

2 Phil. 710

[ G.R. No. 1339. November 28, 1903 ]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. PEDRO MAGSINO, DEFENDANT AND APPELLANT.**

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

**COOPER, J.:**

The defendant, Pedro Magsino, is charged with the offense of robbery committed in the following manner:

“Mariano Dy-Seng, a Chinaman, loaded at the railway station in the town of Angeles, on August 27, 1902, 70 pilones of sugar to be shipped to Manila. As soon as the merchandise was invoiced, it was shipped with the knowledge and intervention of the station master Geronimo Manalo, on car K, No. 300, on the 29th of the same month. When the car arrived at Manila it contained only 36 pilones of sugar, 34 pilones of the amount shipped by Dy-Seng being lacking; that the accused, Pedro Magsino, agent at the said station, abstracted by force by unnailing the strips of cloth used to seal up the door of the car which contained the said sugar, and that, after the abstraction, again fastened the door of the car.”

The defendant was convicted on October 1, 1902, and was sentenced to the penalty of one year and ten months of *presidio correccional*, with the accessories of article 58 of the Penal Code, and was adjudged to make restitution to Mariano Dy-Seng of 34 pilones of sugar, or to pay to the latter the sum of \$246.50, its value, and, in case of insolvency, to the corresponding subsidiary punishment at the rate of one day for each 12£ pesetas, and to the payment of costs. The defendant appeals from this judgment.

It is contended by counsel for the defendant: (1) That the court erred in permitting

Geronimo Manalo, station master of the railway company, to prosecute the case, the party injured being the Chinaman Dy-Seng; (2) that the proof is insufficient to show that the defendant had any participation in the abstraction of the sugar, either as author, accomplice, or *encubridor*; and (3) that the court erred in qualifying the offense as robbery, the facts charged in the complaint consisting in the act of uimailing and renailing the strip of cloth placed over the door as a seal, this act being not included, within the provisions of article 512 of the Penal Code.

I. As to the first objection—that is, that the injured party was the Chinaman, Dy-Seng, and that Geronimo Manalo, the station master, should not have been permitted to prosecute the case—it is sufficient to say that the information was signed by the provincial fiscal and the prosecution was conducted by him in the court below. The case cited by counsel, the United States vs. The Municipality of Santa Cruz,<sup>[1]</sup> is not applicable here. In the case cited the prosecution was not carried on by the provincial fiscal, but it was instituted and carried on by the municipality of Santa Cruz, which municipality had no direct interest and was not entitled under the provisions of section 107 of General Orders, No. 58, as the person injured, to take part in the prosecution of the offense and to recover damages for injuries sustained by reason of the same.

The judgment was rendered in favor of Dy-Seng for the damages resulting from the taking of the 34 pilones of sugar, and no judgment has been rendered in favor of Geronimo Manalo.

Where the complaint is signed by the provincial fiscal and the prosecution is carried on by the Government, it is sufficient authority for the prosecution; that others, who were not entitled to recover damages or carry on the prosecution, intervened in the case, is not such error as tends to prejudice the right of the defendant upon the merits, no judgment having been rendered in favor of such intervening party.

II. The next assignment of error—that is, that the evidence is insufficient to show the participation of the defendant in the taking of the sugar—will require a review of the evidence.

It appears that the defendant, Magsino, was an employee and agent of the railway company at the station of Angeles; that the Chinaman Mariano Dy-Seng, on August 28, 1902, carried to the station 70 pilones of sugar, which was loaded under the direction of the defendant as such agent, in a freight car, for shipment to Manila. Mariano Dy-Seng, as the shipper, sealed the car after it Avas loaded by placing upon the door a strip of cloth, the customary way of

sealing a freight-car door, the defendant at the time being near by. The defendant, as agent of the company, then issued a certificate to Dy-Seng to the effect that the car contained 70 pilones of sugar of the weight of 7,000 kilos. The sugar was shipped and invoiced to Chua-Koko in Manila, When the car reached San Fernando, Pampanga, en route to Manila, it was again weighed and was found to contain but 3,110 kilos, about 36 pilones of the sugar. When it reached Manila, it was examined by Chua-Koko, the consignee, and was found to contain only 36 pilones of sugar. Dy-Seng examined the car at Manila and found that the strip of cloth nailed over the door as a seal had been broken.

