

43 Phil. 205

[G. R. No. 18054. March 18, 1922]

**THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS.
ARSENIO SUNGA Y REYES (ALIAS) ARSENIO LOPEZ, DEFENDANT AND
APPELLANT.**

D E C I S I O N

ROMUALDEZ, J.:

The herein accused is Arsenio Sunga y Reyes (alias) Arsenio Lopez who was prosecuted for, and convicted of, the crime of qualified theft in that with intent of gain he had taken away, without the consent of the owner, certain pieces of jewelry and other valuables worth in all P3,277, equivalent to 16,385 pesetas. The penalty Imposed upon the accused was ten years of presidio mayor, with the accessories prescribed by law, to indemnify the offended party in the sum aforesaid, with subsidiary imprisonment in case of insolvency, and to pay the costs.

The theft was considered as qualified theft on account of the proven and undenied fact that the appellant is fourteen times a recidivist.

Counsel for defense in this instance does not assign any error to the, judgment appealed from, which he finds in accordance with the facts and the law of the case.

However, the prosecution, maintaining that the defendant should be punished in accordance with paragraph 1 of article 518 of the Penal Code in relation with paragraph 3 of article 520 of the same Code, recommends that in the absence of any modifying circumstance, the appellant should be sentenced to suffer the penalty prescribed in article 520, in the medium degree, that is to say, seven years, four months and one day of presidio mayor.

An examination of the record shows without a shadow of doubt the guilt of the accused. His alibi is absolutely worthless as a defense.

The only matter that under the facts of the case concerns us is the determination of the penalty that should be imposed. We are in accord with the prosecution as to the legal

provisions applicable to the case. However, we find that the accused entered the inhabited house through a window, which was not the proper entrance to the house, and, therefore, there is present in this case the circumstance of scaling a house which, had it been alleged in the complaint, would have made the crime robbery (article 508 of the Penal Code, second paragraph before the last), but as this circumstance was not alleged, it must be considered as an aggravating circumstance (No. 21, article 10, Penal Code), with the result that, in the absence of any extenuating circumstance, as in the present case, the penalty must be raised to the maximum degree.

On the other hand the subsidiary imprisonment imposed upon the accused is not permitted by the law because the principal penalty is not correctional, but afflictive, in nature. (Arts. 25 and 51 of the Penal Code.)

The judgment appealed from is modified and the appellant is sentenced to undergo ten years of presidio mayor, to return to the owner the articles stolen, described in the complaint, or their value of P3,277, to the accessories prescribed in article 57 of the Penal Code, and to the payment of the costs of both instances. So ordered.

Araullo, C. J., Malcolm, Avanceña, Villamor, Ostrand, and Johns, JJ., concur.