

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. JUAN FRANCISCO, DEFENDANT AND APPELLANT.

G.R. No. L-568. July 16, 1947

Ponente: HILADO, J.

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HILADO, J.:

Convicted of the crime of parricide by the Court of First Instance of Mindoro, Juan Francisco appeals to this Court and asks us to reverse the decision of the trial court and to acquit him of the crime charged.

On March 4, 1945, defendant, who had been previously arrested on charges of robbery, was being held as a detention prisoner in the municipal jail of Mansalay, Mindoro. On that date he requested permission from the chief of police of Mansalay to go home to see his wife about the procurement of a bail for his provisional release. The permission was granted by the chief of police, and he was allowed to go with sergeant Pacifico Pimentel, who was detailed to guard him. Upon their reaching the house, the sergeant allowed the prisoner to see his wife who was at the time in a room of said house, while said sergeant remained at the foot of the stairs. After a few moments, Pimentel heard the scream of a woman. Running upstairs, he met defendant's wife running out of the room and holding her right breast which was bleeding. Still moments later, Pimentel saw defendant lying down with his little son Romeo, aged one year and a half, on his breast. Pimentel also found defendant to have a wound in his belly while his child had a wound in the back. Pimentel found the child dead.

The prosecution, in recommending the imposition of the capital penalty upon the accused, relies mainly on: (1) the affidavit, Exhibit C (translation, Exhibit C-1), which is a virtual confession of the accused; (2) Exhibit D, which is the record made by the justice of the peace of Mansalay of the arraignment of the defendant upon which the latter entered a plea of guilty; and (3) the rebuttal testimony of Emilia Taladtad, wife of the appellant.

Exhibit C is an affidavit signed and sworn to by appellant before the justice of the peace of Mansalay on March 5, 1945. Exhibit C-1 is its English translation. In said affidavit appellant declares that: "I asked permission from the chief of police so that I may be able to raise my bond and to indicate to me the house of one Guillermo Gervasio, a policeman, and I was consented and the sergeant of police accompanied me to my house; that upon arriving at the house, Sgt. Pacifico Pimentel allowed me to go up in order that I may be able to talk to my wife and the sergeant of police awaited me in the stairs of the house; when I was in the house, I remembered what my uncle told me to the effect that he would order someone to kill me because I am a shame and a dishonor to our family and suddenly I lost my senses and I thought to myself that if someone would kill me it would be more preferable for me to kill myself; when I looked at the bed I saw a scissor near my wife and unconsciously I picked up the said scissor and immediately stabbed my wife whereupon I looked for my child on the bed and stabbed him; I killed my son Romeo Francisco whose age is more or less two years and after that I stabbed myself; after stabbing myself, I heard a shot and the sergeant of police asked me if I would surrender to him or not; I replied him 'yes' then I lost my consciousness."

Sergeant of police Pimentel, whose veracity we find in the evidence no reason to doubt, declared (p. 6, t. s. n.,

Lunar) that the accused confessed to him that because he was already tired or disgusted with his life "on account of the accusation of his father-in-law" against him, he wanted to wipe out his family by stabbing his wife, his son and himself, and killing the three of them. The same witness also stated (p. 9, *ibid.*) that the accused confessed to him that he stabbed his wife, his child and himself because he was ashamed, as his father-in-law told him that he should rather die than live in shame for having dishonored the family of his wife.

