the testimony. The purpose of requiring the justice of the peace to forward to the provincial fiscal a brief statement of the substance of the testimony, evidently is to enable the provincial fiscal to decide, in the first instance, whether he shall present a complaint against the defendant, and in the second, to enable him, in case he decides to prosecute, to properly formulate said complaint. It is practically impossible, in the thickly populated provinces of the Philippine Islands, for the provincial fiscal to personally attend all of the trials and preliminary investigations held before the justices of the peace. The purpose of the provisions of said section 13 is evidently to enable the provincial fiscal to have sufficient information to enable him to decide whether or not the defendant, in the trial before the justice of the peace or in a preliminary investigation, shall be further prosecuted in the Court of First Instance.

In the present case if the memoranda or brief statement of the substance of the testimony taken before the justice of the peace and later forwarded to the provincial fiscal contained any fact or information which the defendants desired to have presented to the Court of First Instance, the law afforded them a remedy by a subpoena duces tecum. (See sec. 402, Act No. 190.) We have decided in numerous cases that the record of a preliminary examination constitutes no part, necessarily, of the proceedings in the Court of First Instance; that it does not constitute a part of the record of the Court of First Instance, unless it is properly presented as evidence. The trial in the Court of First Instance is a trial de novo. The record of the justice of the peace made in a preliminary investigation, can not be used as the basis of the sentence of the Court of First Instance. The only purpose of presenting the record of the preliminary examination in the Court of First Instance is perhaps for the purpose of testing the credibility of the witnesses. The record in the preliminary examination may be presented for the

purpose of showing that certain witnesses testified to certain facts in the preliminary examination which were contrary to their declarations in the Court of First Instance. (U. S. vs. Capisonda, 1 Phil Rep., 575.)

With reference to the 3d assignment of errors to wit: that the lower court imposed an excessive fine in imposing a fine of P300, it may be said that said fine is within the provisions of the law and in our opinion is not excessive. Section 3 of said Act No. 1757 provides that any person violating this section, shall be punished by a fine of not less than P10 nor more than P500, or by imprisonment for not more than one year, or by both such fine and imprisonment in the discretion of the court. We find no reason in the record for modifying the sentence of the lower court with reference to the fine imposed.

With reference to the 4th assignment of error, it will be noted that the appellants claim that the lower court committed an error in deciding that the defendants were guilty of playing the prohibited game of monte "con apuestas de dinero." The appellant has evidently overlooked section 7 of Act No. 1757, which provides, among other things, that -

"The playing at and conducting of any game of monte * * * is hereby prohibited, and any person taking any part therein * * * shall be punished as provided in section 3 hereof."

While it may be true, generally, that persons who play the game of monte play for money, yet, nevertheless, the use of money in the game is not a necessary element in the crime described or defined by the law. It seems that the purpose of the law was to prohibit absolutely the game of monte in the Philippine Islands. The mere fact that money was or was not used in no way constitutes an element of the crime.

In our opinion the evidence shows, beyond a reasonable doubt, that the appellants did, on or about the 1st day of August, 1911, play, in the house of one Cayetano Rafael, at the prohibited game of monte, together with their co-defendants.

After a careful examination of the evidence contained in the record, and of the assignments of error, we find no reason for modifying the sentence of the lower court. The same is, therefore, hereby affirmed, with costs. So ordered.

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

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