

THE UNITED STATES, PLAINTIFF AND APPELLANT, VS. LEON BANDINO, DEFENDANT AND APPELLEE.*G.R. No. 9964. February 11, 1915*

Ponente: TORRES, J.

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On December 4, 1912, the municipal president of Antipolo, Province of Rizal, filed a written complaint in the justice of the peace court of the said pueblo, charging Leon Bandino with the crime of faithlessness in the custody of prisoners committed with reckless negligence. After making the proper investigation, the justice of the peace transmitted the record of the proceedings to the Court of First Instance. Thereafter the provincial fiscal, on July 30, 1913, filed an information wherein he charged the said Leon Bandino with the aforementioned crime, alleging that the accused, a municipal policeman having under his care and guard one Juan Lescano, who was serving a sentence in the "municipal jail of the said pueblo, did, with great carelessness and unjustified negligence, grant him permission to go and buy some cigarettes near the place where he was held in custody; that the prisoner, taking advantage of the confusion in the crowd there, fled from the custody of the accused; with violation of article 358 in connection with article 568 of the Penal Code.

A demurrer was filed to the complaint on the grounds that the facts therein alleged did not constitute a crime, but, on the contrary, proved the innocence of the accused. The court held that the prisoner's escape was not effected with the connivance of his custodian, so that the said crime could not exist, nor did that of escape accompanied by reckless imprudence. He consequently sustained the demurrer and ordered the prosecuting attorney to file a new complaint.

The provincial fiscal then reproduced the previous complaint, adding thereto the words "in tacit connivance with the said prisoner," that is, that the accused did, with exceeding carelessness and unjustified negligence, permit the prisoner to buy cigarettes outside of the jail. Counsel for the accused likewise demurred to this new complaint, on the ground that it was not drawn up in conformity with the legal provisions governing the crime charged and because the facts therein set forth did not constitute a cause of action, but completely exempted the accused from responsibility.

After trial of the case and consideration of the arguments of the provincial fiscal and the attorney for the accused, the court, by an order of the 19th of January of last year. sustained the demurrer filed by the defense and, in view of the fact that the provincial fiscal's statement that he could not further amend his complaint as he believed it to be sufficient as it was, the court finally dismissed the case, ordering the release of the accused and the cancellation of the bail bond, with the costs de officio. The provincial fiscal excepted to this order and appealed therefrom.

Article 358 of the Penal Code prescribes that "any public officer guilty of connivance in the escape of a prisoner in his custody shall be punished," etc.

If there was connivance or consent on the part of the policeman, Leon Bandino, in Juan Lescano's leaving the jail, it is unquestionable that he is responsible for the crime with which he is charged on account of the escape effected

by the said prisoner who took advantage of the leave allowed by his custodian on June 30, 1912.

In the existence and commission of the crime of faithlessness in the custody of prisoners, it is essential that there should have been, on the part of the custodian, connivance in the escape of the prisoner. If the public officer charged with guarding the fugitive did not connive with him, then he did not violate the law and is not guilty of the crime of faithlessness in the discharge of his duty to guard the prisoner.

The renowned juridical writer Escriche, in his dictionary "Legislacion y Jurisprudencia," defines the word "connivance" to be "dissimulation or tolerance, in the superior, of infractions or transgressions committed by his inferiors or subordinates against the institutions or laws under which they live."

It may perhaps be true that the accused had no knowledge that the prisoner Lescano would escape, and that he did not permit him to do so, but it is unquestionable that he did permit him to go out of the municipal jail, thus affording him an opportunity to get away with ease. Therefore the prisoner's escape was effected through the tolerance of his custodian, and is deemed also to have been by connivance with the latter.

According to the rules established by the courts, there is real and actual evasion of service of a sentence when the custodian, failing intentionally or maliciously to perform the duties of his office, and conniving with the prisoner, permits him to obtain a relaxation of his imprisonment and to escape the punishment of being deprived of his liberty, thus making the penalty ineffectual, although the convict "may not have fled, and where the prisoner's leaving the jail and his evasion of service of the sentence were effected with the consent and tolerance of the custodian, or rather in agreement and connivance with him.

Even though the accused committed the crime of faithlessness with carelessness, in violation of regulations or with culpable negligence, the case should not be dismissed nor should the crime go unpunished.

For the foregoing reasons the order appealed from is revoked and the record will be remanded to the court from whence it came in order that such proceedings be had as the law requires.

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

CARSON, J., with whom concurs TRENT, J., concurring:

I concur with the disposing part of the decision.

I think it well to observe, nevertheless, that proof of the facts contained in the information will sustain merely a conviction of infidelidad en la custodia de presos por imprudencia temeraria.

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