

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. PEDRO BARREDO, PEDRO UREA AND ALBINO SARMIENTO, DEFENDANTS AND APPELLANTS.

G.R. No. 9278. December 07, 1915

Ponente: CARSON, J.

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CARSON, J.:

The appellants in this case were convicted in the court below of the crime of attempted rape, and each of them was sentenced to two years, four months and one day of prison correctional, together with the accessory penalties prescribed by law.

A large number of witnesses for both the prosecution and the defense were called at the trial, and the record contains some two hundred and fifty pages of typewritten testimony and documentary evidence. In its last analysis, final judgment as to the guilt or innocence of the accused necessarily turns upon the degree of credit which should be accorded the respective witnesses called for the prosecution and the defense; and a careful examination of the record discloses nothing which would justify us in disturbing the findings in this regard of the trial judge, who saw and heard the witnesses testify and was satisfied beyond a reasonable doubt as to the substantial truth of the account of the commission of the crime of attempted rape which was given on the witness-stand by the principal witnesses called for the prosecution.

In his opinion the trial judge sets forth at some length the material evidence adduced at the trial, and a restatement and review of the evidence at this time would serve no useful purpose.

Suffice it to say that so strongly were we impressed by the forceful oral argument of counsel for the appellants with the possibility of a grave miscarriage of justice in the court below, as a result of the machinations of the personal and political enemies of one or all of the defendants, that we carefully and exhaustively abstracted and analysed for ourselves the great mass of evidence brought here on this appeal, without discovering anything which, in our opinion, would justify us in holding that the trial judge erred in arriving at his conclusion as to their guilt.

It remains only to consider the contentions of counsel for the appellants touching the alleged lack of jurisdiction of the court below to entertain and adjudicate this action. It is urged that the court was without jurisdiction in the premises because the information charging the commission of the crime was filed, and the trial conducted by a special fiscal, improvidently appointed by the trial judge without authority of law.

Section 1 of Act No. 1699 reads in part as follows: "Whenever the provincial fiscal is absent from the province, or fails or refuses to discharge his duty by reason of illness or other cause, or by reason of personal interest in a prosecution or other matter is disqualified to act therein as provincial fiscal, the judge of the Court of First Instance for the province is authorized and required to appoint a temporary fiscal, who shall be paid out of the provincial treasury the same compensation per day as that provided by law for the regular provincial fiscal for the days actually employed. The fiscal thus temporarily appointed shall discharge all the duties of the provincial fiscal

as provided by law which the regular provincial fiscal fails or is unable to perform."

Construing and applying this statute we said in the case of *Nuñez vs. Low* (19 Phil. Rep., 244): "If the provincial fiscal fails or refuses to discharge his duty in the prosecution of criminal cases, the judge of the Court of First Instance is not only authorized but is required to appoint a temporary fiscal to represent the Government in such cases. The attorney for the Moro Province and his assistant stand in the same position as a provincial fiscal with reference to this matter. If the Court of First Instance for the Moro Province did not have authority to appoint a temporary fiscal when the exigencies of the service demanded it, it might occur that the whole court machinery, with reference to criminal cases, would be impeded on account of the refusal on the part of the attorney, or his assistant, to perform their duties'. The presiding judge of the Court of First Instance for the Moro Province has the power to cause the prosecution of criminal cases to go forward, and if the officer designated by law to prosecute such criminal cases fails or refuses to perform his duty, then the judge or court must relieve such officer temporarily and appoint a qualified person to take his place."

From what was said in the case just cited, and indeed from the plain and explicit provisions of the statute, we think there can be no doubt of the power of the judges of Courts of First Instance to appoint special fiscal or prosecuting officers, when, in the exercise of the sound judicial discretion conferred upon them, they find that "the provincial fiscal is absent from the province, or fails or refuses to discharge his duty by reason of illness or other cause, or by reason of personal interest in a prosecution or other matter is disqualified'to act therein as provincial fiscal."

The power to appoint special ftscls being thus expressly conferred upon judges of Courts of First Instance, the mere fact that the judge acts unwisely or improvidently or under a misapprehension of facts when he makes an appointment in no wise affects the legality or the validity of the appointment, except, perhaps, in cases wherein it appears that there has been a manifest abuse of judicial discretion in making the appointment, the effect of which need not be and is not now considered.

