6 Phil. 387

[G.R. No. 2658. August 23, 1906]

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. ROSA ALCANTARA ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

MAPA, J.:

The defendants in this case were charged with the robbery of certain jewels of the value of 11,185.50 pesetas, and convicted thereof in the Court of First Instance, the defendant Alcantara as principal and the defendant Nisayas as an accessory after the fact. The former was sentenced to seven years' imprisonment (*prision mayor*) and the latter to pay a fine of 750 pesetas. The defendant Nisayas did not appeal. Her codefendant, however, did appeal. Two separate complaints were presented successively for the same act charged in this case. In the first complaint the defendants were charged with theft. It does not appear clearly from the record what the outcome was of the prosecution instituted upon the first-mentioned complaint. The appellant in this case alleged in the Court of First Instance that she had been placed twice in jeopardy for the reason that she had been acquitted in the former trial, but failed to present the necessary proof in support of her allegation, and relied upon the fact that such acquittal appeared from the record in the other case. The court below, in discussing this point, merely says that the crime of theft is entirely different and distinct from the crime of robbery, and consequently that the defendants in this case can not set up the defense of having been placed twice in jeopardy. With nothing except what we have now before us we can not determine with certainty whether this is one of the cases covered by the provisions of sections 27 or 28 of General Orders, No. 58. This of itself, without the necessity of passing upon the merits of the questions of law involved in the aforesaid plea of jeopardy, perhaps, would be sufficient to overrule such plea, the defendant having failed to support her allegation of a former acquittal if the merits of the present case did not make it unnecessary to make an express declaration upon this point.

The complaining witness in this case was the owner of a jewelry store on Calle Rosario of this city; she lived in Calle Soler, Her custom was to take the jewels to the store in the morning and to take them back to her house at night. For this purpose she had employed a clerk who had been in her employ for seven years. On the morning of the 29th of July, 1904, this clerk took the jewels, as usual, in order to carry them to her place of business, while the owner was in church attending mass. These jewels were contained in two small boxes locked with keys. The jewels did not reach the store, the clerk having lost them on the way. The fact was reported to the authorities, who, on the evening of the same day, found the said jewelry in the possession of the defendant, the boxes in which the jewels had been contained having been broken open.

As to the manner in which the clerk of the complaining witness lost possession of the property in question, it seems that there was no other eyewitness than the clerk himself, who, by the way, was not called as a witness in this case. The only evidence of record in regard to this matter is the testimony of the complaining witness herself, who testified as to what she had heard from the clerk. She testified that. she met her clerk hurrying by the church about 8 o'clock in the morning, inquired from him as to the whereabouts of the jewels, and that he informed her that the appellant, who had been a servant in the house of the complaining witness for two days under the name of Francisca, had taken them away. After this we find in the testimony of the complaining witness the following questions and answers:

> "Q. Where did Francisco Llamoso (the clerk) tell you that that woman (the appellant) had taken the jewel boxes away from him?—A. In Calle Misericordia in the store of a Chinaman. He said it was raining, and that the girl told him to put the boxes inside the Chinaman's store.
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> "Q. Did Francisco explain to you how she (the girl) took possession of the boxes?—A. When Francisco went out with the two boxes she followed him and told him that she was going to sell something; that the lady had gone out calling, and as I have said before, when they arrived at a Chinaman's store she told him, as it was raining, to put the two boxes inside the Chinaman's store, and at the same time asked Francisco to go and buy some pineapples for her."

It seems that when the clerk returned to the Chinaman's store the appellant had already disappeared, taking the jewelry with her.

This testimony indicates, and we believe that it actually so happened, that the boy who was carrying the jewels turned them over to the appellant for safe-keeping while he went after the pineapples for her. It is not probable that he would have left the jewelry in the Chinaman's store under any other circumstances. He was not acquainted in the store and merely stopped there casually to shelter himself from the rain. This being so, it can not be said that there was any actual *taking (apoderamiento)* of the jewels. The appellant did not, in fact, possess herself, or take the property in question, in the technical and legal sense in which the words "to take possession of" and "to take" are used in the Penal Code in connection with the crimes of robbery and theft, but simply "to receive" them from the clerk, who voluntarily delivered them to her in trust, the clerk in turn having received the same from the owner, the complaining witness in this case. If there were no actual taking, there could have been no robbery because this crime can not be committed except by *taking possession* of the personal property of another against the latter's will. (Article 502 of the Penal Code.)

The fact that the jewels in question had been delivered to the defendant temporarily for safe-keeping certainly did not authorize her to keep them, but on the contrary she was obliged to return the same to the person from whom she received them. There can be no question as to this; neither can there be any question that the misappropriation of these jewels by the appellant under such circumstances constituted an offense against property. But legally speaking, this offense is not and can not be that of robbery with which the appellant in this case is charged.

We accordingly reverse the judgment of the trial court and acquit the appellant of the charge of robbery with the costs of both instances *de oficio.* After the expiration of ten days from the date of final judgment, let the case be remanded to the Court of First Instance for proper procedure. So ordered.

Arellano, C. J., Torres, Carson, Willard, and *Tracey,* concur.

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