**TERRITORY OF NEW MEXICO V. LOBATO, 1913-NMSC-031, 17 N.M. 684 (S. Ct. 1913)**

**TERRITORY OF NEW MEXICO, Appellee,**
**vs.**
**BENITO LOBATO, Appellant**

No. 1452

SUPREME COURT OF NEW MEXICO

1913-NMSC-031, 17 N.M. 684

May 09, 1913

## JUDGES

Roberts, C. J.

**AUTHOR:** ROBERTS

## OPINION

*{*684}* OPINION ON MOTION FOR REHEARING.

**{1}** In the former opinion we say "The defendant did not plead former jeopardy specially, neither did he raise it by motion or call it to the attention of the court in any manner prior to entering upon the trial of the case." This statement would seemingly indicate that the question could have been raised either by plea in bar, or by motion, before entering upon the trial of the case, but the authorities cited imply that such question could only be raised by plea in bar. It is true some courts hold that such question can only be raised by a plea in bar, even where the defendant is being prosecuted under the same indictment, upon which he contends he has already been placed in jeopardy, still, as contended by appellant here, we believe the question can be raised by motion, or in any other appropriate manner, where the defendant is being prosecuted upon the same indictment, and the record in the case contains a recital of all the facts upon which defendant relies. While this is true, the question must be raised at the earliest opportunity. If the defendant has not been arraigned it must be interposed upon arraignment; if he has already been arraigned, and no second arraignment is necessary, it must be raised before entering upon the trial of the case.

**{2}** In this case the question appears of record in the same case, and no good reason exists for the interposition of a special plea. The record in this case discloses that the defendant did not raise the question of former jeopardy in any manner, prior to entering upon the trial of the case, and only did so at the conclusion of the state's case, by a

motion for an instructed verdict. A very interesting discussion of the question will be found in a case note to the case of State v. White, 71 Kan. 356, 80 P. 589, reported in 6 A. & E. Ann. Cas. 132. The annotator says:

"It has been held in a number of cases that a person accused of crimes waives his privilege of immunity from *{*685}* second jeopardy by failing to plead or otherwise set up the former jeopardy when he is arraigned in the second prosecution."

**{3}** The text is supported by numerous adjudicated cases. In the Kansas case the court says:

"When about to be placed in jeopardy before a second jury the accused may, if he so desire, take the chances of a favorable verdict. Should he choose so to do, no one can gainsay him; but it is his duty to make his election then. If it be his purpose to rely upon his right to bar further proceedings he should then so declare. He can not hazard a trial and when defeated revert to a matter which would have prevented a trial. Failing to interpose an objection to entering upon a second trial, he must be held to have waived the right to do so, and must abide the result he invited."

**{4}** To permit a defendant to sit idly by until he ascertains the strength of the state's case against him, and then permit him, should the state make out a strong case, which he felt be could not overcome, to raise the question of former jeopardy, would be, as remarked by the Kansas court, in the cases cited supra, to "sanction a practice which might be termed trifling with the court."

**{5}** Therefore, after a careful review of the authorities we are of the opinion that the question of former jeopardy may be raised, where the facts upon which such pleas are based appear of record in the same case, by a plea in bar, or by a motion for discharge of the defendant, or by objecting to entering upon the second trial upon such ground, or in any other appropriate manner by which the matter is called to the attention of the trial court, but that such question must be raised at the first opportunity. In this case, the question not having been raised until the state had concluded its case, it came too late, and the court properly overruled the motion for an instructed verdict.

**{6}** For the reasons stated, the motion for rehearing is denied.