There can be no question of abuse of judicial discretion in the appointment of the special fiscal in the case at bar; and even if it were admitted that the trial judge acted improvidently or unwisely or erroneously in making the appointment, the appointment when made was a valid, legal appointment, and affords no ground for appellant's contention as to a lack of jurisdiction in the court below to entertain and decide a criminal action based on an information Hied by a special fiscal legally appointed for that purpose.

Moreover, we do not think that in the case at bar the special fiscal was erroneously or improvidently appointed.

The appointment of the special fiscal was made in response to a petition filed by counsel for the private prosecutrix on November 3, 1912, wherein he set forth that on the 12th of June, 1912 the private prosecutrix filed a complaint against the defendants in this action in the court of the justice of the peace of Nagcarlang, charging the commission of the crime on the 9th of that month; that on the 29th of the same month the accused waived a preliminary trial before the justice of the peace and prayed that the cause be remanded to the Court of First Instance; that the cause was remanded in the early days of July, 1912; that about the 2nd of October, 1912 the provincial fiscal conducted an investigation of the alleged crime at the urgent request of counsel for the private prosecutrix; that thereafter the provincial fiscal promised to file a formal information against the accused, but later declined to do so, promising, never-the-less to ask the court to appoint a special fiscal, as he himself, was not disposed to press the case; that the provincial fiscal had not done anything further at the date of the petition (November 9 [8], 1912); and that a special fiscal should be appointed to prosecute the case in view of the manifest indisposition on the part of the provincial fiscal to bring the accused to trial.

This petition was endorsed over to the provincial fiscal by the presiding judge, and returned with an extended

statement, in which this official set out at length his reasons for declining to file an information, and proceed with the trial. In substance he stated that as a result of his investigations based upon the complaint of the private prosecutrix, he was satisfied that the accused had not committed the crime with which they were charged; that the evidence against them was unsatisfactory and unworthy of credence; and that they were victims of a conspiracy of their personal and political enemies to ruin them by compelling them to stand trial for a heinous offence which they had not committed.

Thereafter the trial judge, upon full consideration of the statements of counsel for the private prosecutrix, and of the provincial fiscal held that in the interests of justice it would not be proper "to deny the petition of the injured woman" and appointed a special fiscal under the provisions of Act No. 1699.

Holding as we do that the 'evidence relied upon by the private prosecutrix is sufficient to sustain a finding as to the guilt of the accused beyond a reasonable doubt, we need hardly say that we think the trial judge properly appointed a special fiscal to prosecute the case, in view of the failure of the provincial fiscal to file an information and bring the accused to trial.

We agree with the contentions of counsel that a conscientious prosecuting official, whose investigations have satisfied him as to the innocence of persons charged with the commission of crime, should not institute criminal proceedings against such persons. But we are of opinion that in the event that criminal proceedings have been instituted, and the investigations of the provincial fiscal have satisfied him that the accused person is innocent, or that evidence sufficient to secure conviction will not be forthcoming at the trial despite the exercise of due diligence to that end, it then becomes his duty to advise the court wherein the proceedings are pending as to the result of his investigations, and to move the court to dismiss the proceedings, leaving it to the court to take such action as may be proper in the premises. In this jurisdiction provincial fiscals are not clothed with power, without the consent of court, to dismiss or nolle prosequi criminal actions actually instituted, and pending further proceedings. The power to dismiss is vested solely in the courts, that is to say in the presiding judge thereof.

Discretion in the matter of subjecting to trial persons remanded for trial in a Court of First Instance by a justice of the peace lies with the judge of that court. It is for the justice of the peace to determine whether the accused shall be remanded for trial. Act No. 194, sees. 1 and 2, and Act No. 1627, sec. 13, and section 2 of Act No. 194, expressly provide that in case the justice of the peace binds the accused person over to a regular trial, such person shall be committed or admitted to bail "to await the action of the judge or Court of First Instance"—not that he shall await the action of the provincial fiscal. When the justice of the peace remands an accused person for trial in the Court of First Instance, the case ..becomes forthwith a criminal action pending in that court, and can only be terminated therein by the court itself.