It appears that on August 27 one Bspiridion Basilio was making some shipments of sugar to Malolos, having shipped two cars of 70 pilones each to that station; that he accompanied these shipments to Malolos, and, while at Malolos on August 29, 1902, one Pedro Sondiang arrived there, having in his charge an invoice of 34 pilones of sugar which had been shipped from Angeles to Malolos. This invoice was sent by the defendant, Magsino, to Basilio, with the request that the latter should assist the former in making the sale of the sugar mentioned in the invoice. Basilio answered saying he did not have time to attend to the sale of the sugar for the defendant, on account of his having to leave for Manila, and turned over the invoice to a Chinaman, Tomas Iniguez, leaving the sugar with him. Basilio, after his return to Angeles, in a conversation with the defendant, asked defendant where the sugar came from. The defendant replied that it came from his father, to whom it had been delivered as rent by Tomas Dison. After the return of Basilio to Angeles, at the request of the defendant, Basilio sent one Hilaria de la Cruz from Angeles to Malolos to look after the sugar, she bearing a letter to the Chinaman Tomas Iniguez. Upon the presentation of this letter to Tomas Iniguez at Malolos, he delivered to Hilaria 200 pesos as a payment on account of the sugar which had been left in his charge by Basilio. Hilaria testified that she returned with the money to Angeles and there turned it over to the defendant.

The defendant testified in his own behalf and made the following statement with reference to the shipment of the 34 pilones of sugar from Angeles to Malolos: He stated that in the course of his duties as agent at the station, whenever the station master was absent and merchandise was sent to the station for loading, he attended to supplying the car; that between 6 and 7 o'clock of the morning of August 28, 1902, Espiridion Basilio requested a car for the loading of some sugar; that at this hour the station master, Manalo, had not arrived; that about 7 o'clock in the morning he gave an order for the loading of the sugar, and that the car was loaded between 9 and 10 o'clock; that on the same day after the sugar had been loaded, Basilio entered the office and asked him to invoice the sugar, and to this the defendant replied that the train was then in sight and that he would send the invoice to

Basilio at Malolos; that Basilio, after leaving \$7.06, the amount of freight charges on the car to Malolos, took the train for Malolos; that on the following day the defendant, seeing Pedro Sondiang in the station, and learning that Sondiang was going to Malolos, requested him to take the invoice to Basilio.

The defendant on cross-examination denied that the 34 pilones of sugar shipped from Angeles to Malolos was his property, or that he ever made any claim to it. He also denied the statement of Hilaria de la Cruz, to the effect that she turned over to him the 200 pesos, which she testified to having received from the Chinaman Tomas Iiiiguez at Malolos.

There is attached to the brief of defendant's counsel an affidavit of Hilaria de la Cruz in which she states that her testimony on the trial was given at the request of her brother-in-law, Espiridion Basilio; that she had also been threatened with death by Geronimo Manalo, the station master at Angeles, if she did not testify in the manner in which she did on the trial of the case; that she wished now to retract all she said at the trial of the case and states that it was not true that she delivered any money to the defendant, Magsino, at any time on account of the sale of the sugar.

This declaration on oath can not be considered in the decision of this case, as it was not delivered at the trial and is not contained in the record, nor would it be entitled to any weight if considered. Her testimony given in the trial was consistent and has the appearance of being true.

