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NOTES and COMMENTS

THE GRADUATION OF A PENALTY CONSISTING OF ONE PERIOD OF A DIVISIBLE PENALTY

The earliest case deciding the question of the graduation of a penalty consisting of one period is U. S. v. Fuentes, 4 Phil. 404, which enunciated the doctrine, based on decisions of the Supreme Court of Spain, that the penalty next lower to a penalty consisting of one period is the corresponding period in the next divisible penalty. Justice Albert of the Court of Appeals followed this doctrine in his *Revised Penal Code, Annotated.* Subsequently, and after the lapse of many years, the same question was squarely considered for the first time on the merits and principle involved and not merely on authority, in People v. Co Pao, 58 Phil. 545, wherein the decisions of the Supreme Court of Spain on which the Fuentes case was based were examined and it was found out that the said decisions refer exclusively to robbery defined and penalized in article 299 of our Revised Penal Code. The Fuentes case was apparently based on the wrong decisions and was overruled by the Co Pao case which held that the penalty next lower in degree to a penalty consisting of one period should be taken from the same divisible penalty, whenever possible. This holding was followed in People v. Gayrama, 34 O. G. 561, and in two cases decided by the Court of Appeals, namely: People v. Gaba, 36 O. G. 1865, the facts of which are identical to the facts in the Fuentes case; and People v. Padilla, 36 O. G. 2404, wherein the decision was penned by Justice Albert in the course of which he expressed the personal view that the penalty immediately inferior to a penalty consisting of one period is the corresponding period of the next divisible penalty.

Article 61 of the Revised Penal Code provides as follows:

Art. 61. *Rules for graduating penalties.*—For the purpose of graduating the penalties which, according to the provisions of articles 50 to 57, inclusive, of this Code, are to be imposed upon persons guilty as principals of any frustrated or attempted felony, or as accomplices or accessories, the following rules shall be observed:

1. When the penalty prescribed for the felony is single and indivisible, the penalty next lower in degree shall be that immediately following that indivisible penalty in the scale prescribed in article 70 of this Code.

2. When the penalty prescribed for the crime is composed of two indivisible penalties, or of one or more divisible penalties to be imposed to their full extent, the penalty next lower in degree shall be that immediately following the lesser of the penalties prescribed in the above mentioned scale.

3. When the penalty prescribed for the crime is composed of one or two indivisible penalties and the maximum period of another divisible penalty, the penalty next lower in degree shall be composed of the medium and minimum periods of the proper divisible penalty and the maximum period of that immediately following in said scale.

4. When the penalty prescribed for the crime is composed of several periods, corresponding to different divisible penalties, the penalty next lower in degree shall be composed of the period immediately following the minimum period prescribed and of the two next following, which shall be taken from the penalty prescribed, if possible; otherwise, from the penalty immediately following in the above mentioned scale.

5. When the law prescribes a penalty for a crime in some manner not specially provided for in the four preceding rules, the courts, proceeding by analogy, shall impose corresponding penalties upon those guilty as principals of the frustrated felony, or of attempt to commit the same, and upon accomplices and accessories.

As is evident, the first four rules of the foregoing article do not cover a case where the given penalty consists of one period of a divisible penalty. In a case of such kind, according to rule 5 of the same article, the courts should proceed by analogy. The question is which of the first four rules of article 61 should be followed by way of analogy.

Rule 3 is obviously inapplicable.

Justice Albert of the Court of Appeals opines that rule 1 should be applied. The penalty next lower in degree to a penalty consisting of one period of a divisible penalty should be taken