The voluntariness and spontaneity of the confession contained in Exhibit C was testified to by the justice of the peace of Mansalay and police sergeant Pimentel. The first stated in substance that the accused signed and swore to said affidavit in his presence as well as that of Pimentel, one Sebastian Punzalan, and the chief of police Alfredo Iwahi; that said justice of the peace had previously read the contents of the same affidavit to the accused and that the accused signed without any intimidation having been exerted in the presence of said justice of the peace; that the accused signed voluntarily in the session hall of the justice of the peace court in barrio Paclasan. (pp. 26-27, *ibid.*). Pimentel testified, upon the same point, that no force was exerted upon appellant to state what is contained in the affidavit; that he had not maltreated or boxed the accused as pretended by the latter; that, the contents of the exhibit were read to the accused; that he did not threaten the accused to shoot the latter if he would not swear to Exhibit C before the justice of the peace, as declared by said accused (pp. 25-26, *ibid.*). In this connection we note from the testimony of the accused himself that on the way to the house of the justice of the peace after the incident, he was being helped by chief of police Iwahi when, according to him, sergeant Pimentel told him that he was going to swear to the contents of Exhibit C and that if he would not do so Pimentel would shoot him (p. 17, *ibid.*) ; that (the same accused assured the court) Iwahi treated him well (t. s. n., p. 20, *ibid.*); and really from the entire testimony of this accused the good treatment accorded him by chief of police Iwahi is clearly discernible. He was under preventive detention in the house of Iwahi and it was Iwahi who suggested or told him, after he had killed and dressed the former's pig, that he bring a kilo of the meat to his (appellant's) wife (p. 13, *ibid.*). It was also Iwahi who allowed him to go to his house on the same occasion for the purposes of the procurement of his bail (p. 13, *ibid.*).

Under these circumstances, besides the complete absence of proof of any reason or motive why Pimentel should so threaten the accused, we find the accused's version incredible. On page 16 of the same transcript, answering a question by the Court of First Instance, the accused testified that he understands English and the translation Exhibit C-1 of the affidavit Exhibit C is in that language.

Other indications of appellant's lack of trustworthiness are: While on page 14 of said transcript he testified that he was the only one who went to the house of his wife because Pimentel, according to him, remained in the house of Roberto Magramo, on page 13 he declared that he was accompanied by the sergeant of police of Mansalay, Pacifico Pimentel to the house of his wife and that the chief of police ordered Pimentel to so accompany him. Contradicting the same pretension of his having gone alone to his wife's house is his own testimony on page 17 of the transcript wherein he assured affirmatively the question of his own counsel whether Pimentel was the policeman who was with him to guard him on the occasion of his going to his wife's house; and really, while he imputed upon his wife the wounding of their child, who died as a consequence thereof, he admitted that he did not tell this to the justice of the peace of Mansalay (p. 18, *ibid.*), and the reason he assigned for this passive conduct on his part to the effect that he was afraid of Pimentel (p. 19, *ibid.*) is patently unacceptable, for no motive whatsoever has been established to make us believe that the accused had reasons to be so afraid of Pimentel. Appellant's testimony to the effect that Pacifico Pimentel was testifying against him because Pimentel "being my guard that time he might be held responsible for allowing me to go alone" (p. 17, *ibid.*), is absolutely without merit. This testimony clearly reveals a desire to show that because Pimentel allowed the accused to go up the house while the former stayed at the foot of the stairs, said Pimentel would be responsible for what had happened unless the accused was the one who killed the child and wounded his wife rather than the wife having accidentally

wounded the child and killed him and been stabbed by the accused, who also stabbed himself. As we said a moment ago, we do not give any merit to this testimony. The reason is obvious. If it was Pimentel's purpose in testifying against the accused to relieve himself of all responsibility for what had happened, it would have been more conducive to this result if Pimentel had testified that it was not the accused, whom he had allowed to go upstairs unguarded, who was guilty, but his wife, of the wounding of the child, and that the accused wounded his wife only as the result of the obfuscation produced by the child's death. And the fact that Pimentel gave the version which might place no small blame on him for allowing the accused to go up the house alone, gives special weight to his testimony.

This case, as developed by the evidence for the prosecution, which has not been destroyed nor enervated by that of the defense, presents a truly strange happening. But the fact of the commission of the crime of parricide appears to us to have been established beyond reasonable doubt. As to the reasons impelling the commission of the act, the case is a strange one and admittedly not common. But while it is not necessary even to prove motive in case the commission of the crime is established as required by law (U. S. vs. Ricafor, 1 Phil., 173; U. S. vs. McMann, 4 Phil., 561; U. S. vs. Reyes, 18 Phil., 495; U. S. vs. Balmori and Apostol, 18 Phil., 578), here we have a case of a crime proven beyond reasonable doubt, not absolutely without a proven motive, but with proof of a motive testified to by the accused himself in his confession, strange though it be. But at times "truth is stranger than fiction," and it so happens here. The law must be applied to the facts.