The following facts in the case seem to be uncontroverted:

That 34 pilones of the 70 pilones of sugar belonging to Dy-Seng, and loaded on the car at Angeles, were taken out of the car before it reached Manila. This was shown by the testimony of Dy-Seng, who examined the car after it reached Manila, and by the testimony that the car was short this amount when re weighed en route at San Fernando, Pampanga; that the exact amount of this shortage was about the same time shipped from Angeles to Malolos; that this shipment to Malolos was not made through accident or mistake is shown by the testimony of the defendant, who states that he shipped 34 pilones of sugar from Angeles to Malolos, consigned to Basilio, the invoice for which he sent to Basilio at Malolos by Pedro Sondiang, and by the testimony of Basilio, who states that he received from the hands of Pedro Sondiang the invoice of the shipinentj and by the testimony of Sondiang that the defendant gave him the invoice at Angeles, which he delivered to Basilio at Malolos; that the 34 pilones of sugar were surreptitiously taken may be inferred from the fact that it

was placed in the hands of the Chinaman Tomas Ifiguez for sale, and that both the defendant, who loaded it, and the consignee, Basilio, who received it at Malolos, deny any claim to it.

The opportunity of the defendant for abstracting the sugar from the car of Dy-Seng and reshipping it to Malolos was superior to that of Basilio. In the performance of his duties as agent at Angeles the loading of cars was intrusted to the defendant, thus affording him, without suspicion, the opportunity of handling the sugar in the car loaded for Dy-Seng and reloading it on the car sent to Malolos; while, on the other hand, it is entirely improbable that Basilio could have performed this act at the station undiscovered by the employees of the railway company.

These circumstances tend strongly to corroborate the testimony of the witnesses who testified against the defendant. The testimony of Basilio plainly made out the case against the defendant. His testimony is direct and positive that he was in Malolos at the time the invoice was sent him, and that it was sent by the defendant with the request that the sugar be sold for his account. The testimony of Hilaria de la Cruz was also direct and positive, to the effect that she went to Malolos to make the collection from the Chinaman Tomas Iniguez, and collected from him \$200 on account of the sale of the sugar, and delivered this amount to the defendant.

It seems entirely probable that the defendant availed himself of the confusion which might occur by the shipment at the same time of a like quantity of sugar belonging to Dy-Seng and belonging to Basilio, and, taking advantage of this, abstracted from the car of Dy-Seng the 34 pilones of sugar belonging to him and shipped it to Malolos as a part of the shipment of Basilio, in the hope, perhaps, of securing the cooperation of Basilio in the theft.

The testimony is entirely sufficient to fix upon the defendant the crime of abstracting the 34 pilones of sugar belonging to Dy-Seng.

III. The only question that remains to be determined is whether the offense committed is that of robbery as defined and punished by article 512 of the Penal Code or is that of *estafa*. This article reads as follows:

“ART. 512. Robbery committed in an uninhabited place or in a building which is not one of those mentioned in the first paragraph of article 508, if the value of the objects robbed should exceed 1,250 pesetas, shall be punished with the

punishment of *presidio correccional* in its medium and maximum degree, providing that any of the following circumstances be attendant, among them: Wrongful entry; breaking of walls, roofs, or floors; the forcing of doors, wardrobes, etc., coffer, or any other kind of furniture or locked or sealed objects.”

We think that the car in which the sugar belonging to Dy-Seng was loaded came within the meaning of this section of the Penal Code. The word “building” mentioned in article 512 was evidently intended to embrace any kind of structure, not mentioned in the first paragraph of article 508, used for the storage or safe-keeping of personal property.

That there was a breaking by force we think is also shown by the evidence. The car, after being loaded, was by the owner of the cargo, Dy-Seng, closed by nailing a strip of cloth over the door so as to seal it, the customary manner of sealing a freight car. Dy-Seng testified that, upon the examination of the car at Manila, the strip of cloth had been unnailed and again nailed over the door. This was a breaking by force within the meaning of the statute.

IV. We think the court also properly applied the aggravating circumstance mentioned in No. 10 of article 10 of the Penal Code – that is, that it was an act committed with abuse of confidence. It was the duty of the defendant to superintend the loading of cars, and he availed himself of the opportunity which this office afforded him for abstracting the sugar.

There was no error committed by the Court of First Instance in the conviction of and in the sentence imposed upon the defendant. The judgment is therefore affirmed, and the costs of this appeal adjudged against defendant.

*Arellano, C. J., Torres, Willard, Mapa, and McDonough, JJ., concur.*

*Johnson, J., did not sit in this case.*

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<sup>[1]</sup> 1 Phil. Rep., 731.

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