

45 Phil. 159

[G.R. No. 17763. September 11, 1923]

**THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS.
PROCESO BUSTOS ET AL., DEFENDANTS AND APPELLANTS.**

R E S O L U T I O N

STREET, J.:

In their petition to rehear the attorneys for the appellants have made a point which was not touched upon in any of the lengthy briefs filed for them in this court, and a few words will be added to clarify the situation and exhibit the facts in the light in which we view them.

It will be recalled that, after the appellants had been convicted in the lower court and the cause brought before us upon appeal, the appellants made application to this court for a reopening of the case in order that certain newly discovered evidence might be brought before the court, consisting of the testimony of Warren D. Smith, Honorio Garcia, Fausto Navarro and Sergio Dunca, who had not been previously examined. This petition was at first denied, but the court reserved the right to act favorably upon the application when the cause should be heard upon its merits. Later, upon the recommendation of the Attorney-General, by an order of March 23, 1922, amended by that of March 28, 1922, the record was returned to the court of origin in order that the testimony of said witnesses and others might be taken. In a resolution of June 13, 1922, the previous order was modified, or rather explained by a statement to the effect that it was not intended that an entirely new trial should be had in the lower court but only that the new proof might be taken in the lower court for consideration by this court. In conformity with the orders mentioned various witnesses were examined, some being presented by the attorneys for the appellants and others by the prosecuting attorney; and said proof was returned

to this court with the original record.

The steps above-mentioned were taken upon the initiative of the attorneys for the appellants, and no objection was made by them in this court to the use of said testimony. On the contrary in a lengthy brief filed by the appellants, the testimony of Warren D. Smith, as a handwriting expert, was relied upon to show that the questioned signature of Liborio Bustos was a forgery.

When the cause was heard by this court, the fact did not escape notice that this new evidence was introduced in support of an application for a new trial, and in that light it was viewed. Nevertheless, in exhibiting the facts in the narrative part of the opinion, we referred to and used the testimony so taken; and it is quite apparent that the use thus made of it was legitimate. The evidence had been brought before us chiefly upon the initiative of the appellants and in so far as the facts revealed in said proof tended to support the decision of the court below, it was not improper that it should be stated in the opinion.

The position now taken by the attorneys for the appellants in the motion to rehear is that we have used evidence against the accused which was not considered by the court below. But it must be remembered that this court has jurisdiction to grant a new trial upon newly discovered evidence; and when evidence in support of such a motion is brought before us by the accused, it may be accepted to refute the contention for a reversal, if it be found to be in fact unfavorable to the point of view of the accused, as happened in this case. It cannot be permitted to an appellant to experiment with the court by placing before it evidence in support of a motion for a new trial, and after the experiment has been found unsuccessful to make for the first time the contention that such proof was not properly before the court.

In conclusion we have only to add that, in the opinion of the majority of this court, the proof upon which the appellants were convicted in the lower court was abundantly sufficient to justify the conviction, and if this court in passing upon the appeal had at first confined itself to that proof and had afterwards considered the new proof separately in support of the motion for a new trial, the result would have been the same; and the circumstance that in the narrative part of the opinion of the court all the testimony was woven into one

complete fabric does not alter the complexion of the case.

The motion is in our opinion not well founded, and the same is denied.

Araullo, C.J., Malcolm, Villamor, Avanceña, and Romualdez, JJ., concur.

Johnson, J., took no part in this resolution.

Johns, J.: For the reasons assigned in my original dissent,^[1] I dissent from this opinion.

^[1] See page 56, *ante*.