We have scanned and searched the evidence and the record diligently for facts and circumstances which might sufficiently establish insanity or any allied defense, but we have failed to find them.

As we construe the evidence, we believe that Exhibit C contains the truth, as narrated by the accused himself who, at the time of making it, must have been moved only by the determination of a repentant father and husband to acknowledge his guilt for acts which, though perhaps done under circumstances productive of a diminution of the exercise of will-power, fell short of depriving the offender of consciousness of his acts. We will have occasion to further consider this aspect of the case later.

Exhibit C was signed and sworn to by appellant the day following the fatal event. Presumably, on making this confession appellant had not yet had time to reflect upon the consequences of such a confession to himself—egoism was not yet allowed to operate against the promptings of his conscience. But when on February 23, 1946—almost one year after—this man testified in his own defense in the Court of First Instance, he already had had ample opportunity to reflect upon those consequences. And what happened? As in similar cases, he repudiated his confession, and alleged torture and violence to have been exerted upon his person and his mind in order, so he now pretends, to extract it from him. As we find the confession to have been given voluntarily, we feel justified in concluding that its subsequent repudiation by the accused almost a year after must have been due to his fear of its consequences to himself, which he not improbably thought might cost him his own life. It was the struggle between the noble and the ignoble in the man, and the latter, aided by the instinct of self-preservation, won.

Defense counsel attacks the value of Exhibit C as evidence of guilt for the reason that the statements contained therein were not, counsel contends, given spontaneously but through use of violence and intimidation. He also questions the admissibility of Exhibit D on the ground that it has not been properly identified; and, with more vigor and stronger emphasis, he impugns the admissibility of the testimony of appellant's wife, invoking the provision of section 26 (d) of Rule 123 prohibiting the wife and the husband from testifying for or against each other.

As to Exhibit C, this document was sworn to and subscribed by said accused before the justice of the peace of

Mansalay. This official testified that he asked the prisoner before the latter signed said exhibit whether he understood the contents thereof, and that said latter answered in the affirmative. The witness further declared that appellant signed the exhibit voluntarily and that said appellant said that the said affidavit was his (p. 10, *ibid.*). There is a total absence of evidence, besides the testimony of appellant himself, to show that his statements contained in said exhibit were extracted from him by the use of violence and intimidation. While we are not unaware of the practice resorted to by some peace officers of extracting admissions or confessions from persons accused of crime by the employment of third-degree methods, in the present case we fail to find from the evidence sufficient proof to destroy the categorical testimony of the justice of the peace that Exhibit C was signed by appellant voluntarily and with a full understanding thereof. Furthermore, the statements of appellant in said Exhibit C were corroborated by the testimony of his wife on rebuttal. This leads us to the consideration of the admissibility of the wife's testimony.

The rule contained in section 26 (d) of Rule 123 is an old one. Courts and text-writers on the subject have assigned as reasons therefor the following: First, identity of interest; second, the consequent danger of perjury; third, the policy of the law which deems it necessary to guard the security and confidences of private life even at the risk of an occasional failure of justice, and which rejects such evidence because its admission would lead to domestic disunion and unhappiness; and, fourth, because where a want of domestic tranquility exists, there is danger of punishing one spouse through the hostile testimony of the other. This has been said in the case of *Cargill vs. State* (220 Pac., 64, 65; 25 Okl. Cr., 314; 35 A. L. R., 133), thus:

"The reasons given by law text-writers and courts why neither a husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed by one against the other have been stated thus: First, identity of interests; second, the consequent danger of perjury; third, the policy of the law which deems it necessary to guard the security and confidences of private life even at the risk of an occasional failure of justice, and which rejects such evidence because its admission would lead to domestic disunion and unhappiness; and, fourth, because, where a want of domestic tranquility exists, there is danger of punishing one spouse through the hostile testimony of the other. (70 C. J., 119.)"

