

43 Phil. 317

[ G. R. No. 17987. April 25, 1922 ]

**FLORENCIO FABILLO, PLAINTIFF AND APPELLEE, VS. EUSEBIO TIONKO AND LUIS EGAY, DEFENDANTS AND APPELLANTS.**

**D E C I S I O N**

**MALCOLM, J.:**

The appellants in this case contend that the trial judge, the Honorable Andres Borrromeo, abused his discretion in not acceding to their request for a transference of the trial from the date set, April 30, 1921, to the month of July of the same year, and in not acceding to the motion for a new trial interposed by Attorney Eusebio Tionko, in his own behalf and in behalf of his codefendant. Accordingly, appellants pray for a reversal of the judgment and for an order directing the celebration of a new trial.

A statement of the case may be made as follows: The complaint was filed in the Court of First Instance of Surigao on August 11, 1920. The answer of defendant Tionko was filed in the same court on August 30, 1920. The trial judge, the Honorable Fermin Mariano, presided at the trial of the case on September 8, 1920, at which time the evidence for the plaintiff was presented, without either of the defendants being present. On September 15, 1920, defendant Tionko filed a motion for the annulment of all that had taken place at the trial, on the ground that he had not been notified of the day and place of the same. The trial judge acceded to the request of defendant Tionko, notwithstanding that the records apparently showed that proper notice of the date of the trial had been sent him. Still later, amended answers and complaints were filed by the respective parties.

The case was again set down for trial on April 25, 1921, and the parties were properly notified. Defendant Egay thereupon asked for a transference until the month of May, "because of sickness, and defendant Tionko for a transference until the month of July, because of the necessity of his attendance on the sessions of the House of Representatives. Judge Borrromeo considered these motions and on April 9 ordered that the case be called on

April 30, 1921. Defendants, however, again requested by telegram that the case be put over until the July term; Egay because of sickness, and Tionko because the Independence Mission was in session. Judge Borromeo refused a further continuance, and after taking<sup>1</sup> the evidence presented by the plaintiff, rendered a judgment against the defendants, condemning them to return the thirty-eight posts described in the complaint, or jointly and severally to reimburse the plaintiff in the sum of P480, and to pay the plaintiff P150, additional, as damages, with costs against them.

The legal principles applicable to the facts are extremely clear. It is a general rule that the granting or refusing of a motion for continuance is in the sound discretion of the trial court, and that the appellate court will not interfere with the exercise of this discretion, unless the action of the trial court is clearly erroneous, or is a clear abuse of its discretion. In this instance, we are of the opinion that Judges Mariano and Borromeo have been extremely patient with the defendants in the efforts of the latter to delay the administration of justice.

Relative to the excuse of defendant Egay as to why he could not be present for the hearing of the case, it should be recalled that his only showing of sickness was made in a brief telegram. In the case of *Natividad vs. Marquez* ([1918], 38 Phil., 608), this court applied the rule that "the fact of illness must be established by some satisfactory sworn statement, either in the shape of an affidavit or the certificate of a physician that satisfies the court of the inability of the party to be present," and that rule is again here applicable.

Relative to defendant Tionko, who was likewise counsel for the defense, it should be recalled that Mr. Tionko relied on the necessity of his presence at the sessions of the Independence Mission, as a reason for the postponement of the trial in this case. The rule on this subject is, that the absence of counsel in attendance on the Legislature as a member thereof is not a sufficient cause for a continuance except where it is so provided by statute. (13 C. J., 146; *Sharman vs. Morton* [1860], 31 Ga., 34.) If attorney Tionko had so desired, he could easily have made arrangements for the handling of his cases in the provincial courts during his absence in Manila, to attend to his duties as a member of the Philippine Legislature. Certainly, the wheels of justice cannot stop because of the meetings of the Legislature any more than the Legislature should adjourn because of sessions of court.

Finding no reversible error, judgment must be affirmed, with costs against the appellants. So ordered.

*Araullo, C. J., Villamor, Ostrand, Johns, and Romualdez, JJ., concur.*

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