The duty imposed upon the provincial fiscal in such cases is either to go forward with the prosecution or to move the court to dismiss the complaint, and in either event to move with the promptitude necessary to secure the right of the accused to a speedy trial. It is, in part, to aid him in determining the course to be adopted at this stage of the proceedings that provision is made in section 2 of Act No. 302 for official investigations by provincial fiscals. But it is to be observed that it is expressly provided that: "This section shall not be construed to authorize a provincial fiscal to act as justice of the peace in any preliminary investigation, but only as authorizing him to secure the attendance of witnesses before him in making necessary investigation for the purpose of instituting or carrying on criminal prosecutions."

Upon a motion of the provincial fiscal to dismiss a complaint upon which an accused person has been remanded for trial by a justice of the peace, it rests in the sound discretion of the judge whether to accede to such motion or not. Ordinarily, of course, he will dismiss the action in accordance with the suggestion of an experienced fiscal

who has personally investigated the facts. But if he is not satisfied with the reason assigned by the fiscal, or if it appears to him from the record of the proceedings in the court of the justice of the peace, or as a result of information furnished by the private prosecutor, or otherwise, that the case should not be dismissed, he may deny the motion.

It is true, as counsel supported by authority contends, that the practice whereby the prosecuting officer in some jurisdiction enters upon the records of a criminal case that "He does not desire to presecute further"—*dicat nolle prosequi*—is a very ancient one. Under the English rule the uncontrolled right to enter a "*nolle prosequi*" was the prerogative of the Attorney-General. The right of the Attorney-General to dismiss without consent of court was there maintained under the theory that that officer was the immediate representative of the King, and that the judges should not therefore challenge the formal expression of his will in this regard.

Some American states have followed the English rule. Others have declined to adopt it. The modern tendency would seem to be to modify and control the power of prosecuting officers in this regard either by express legislative enactment or by the judicial recognition of a custom, "amounting nearly to law" requiring the consent of the court in all cases wherein it is exercised; and some of the courts which do not consider themselves bound by common law precedents have declared the English practice unsound and have held the better rule to be "to ask leave of the court giving some good reason therefor."

"The order is usually taken upon motion by the prosecuting officer and with leave of the court." (10, Enc. of Plead, and Practice, 556.)

"There are States in which a statute, directly or by construction, requires the consent of the court; or in which a custom amounting nearly to law does; and others wherein while the prosecuting officer acts practically on his own responsibility, the court claims the right to control him if it chooses; and in some it is not plain what the course is." (Bishop, Criminal Procedure, Vol. 2, sec. 1389, 2nd ed.)

"In Virginia in 1803, the General Court consisting of five judges unanimously decided: 'That the District Attorney has not in any case the right to enter a *nolle prosequi* without leave of the court.' " (Anonymous, 1 Va., Cas. 139.)

"At common law the attorney general alone possessed this power; and might, under such precautions as he felt it his duty to adopt, discontinue a criminal prosecution in that form at any time before verdict * * *. It probably exists unimpaired in the attorney general to this day, and it has been by several statutes delegated to district attorneys, who now represent the attorney general in nearly everything pertaining to indictments and other criminal proceedings local to their respective counties.

"The legislature finding the power in so many hands, and fearing its abuse * * * provided that it should not thereafter be lawful for any district attorney to enter a *nolle prosequi* upon any indictment, or in any other way discontinue or abandon the same without leave of the court having jurisdiction to try the offense charged." (People vs. McLeod, 1 Hill., 377, and 25 Wendell, 483.)

"Nor was the paper handed by the Solicitor-General to the clerk an entry of *nolle prosequi*. Such a proceeding is to be *cor am judice*. It must go on the minutes of the court and must transpire, at least, with the cognizance of the court. The minutes are the records of the acts of the court and no entry can be made thereon except with his consent. This the Solicitor General did not ask. The *nolle prosequi* was not, therefore, a complete act * * *. Nor is it in our judgment, within the power of the Solicitor General to *nolle prosequi* an indictment at his option without the approbation of the court.