However, as all other general rules, this one has its own exceptions, both in civil actions between the spouses and in criminal cases for offenses committed by one against the other. Like the rule itself, the exceptions are backed by sound reasons which, in the excepted cases, outweigh those in support of the general rule. For instance, where the marital and domestic relations are so strained that there is no more harmony to be preserved nor peace and tranquility. which may be disturbed, the reason based upon such harmony and tranquility fails. In such a case identity of interests disappears and the consequent danger of perjury based on that identity is non-existent. Likewise, in such a situation, the security and confidences of private life which the law aims at protecting will be nothing but ideals which, through their absence, merely leave a void in the unhappy home.

At any rate, in the instant case the wife did not testify in the direct evidence for the prosecution but under circumstances presently to be stated. It will be noted that the wife only testified against her husband after the latter, testifying in his own defense, imputed upon her the killing of their little son. (P. 15, *ibid.*) By all rules of justice and reason this gave the prosecution, which had theretofore refrained from presenting the wife as a witness against her husband, the right to do so, as it did in rebuttal; and to the wife herself the right to so testify, at least, in self-defense, not, of course, against being subjected to punishment in that case in which she was not a defendant but against any or all of various possible consequences which might flow from her silence, namely: (1) a criminal prosecution against her which might be instituted by the corresponding authorities upon the basis of her husband's aforesaid testimony; (2) in the moral and social sense, her being believed by those who heard the testimony orally given, as well as by those who may read the same, once put in writing, to be the killer of her infant child. It has been aptly said that the law of evidence is the law of common sense. Presuming the husband who so testified

against his wife to be endowed with common sense, he must be taken to have expected that the most natural reaction which the said testimony would give rise to on the part of the prosecution, as well as of his wife, was to deny upon rebuttal the new matter which was involved in the same testimony, namely, the imputation that it was his wife who killed their little son. Upon the part of the prosecution, because he not only limited himself to denying that he was the killer, but went further and added what was really a new matter consisting in the imputation of the crime upon his wife. And upon the part of the wife, because of the reasons already set forth above. Hence, in giving such testimony, the husband must, in all fairness, be held to have intended all its aforesaid natural and necessary consequences. By his said act, the husband—himself exercising the very right which he would deny to his wife upon the ground of their marital relations—must be taken to have waived all objection to the latter's testimony upon rebuttal, even considering that such objection would have been available at the outset.

At this point, it behooves us to emphasize the all-important role of the State in this case. The State being interested in laying the truth before the courts so that the guilty may be punished and the innocent exonerated, must have the right to offer the rebutting testimony in question, even against the objection of the accused, because it was the latter himself who gave rise to its necessity. It may be said that the accused husband thought that he would have more chances of convincing the court of his pretended innocence if he pointed to his wife as having caused the death of their child, instead of simply denying that he was the author of the fatal act. To this we would counter by saying that if he was to be allowed, for his convenience, to make his choice and thereby impute the act upon his spouse, justice would be partial and one-sided if both the State and the wife were to be absolutely precluded from introducing the latter's rebutting testimony.

As well settled as this rule of marital incompetency itself is the other that it may be waived.

"Waiver of incompetency.—Objections to the competency of a husband or wife to testify in a criminal prosecution against the other may be waived as in the case of the other witnesses generally. Thus, the accused waives his or her privilege by calling the other spouse as a witness for him or her, thereby making the spouse subject to cross-examination in the usual manner. It is well established that where an accused introduces his wife as a witness in his behalf, the state is entitled to question her as to all matters germane and pertinent to her testimony on direct examination. It is also true that objection to the spouse's competency must be made when he or she is first offered as a witness, and that the incompetency may be waived by the failure of the accused to make timely objection to the admission of the spouse's testimony, although knowing of such incompetency, and the testimony admitted, especially if the accused has assented to the admission, either expressly or impliedly. Other courts have held that the witness's testimony is not admissible even with the other spouse's consent. Clearly, if the statute provides that a spouse shall in no case testify against the other except in a prosecution for an offense against the other, the failure of the accused to object does not enable the state to use the spouse as a witness." (3 Wharton's Criminal Evidence, 11th Ed., section 1205, pp. 2060-2061.)

