45 Phil. 167

[G.R. No. 20886. September 21, 1923]

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. NARCISO NAYCO Y PASION, DEFENDANT AND APPELLANT.

D E C I S I O N

STATEMENT

The defendant was charged in the municipal court of Manila with the crime of qualified theft of two boxes of onions of the value of P17, and the information further alleged that "the herein accused has heretofore been twice (2) convicted of theft in the Municipal Court, by virtue of final judgments." In that court he was tried and found guilty, and sentenced to three years, six months and three days of imprisonment and costs. From the judgment he appealed to the Court of First Instance, and upon his arraignment, he plead not guilty. At the day of the trial, and with the permission of the court, the defendant withdrew his former plea and entered a plea of guilty. The court sentenced him to four years, two months and one day of *presidio correccional*, and, under Act No. 3062 of the Philippine Legislature, imposed a further and additional penalty of two years and one month. From this judgment, the defendant appeals, contending, in substance, that the court erred in imposing the penalty, and, in particular, the additional penalty under Act No. 3062.

JOHNS, J.:

The only question involved is the sentence which should be imposed upon the information.

In his brief, the Attorney-General says:

> "The penalty fixed by law is *presidio correccional* to its full extent, but there having been no aggravating or attenuating circumstance in the commission of the crime, the penalty prescribed by law should be imposed in its medium degree, to wit: 2 years, 4 months and 1 day to 4 years and 2 months of *presidio correccional*. But taking into consideration the value of the thing stolen, it is believed that the penalty above mentioned should be imposed in its minimum degree, namely, 2 years, 4 months and 1 day of *presidio correccional*."

Upon that point we agree.

He further says that:

> "In accordance with section 1 of Act No. 3062, said appellant should be considered and declared a habitual delinquent, and an additional penalty of 1 year and 2 months which is equivalent to one-half of the penalty above mentioned should be imposed upon him."

Upon that point we do not agree.

The information does not make any allegation or contain any reference whatever to Act No. 3062.

Clark's Criminal Procedure, p. 204, says:

> "The previous conviction enters into the second or third offense to the extent of aggravating it, and increasing the punishment; and, where it is sought to impose the greater penalty for a second or third offense, the previous conviction or convictions, like every other material fact, must be distinctly alleged in the indictment. 'When the statute imposes a higher penalty upon a second and a third conviction, respectively, it makes the prior conviction of a similar offense a part of the description and character of the offense intended to be punished; and therefore the fact of such prior conviction must be charged as well as proved. It is essential to an indictment that the facts constituting the offense intended to be punished should be averred.' And in like manner,

> when
> a statute, besides imposing a higher penalty upon a second or third conviction than upon the first, provides that any person convicted of two or more offenses upon the same indictment shall be subject to the same punishment as if he had been successively convicted on two indictments, still the second and third offenses must be alleged in the indictment to be second and third offenses in order to warrant the increased punishment."

In Ruling Case Law, vol. 14, p. 190, it is said:

> "It is a general rule that in a criminal prosecution under a statute imposing a greater punishment for a second or subsequent offense than for the first, the fact that the offense charged is a second or subsequent violation must be directly averred in the indictment or information, in order to justify a conviction as for a second or subsequent offense."

The rule is well stated in 129 Wis., 174,[1] vol. 9, American and English Annotated Cases, p. 767, where it is held:

> "In a criminal prosecution under a statute imposing a more severe punishment for a second offense than for the first, the defendant's conviction for the first offense must be alleged in the indictment and proved on the trial, in order to warrant his conviction and punishment as for a second offense.
>
> "In a criminal prosecution under a statute imposing a more severe punishment for a second offense than for the first, where the indictment fails to allege the defendant's conviction for a prior offense, evidence showing his prior conviction is inadmissible for any purpose, and error in admitting such evidence when offered by the prosecution is not cured by the fact that the defendant, on his subsequent cross-examination, testifies over objection to his prior conviction."

In the notes to this case, a number of decisions from other States are cited, all of which are to the same effect.