"By the act of 1870 it is expressly provided to the contrary. But even before that Act, although we are aware it has often been done, we know of no authority for it:—The State is the party and the Solicitor General only the agent to carry on the proceeding. He has not and ought not to have unlimited power of prosecution, and great

evils may result and have resulted from placing such a power in the hands of one man * * *," (Statham vs. State, 41 Ga., 507.)

"The District-Attorney acts for the people in criminal cases except he must have the consent of the court to enter a nolle prosequi." (Moulton vs. Beecher, 1 Abb., 193.)

In the case of King vs. Robertson (6 Hawaii, 718) the court said: "The proposition of the counsel for the AttorneyGeneral that at the common law the Attorney-General of England and of States which have adopted this part of the common law has the right upon his sole responsibility to enter a nolle prosequi, is not doubtful, and has not been questioned by this court. But the common law is not in force in this Kingdom * * *.

"The uniform practice of the Supreme Court and the circuit courts has been that the Attorney-General by himself, or by his deputy, when desiring to nolle prosequi a case after indictment found, asks leave of the court that it may be so entered, giving the court or the presiding justice some satisfactory reason therefor."

In the case of United States vs. Valencia (1 Phil. Rep., 642) this court said: "After the complaint has been presented and" certainly after trial has been commenced the Court and not the fiscal has full control of it. The complaint cannot be withdrawn by the fiscal without the consent of the Court."

Section 62, of Act No. 136 prescribing the duties of the provincial fiscal provides that: "He shall be an officer of the Court and subject to its directions in relation to official matter pending in the Court of First Instance."

Section 2. of Act No. 194 provides that when a justice of the peace binds the accused person over to a regular trial, such person shall be committed or admitted to bail "to await the action of the judge or Court of First Instance."

We conclude that in this jurisdiction, under the uniform practice since the announcement of the rule in the case of United States vs. Valencia, {supra}, in the first volume of our reports, and as a logical and necessary consequence of the above cited provisions of the statutes in this regard, provincial fiscals have not the power to dismiss criminal actions pending in Courts of First Instance without leave of court; and that this limitation upon their power extends to the dismissal of complaints upon which accused persons have been committed or admitted to bail to await the action of the judge of the Court of First Instance.

The trial judge was manifestly of opinion that the long delay of the provincial fiscal before taking action in the case at bar, and his attitude when called upon to explain his failure to prosecute at the urgent instance of counsel for the private prosecutrix, amounted to a substantial failure on his part to discharge his duty in the premises. In this we are inclined to agree with the trial judge. Without reflecting upon the integrity or the good faith of the provincial fiscal, we think that he undoubtedly misconceived his duty, and that he failed to discharge it when he neglected and declined to proceed with the prosecution. He evidently was of opinion that it rested wholly in his discretion whether the case should or should not proceed to trial, and that he had the uncontrolled power to decline to prosecute, with or without the consent of the trial judge. He manifestly erred in his belief that the evidence relied upon by the private prosecutrix was insufficient to justify him in proceeding with the prosecution. Men's minds may well differ as to the probative value of evidence submitted in support of an alleged fact, and we do not pretend to say that he must have been convinced of the guilt of the accused, beyond a reasonable doubt, as was the trial judge after hearing the evidence. But we think that the evidence was undoubtedly sufficient to justify and require his proceeding promptly with the trial, and submitting the evidence to the court for its final determination of the guilt or innocence of the accused. In failing so to do, he failed in the discharge of his duty, and we think that under all the circumstances the trial judge properly appointed a special fiscal to conduct the proceedings in his stead.

In conclusion we here insert a number of citations of authority touching the degree of proof upon which an accused person may properly be required to stand trial for the crime with which he is charged, partly in explanation and support of our ruling upon the action of the court below in holding that the provincial fiscal had failed to discharge his duty in the premises, and partly for the information of committing magistrates and prosecuting officers generally.

Chief Justice Marshall, acting as committing magistrate, in holding that evidence presented by the government, consisting principally of affidavits, was sufficient to justify the commitment of Aaron Burr, prefaced his opinion as follows: "On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief; nor should I even require that which should absolutely convince my own mind of the guilt of the accused: but I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it." (U. S. vs. Burr., 25 Fed. Cas., 14692a.)

