

1 Phil. 539

[ G.R. No. 593. December 10, 1902 ]

**THE UNITED STATES, COMPLAINANT AND APPELLANT, VS. JOAQUIN FERNANDEZ Y HERRERIAS ET AL., DEFENDANTS AND APPELLEES.**

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

**TORRES, J.:**

Case No. 47 was commenced in the Court of First Instance of Iloilo on June 23, 1901, upon a complaint filed by Cirilo Mapa, attorney at law, charging Francisca Zulueta and her husband, Joaquin Fernandez Herrerias, with the crime of calumny. The defendants appeared before the court, and, having been arraigned upon the charge, on the 13th of August filed in due form a demurrer to the information. Upon this the private prosecutor filed an answer, and, without further proceedings by the provincial fiscal, who was duly notified, the incident was decided by an order dated the 4th of November, 1901, by which the demurrer of the defendants was overruled, and, in accordance with the provisions of section 24 of General Orders, No. 58, the defendants were directed to plead to the charge at the day and hour designated.

On the 4th of November, 1901, the attorney for the defendants moved the court to dismiss the information, upon the ground, among others, that the same was presented by a person not authorized to represent the United States, and not a party to the proceedings; that the action had not been prosecuted by the provincial fiscal, and had been abandoned, inasmuch as he had failed to make reply within three days to the demurrer and the argument in support thereof filed by the defendants.

The court below, by an order of the same date, November 4, 1901, after service of notice upon the provincial fiscal and upon the private prosecutor, ordered the parties to appear on the morning of the 8th of November. The hearing took place on that day, and after oral argument by the attorney for the defendants, the private prosecutor, and the provincial fiscal, on the 23d of November the order appealed from was entered.

By the order of the 4th of November the court below overruled the demurrer of the defendants to the information upon which this prosecution was instituted. The judge could not subsequently enter an order of dismissal, and order the answer filed by the private prosecutor against the demurrer to be excluded because he considered that the provincial fiscal had abandoned the prosecution of the case.

The fact that the provincial fiscal did not reply to the demurrer taken by the attorney for the defendants was not sufficient ground to authorize the dismissal of the case, because as the demurrer was overruled by the order referred to, the prosecution of the case should have been continued and the defendants ordered to plead, in accordance with section 24 of General Orders, No. 58, dated April 23, 1900, as Avas expressly directed by the order referred to of November 4.

It is necessary to hold constantly in mind the provisions of section 107 of General Orders No. 58, when considering the rights of the party injured by the commission of the offense, and further that all public offenses tried before the Courts of First Instance must be prosecuted by complaint or information, in accordance with section 3 of the general order cited. As the private prosecutor, Cirilo Mapa, filed a complaint in his capacity as the party injured and entitled to take part in the prosecution of the crime of which the defendants are charged, and for the purpose of enforcing against them their civil liability, it is evident that the case was properly commenced by the filing of the said complaint.

There was no abandonment of the penal action by the provincial fiscal, as it appears from the record that since the preliminary investigation was had that officer has constantly participated in the prosecution, and that notice was served upon him of the order overruling the demurrer, and that notice was served upon him of the orders made by the judge for the prosecution of the case. This, apart from the petition filed by him, and which, appears on page 10 of the record, and the fact that he was present when the defendants appeared, and that he addressed the court at the time they were arraigned in the hearing upon the motion, and that he joined the private prosecutor in his appeal to this court against the order referred to. If the provincial fiscal failed to answer in writing to the demurrer filed by the attorney for the defendants, this was possibly due to the fact that no copy of the demurrer, or of the argument in support of it, was served upon him, and in the order on page 30 of the record the judge did nothing more than to direct that notice of the order be served upon the provincial fiscal. But however that may be, the failure on the part of the fiscal to so reply or answer would under no circumstances be sufficient to authorize the dismissal of the prosecution, or to support the conclusion that the representative of the Government had

abandoned the case, when several other acts of that officer demonstrate the contrary; furthermore, section 38 authorizes the appointment of a practicing attorney to perform the duties of the fiscal, should he be absent during the trial.

Upon these grounds, therefore, we are of the opinion that the order of the 23d of November, 1901, should be reversed, and that the case should be returned to the court below for a continuation of the prosecution, in accordance with the procedural law.

*Arellano, C. J., Cooper, Smith, Willard, and Ladd, JJ., concur.*

*Mapa, J., disqualified.*

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