In Larney *vs*. City of Cleveland (34 Ohio St., 599), it is held:

> " '* * * By the rules of criminal pleading, the indictment must always contain an averment of every fact essential to the punishment to be inflicted.' "

The question here involved was also decided in the case of People *vs*. Rosen, by the New York Court of Appeals, vol. 208, p. 169, where it is held:

> "1. The statute (Penal Law, secs. 1020, 1021) provides that a person convicted of a felony who has been, before such conviction, convicted in this state of any other crime may be adjudged by the court, in addition to any other punishment inflicted upon him, to be an habitual criminal and that such habitual criminal shall be at all times subject to the supervision of every judicial magistrate of the county, and of the supervisors and overseers of the poor of the town where he may be found. These provisions, however, relate only to a case where an accused person has been duly charged in the indictment with, and subsequently convicted of, a second offense.
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> "2. Where a defendant indicted for burglary in the first degree, not charged as a second offense, pleaded guilty to such charge, and it appeared upon his examination prior to sentence, pursuant to the statute (Code Crim. Pro. section 485a), that he had before been convicted of a felony and sentenced to a reformatory, it was error for the trial court, acting upon such information, to adjudge that the defendant was an habitual criminal."

The case of State *vs*. Findling (123 Minn., 413), is well considered and in point. It holds:

> "1. Section 4772, R. L. 1905, providing for increased punishment of persons convicted of certain crimes where it appears that they had previously been convicted of a felony, *held* valid, and not in violation of the twice in jeopardy clause of the state Constitution.
>
> "2. In the absence of some statute regulating the procedure, to authorize the

> court to impose the increased punishment, the fact of the prior conviction must be set forth in the indictment, established by proper evidence, and passed upon by the jury."

And on pages 416 and 417, it is said:

> "And the courts applying this rule all hold that the prior offense must be charged in the indictment and also established on the trial, and a verdict of the jury rendered thereon * * *. All other courts where the question has been presented hold that the prior conviction must be pleaded and proven on the trial, and no distinction is made because of the fact that in some of the states the punishment is fixed and determined by the jury, and in others by the court upon a verdict of guilty."

The constitutionality of the law is settled in the case of Graham *vs*. West Virginia, by the Supreme Court of the United States (56 L. ed., 917), where, on page 921 of the opinion, it is held:

> "1. The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted. Statutes providing for such increased punishment were enacted in Virginia and New York as early as 1796 and in Massachusetts in 1804; and there have been numerous acts of similar import in many states. This legislation has uniformly been sustained in the state courts."

Upon the question here involved, many decisions of our court have announced the same rule. In the recent decision of United States *vs*. Tieng Pay (42 Phil., 212), it is held:

> "3. ID.; ID.; MATERIAL FACT NOT ALLEGED IN THE COMPLAINT NOT PROVABLE.—In the present case no allegation of recidivism was made in the complaint; yet the

> lower court permitted proof of the same during the trial, against the objection of the defendant. *Held:* It was error to admit such proof. Any evidence presented which does not directly or indirectly tend to prove some of the facts alleged in the complaint should be rejected by the court. Otherwise, and under any other rule, a defendant might be charged with one crime and convicted of a very different and dissimilar crime, which, of course, cannot be sanctioned under a government of law."

For want of an allegation in the information in the instant case to the effect that the defendant was an habitual delinquent, under the terms and provisions of Act No. 3062, all of the sentence under that Act is error, and must be eliminated from the judgment.

Where it is sought to enforce the provisions of Act No. 3062, it is necessary to make some allegation or reference to the Act in the information. But a formal or technical plea is not required.

In the instant case, it is alleged:

> "The herein accused has heretofore been twice (2) convicted of theft in the Municipal Court by virtue of final judgments."

In such a case, to invoke the penalty of the Act, it would be sufficient to further allege "and that the defendant is an habitual delinquent under the terms and provisions of Act No. 3062." In other words, the pleader should first charge the crime; second, that the defendant is a recidivist in the usual language; and, third, that he is an habitual delinquent under the provisions of Act No. 3062.

Where the defendant has not lost his legal rights, this or, in substance, a similar allegation should be made to enforce the penalty provided for in Act No. 3062.

For such reasons, the judgment of the lower court will be modified, and one will be entered here, sentencing the defendant to two years, four months and one day of *presidio correccional*, with costs against the appellant on this

appeal. So ordered.

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

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[1] Paetz *vs*. State.

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