Again, in *Ex parte Bollman* (4 Cranch 75; 2 L. ed. 554), the Chief Justice said: 'This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail.'" (loc. cit., 125.)

"* * * Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though from the nature of the case it must be *ex parte*, ought in most other respects, to be such as a court and jury might hear," (loc. cit.; 130.)

In *Rhea vs. State* (61 Neb., 15,) it was said: "Evidence that would justify a committing magistrate in finding that probable cause existed for the detention of a defendant need not necessarily be sufficient to sustain a verdict of guilty when he is placed on trial."

In *re Kelly* (28 Nev., 491), it was said: "We are not called upon on this hearing to pass upon the sufficiency of this evidence to warrant the conviction of the defendant, and upon that question express no opinion. In this connection it is proper to observe that a magistrate, in holding a defendant to answer for a crime, is not required to have submitted evidence sufficient to establish the guilt of the person charged beyond a reasonable doubt. As was said in a recent decision (*In re Mitchell* [Cal. App.] 82 Pac, 347): 'In order to hold defendant and put him on his trial, the committing magistrate is not required to find evidence sufficient to warrant a conviction. All that is required is that there be a sufficient legal evidence to make it appear that "a public offense has been committed and there is sufficient cause to believe the defendant guilty thereof." ' "

The rule in New York is thus stated in *People vs. Shenk* (142 N. Y. S., 1081), by the Court of Special Session: "A committing magistrate is not required to exact the full measure of proof necessary to secure a conviction, but is obliged to hold one accused of crime for trial if there is reasonable ground to believe him guilty. But there must be proof 'that a crime has been committed and that there was sufficient cause to believe the defendant guilty thereof (Citing, *Willet vs. Quinn*, 135 N. Y. S. 477; *Perkins vs. Moss*, 187 N. Y., 410; 11 L. R. A., N. S., 528; 10 Ann. Cas., 309; *Bungart vs. Wells*, 68 N. Y. S., 59.)"

In *State vs. McGinley* (153 Wis., 5), it was said: "Upon just what ground the trial court condemned the action of the examining magistrate does not clearly appear. If, in deciding that the evidence was insufficient to make out a prima facie case, the judge viewed such evidence from the standpoint of a trial court, grievous error was committed. An examination to see whether an accused person shall be placed on trial for an offense charged against him, is a mere inquest. The examining magistrate has very broad latitude in the matter—if the evidence, in any reasonable view of it, satisfies him that a crime within the charge made has been committed and there is reasonable cause to believe the accused is the guilty party he is warranted in holding him to bail. If there is evidence sufficient to give the magistrate any room whatever for the exercise of judgment,—in other words, any jurisdiction to decide the questions of fact within the broad field of probability, then his decision can not be reversed in the matter attempted in this instance."

In *United States vs. Steffens* (27 Fed. Cas., 16384), it was said: "A committing magistrate acts in a twofold capacity,—as a court in deciding questions of law and of evidence; as a jury in finding questions of fact. But the scope of investigation before the magistrate falls far short of a trial of a prisoner before the court and a jury. It is not required before the magistrate as it is before the jury, that all reasonable doubt of the prisoner's guilt must be removed; it is only required that the evidence be sufficient to establish probable cause that the prisoner committed the offense charged."

The following cases are also in accord on the point in question: *United States vs. Lumsden* (26 Fed. Cas., 15641); *In re Van Campen* (28 Fed. Cas., 16835); *In re Squires* (13 Idaho, 624); *State vs. Layman* (22 Idaho, 387); *Lundstrum vs. State* (140 Wis., 141); *Ex parte Patterson* (50 Tex. Crim., 271); *People vs. Van de Carr* (84 N. Y. S., 461).

We find no error in the proceedings in the case at bar prejudicial to the substantial rights of the defendants and appellants, and the judgment convicting and sentencing them in the court below should therefore be affirmed, with the costs of this instance against the appellants. So ordered.

Arellano, C.J., Torres, and Araullo, JJ., concur.

Trent, J., dissents.

Judgment affirmed.

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