not from the same divisible penalty but always from the next divisible penalty in accordance with the scale in article 70 of the Code. Thus, if the given penalty is *prisión correccional* in its medium degree, the penalty next lower is *arresto mayor* in its medium degree. U. S. v. Fuentes, *supra*. He gives two reasons for this view: (1) The Revised Penal Code, unlike its predecessor, has clearly established a distinction between "period" and "degree" naming each of the three equal parts into which a divisible penalty is divided, a "period", and reserving the name "degree" to the diverse penalties mentioned by name in the Code; and since article 61, in speaking of a penalty lower by one degree or two degrees refers to the scale in article 70 of the Code, the penalty lower by one degree is to be looked for, not in the other periods of the same penalty, but in the penalty coming below it in the said scale; and (2) If the penalty next lower in degree is taken from the same divisible penalty, a situation will happen where accessories and accomplices would suffer the same divisible penalty imposed on the principal although in different periods only. For instance, a prisoner serving sentence commits homicide. According to article 160 of the Code, he is to be punished with the maximum period of *reclusión temporal*. If there are accomplices and accessories, a penalty lower by one degree or two degrees shall be imposed. If the penalty next lower in degree is to be taken from the same divisible penalty, the accomplice would suffer the medium period, and the accessory, the minimum period of *reclusión temporal*. It is plain therefore that this method of graduation imposes the penalty reserved by law for the principal in the crime of homicide, upon the accomplice and accessory. In an ordinary homicide, the penalty of *reclusión temporal* in any of its periods would be the proper penalty for the principal. In this instance, a person playing a secondary or tertiary part in the homicide would be punished with the very penalty of *reclusión temporal* in the medium and minimum period intended for the principal. Whereas, under the interpretation that seems to be the more reasonable, the principal would be penalized with *reclusión temporal*, the accomplice with *prisión mayor*, and the accessory with *prisión correccional*, which is exactly what the law prescribes. See People v. Padilla, *supra*, decided by the Court of Appeals; Albert, Revised Penal Code Ann. 207.

If the foregoing interpretation of Justice Albert is examined carefully, it would seem more accurate to say that rule 2,

which, among others, covers a case where the given penalty is a divisible penalty imposed to its full extent, and not rule 1, which applies only to indivisible penalties, should be followed. Under rule 2, if the given penalty is, say, *prisión correccional*, the penalty immediately inferior is *arresto mayor*. It would seem therefore that if as Justice Albert states the penalty next lower to a penalty consisting of one period of a divisible penalty should be looked for in the next divisible penalty in accordance with the scale, then it is rule 2 and not rule 1 which is most analogous.

The reason that since the Code distinguishes between period and degree, and since article 61 refers to the scale in article 70, the penalty next lower should be taken from the penalty following in the scale does not appear tenable because, (1) it should be borne in mind that in the instant case, the first four rules are being applied only by way of analogy, for which reason, the distinction between period and degree cannot and should not be literally observed, and (2) there is no reason why any distinction should be made between the graduation of a penalty consisting of two periods, in which rule 4 is applied, and the graduation of a penalty of one period. Justice Albert admits as well settled that when the penalty consists of two periods, for instance, *prisión mayor*, in its minimum and medium degrees, the penalty next lower is taken from the remaining periods of the same divisible penalty, if possible, and if not, from the periods of the next divisible penalty, which, in the example given, is *prisión correccional* in its medium and maximum degrees. It is believed that in both cases, the same method of graduation should be followed, and rule 4 should apply to both.

The other reason, namely, that it would be too harsh to accomplices and accessories if in graduating a penalty of one period, the period immediately following is taken as the one next lower in degree, and in which the example of article 160 is cited, is likewise untenable. The example is misleading. Article 160 treats of a person who commits a felony after having been convicted by final judgment, before beginning to serve such sentence, or while serving the same. Such person is in reality a quasi-recidivist, belonging to the same category as a recidivist and habitual delinquent, as defined in rule 5 of Article 62 of the Code, and that this is so is evident from the opening sentence of article 160 itself, which runs thus: "Besides the provisions of rule 5 of article 62 * * *." Article 160 in

