

## THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. FULGENCIO GERNALE, DEFENDANT AND APPELLANT.

*G.R. No. 8098. November 19, 1912*

Ponente: ARELLANO, C.J.

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### ARELLANO, C.J.:

Brigido Marcial was a servant in the employment of Eduardo Rotaache, a representative in Bulan, Province of Sorsogon, of the firm of Lizarraga Brothers. One night at 10 o'clock, acting in accordance with a previous arrangement made with the defendant, Fulgencio Gernale, he took advantage of an occasion when his master absented himself from the dining room to attend to an urgent matter which was to detain him for some time outside of his room, and entered the latter, extracted from the pocket of Rotaache's trousers the key to the safe kept in an office located on the ground floor, and admitted Gernale into the office. The defendant, with, key furnished him by Marcial, opened the safe and they both extracted therefrom P1,038 in coin and banknotes and a bill of exchange for the sum of 1,200, equivalent all together to 11,415 pesetas, the unit of value in the provisions of the Penal Code.

Marcial was prosecuted in a separate case in which, as he testified, he w convicted.

The complaint in the present case is limited to Gernale and expressly charges him with the crime of robbery.

The defendant's responsibility, as a point of fact, was held to have been established by the trial court, and no error of fact or of law has bee proven against such finding.

The evidence adduced by the prosecution was corroborated by the discovery, made by the fiscal himself, of a sum of money which had been hidden in a fence by the defendant, and by the latter's voluntary delivery to the justice of the peace, of another part of the money which had been given to Gernale, according to his testimony, by Brigido Marcial.

The Court of First Instance of Sorsogon classified the crime as one of robbery without weapons, committed in an inhabited house with force again things, by the guilty parties using false keys; and the value of the articles stolen exceeding 1,250 pesetas, the defendant was sentenced, pursuant to article 508 of the Penal Code, to two years four months arid one day of presidio correccional, to restore, jointly with Brigido Marcial 356 pesos and 61 centavos, the value of the unrecovered remainder of the stolen property.

The Attorney-General, in this instance, understands that the crime commit not one of robbery, but of theft, as neither was force employed against things, nor were false keys used, and requests that, in accordance with paragraph No. 1 of article 518 of the Penal Code, the defendant be sentenced to four years nine months and ten days of presidio correccional

The crime that is the subject of the complaint, is robbery, and that punished in the judgment appealed from is also robbery. This classification concords with the dictates of the law and the well-settled principles founded on interpretations of the Penal Code. According to the provision of article 516 of this code, false keys are: "2. True

keys stolen from the owner." "Robbery is committed with force against things by making use false keys." (Art. 508, subart. 3.) Brigido Marcial stole from his master's room the true keys with which the safe was opened. "In order that true may be held to be false keys," says a decision of the supreme court of Spain of March 18, 1896, "it is necessary that they should have been st from their owner; if they were legitimately delivered to the defendant, the crime is theft and not robbery."

As the value of the stolen property exceeded 1,250 pesetas and the robber was perpetrated without weapons, the defendant should be punished in accordance with case No. 2 of article 508 of the Penal Code by the penalty immediately inferior to that provided for case No. 1 of the same article, which is presidio mayor in its medium and maximum degrees and cadena temporal in its minimum degree. The penalty immediately infer is the medium and maximum degree of that of presidio correctional and the minimum of that of presidio mayor, pursuant to rule 4 of article 75, in conformity with which the penalty was applied in the judgment appealed from, but not in the corresponding degree, inasmuch as the minimum of the minimum of the penalty is two years four months and one day, in the absence of any extenuating circumstance. When the crime is attended by no aggravating or extenuating circumstance, the penalty must be applied in the medium degree, which would be from four years two months and one day to six years; but when there is an aggravating circumstance, like nocturnity in this case, the penalty is from six year day to eight years.

The judgment appealed from is, therefore, affirmed; provided, however, that the penalty imposed shall be six years and one day, with the costs of this instance against the appellant.

Torres, Mapa, Johnson, Carson, Moreland, and Trent, JJ., concur.

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