effect adds another rule of the rules prescribed in article 62 with respect to aggravating circumstances, for quasi-recidivism is nothing more than an aggravating circumstance, although of a special kind. Article 62 provides also that aggravating circumstances which arise from any personal cause shall aggravate the liability only of the principals, accomplices and accessories affected thereby. Quasi-recidivism, like recidivism and habitual delinquency, is such a personal cause, and, it being so, it would not be considered in computing the penalty to be imposed on accomplices and accessories. Stated otherwise, the penalty actually imposed by article 160 on quasi-recidivists, namely the maximum of the penalty for the new felony, would not be the basis for computing the penalty lower by one degree or two degrees to be imposed on accomplices and accessories. The penalty on accomplices and accessories to the crime committed by a quasi-recidivist under article 160 would be computed as in ordinary cases—that is the basis of the computation would not be the maximum period of the penalty for the new felony but the penalty originally provided by law for the new felony, disregarding, for the moment, the aggravating circumstance of quasi-recidivism. In the ordinary method of computing the penalty on accomplices and accessories, the procedure is to base the computation on the penalty provided by law on the principal without considering the aggravating or mitigating circumstances attendant upon the commission of the crime, by following the rules in articles 50 et seq. but before the rules in articles 62 et seq. are applied. The penalty lower by one degree or two degrees is computed from the penalty originally provided by law and not from the penalty imposed on the principal after the aggravating or mitigating circumstances are considered. Take the ordinary homicide case punished with *reclusión temporal.* The principal, after considering the mitigating or aggravating circumstances, may ultimately be punished with *reclusión temporal* in its maximum period. The penalty on accomplices and accessories, or lower by one degree or two degrees, would not be computed from *reclusión temporal* in its maximum period, but from *reclusión temporal* alone in which case, the accomplices and accessories would be punished with *prisión mayor* and *prisión correccional,* respectively, the proper period to be determined depending upon the aggravating and mitigating circumstances present. The same procedure would be followed under article 160. The quasi-recidivist committing homicide would be pun-

ished with *reclusión temporal* in its maximum period. The penalty on accomplices and accessories or lower by one degree or two degrees, would be computed not from *reclusión temporal* in its maximum period, but from *reclusión temporal* alone, in which case they would be punished, as in ordinary homicide cases, with *prisión mayor* and *prisión correccional.* If the accomplices and accessories happen to be quasi-recidivists themselves, they would then be punished with the maximum periods *prisión mayor* and *prisión correccional,* which penalties constitute "the maximum period of the penalty prescribed by law for the new felony", and this, it is believed, is the more reasonable way of applying article 160 to accomplices and accessories. To compute the penalty from *reclusión temporal* in its maximum period is error because, as stated previously, quasi-recidivism is an aggravating circumstance arising from a personal cause, and could not affect accomplices and accessories. From all the foregoing, it is evident that no harshness to accomplices and accessories would result in not following the view of Justice Albert. Parenthetically, suppose the interpretation of Justice Albert is correct. Suppose the accomplices and accessories to the homicide committed by a quasi-recidivist are actually punished with *reclusión temporal* in its minimum and medium periods. Is the penalty harsh? Undoubtedly not. Because persons assisting a criminal in committing another crime show as much perversity or dreadfulness as the criminal himself, and, according at least to the positivist theory of criminology they logically deserve the same penalties.

The other view, which is submitted to be the correct one and which is maintained by the Supreme Court and followed by the Court of Appeals, is to the effect that rule 4 should be applied by way of analogy. The penalty next lower to a penalty consisting of one period of a divisible penalty is to be looked for in the same divisible penalty, whenever possible, and if not, (that is when the given penalty is the minimum period) the maximum period of the next divisible penalty in accordance with the scale in article 70—it is in this instance that the scale in article 70 would be applied. If the given penalty is *prisión mayor* in its maximum period, the penalty next lower is *prisión mayor* in its medium period. People v. Co. Pao, *supra*; if *reclusión temporal* in its maximum period, then the penalty next lower is the medium period of the same penalty. People v. Gayrama, *supra*; if *prisión correccional* in its medium period,

the minimum period. People v. Gaba, *supra,* decided by the Court of Appeals two degrees lower than *reclusión temporal* minimum is *prisión mayor* medium; four degrees lower than *reclusión temporal* minimum is *prisión correccional* maximum, People v. Padilla, *supra.* Two reasons are given for this view: (1) According to Justice Vickers speaking for the court in the Co Pao case, there is no justification for jumping over the other periods in the same divisible penalty or in the next divisible penalty; and (2) According to Justice Diaz, speaking for the court in the Gayrama case, a period of a divisible penalty may in itself be considered a degree because it is divisible into three periods as authorized by article 65 of the Code, and, it may be added, because, according to Justice Albert himself, a degree refers to the diverse penalties mentioned by name in the Code, hence if the Code names as a penalty *reclusión temporal* in its maximum period, this in itself even if called a period may be considered a degree.

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