Wharton, in note 10 at the foot of page 2060 of the cited volume refers us to section 1149 appearing on page 1988 of the same volume, dealing with waiver of objection to incompetency of witnesses in general. We transcribe this section for convenient reference:

"Waiver of objection to incompetency.—A party may waive his objections to the competency of a witness and permit him to testify. A party calling an incompetent witness as his own waives the incompetency. Also, if, after such incompetency appears, there is failure to make timely objection, by a party having knowledge of the incompetency, the objection will be deemed waived, whether it is on the ground of want of mental capacity or for some other reason. If the objection could have been taken during the trial, a new trial will be refused and the objection will not be available on writ of error. If, however, the objection of a party is overruled and the ruling has been excepted to, the party may thereafter examine the witness upon the matters as to which he was allowed to testify to without waiving his objections to the witness's competency." (Ibid., section 1149, p. 1988.)

It will be noted, as was to be expected, that in the last above-quoted section, the author mentions certain specific cases where the courts concerned hold that there was waiver, but for obvious reasons neither the author nor the said courts have attempted to make an enumeration of all possible cases of waiver. In the very nature of things, it would be impossible to make a priori such a complete enumeration and to say that it is exclusive. So long as the Legislature itself does not make its own statutory and exclusive specification of cases of such waiver—and we doubt that it ever will—no complete and exclusive enumeration can, nor should, be attempted by the courts, for in the absence of such legislation the cases of waiver will be as indefinite in number as indefinite are and always will be the varying and unpredictable circumstances surrounding each particular case.

To illustrate, Mr. Wharton says above that the accused waives his or her privilege by calling the other spouse as a witness for him or her, thereby making the spouse subject to cross-examination in the usual manner, the reason being that the State is entitled to question the spouse so presented as to all matters germane and pertinent to the direct testimony. In the same way, and for a similar reason, when the herein appellant gave his testimony in question in his defense, the State had the right to rebut the new matter contained in that testimony consisting in the imputation upon his wife of the death of the little boy. And that rebuttal evidence, which was rendered necessary by appellant's own testimony, could be furnished only by his wife who, as he fully knew, was alone with him and their son at the precise place and time of the event. This right to rebut is secured to the State, no less than to the accused, by Rule 115, section 3, paragraph (c), the provision further authorizing the court, in furtherance of justice, to permit one or the other party to offer "new additional evidence bearing upon the main issue in question." So that if the waiver that we here declare to flow from the above-mentioned testimony of appellant does not happen to be among those which were mentioned in the cases cited by Mr. Wharton, that is no reason against the existence of said waiver.

When the husband testified that it was his wife who caused the death of their son, he could not, let us repeat, justly expect the State to keep silent and refrain from rebutting such new matter in his testimony, through the only witness available, namely, the wife; nor could he legitimately seal his wife's lips and thus gravely expose her to the danger of criminal proceedings against her being started by the authorities upon the strength and basis of said testimony of her husband, or to bear the moral and social stigma of being thought, believed, or even just suspected, to be the killer of her own offspring. A decent respect and considerate regard for the feelings of an average mother will tell us that such a moral and social stigma would be no less injurious to her than a criminal punishment. And if the wife should, in such a case and at such a juncture, be allowed to testify upon rebuttal, the scope of her testimony should at least be the same as that of her husband. This is only simple justice and fairness dictated by common sense. Since the husband had testified that it was his wife who caused the death of the little boy, she should be allowed to say that it was really her husband who did it. We hold that it is not necessary, to justify such rebuttal evidence, and to declare the existence of the waiver upon which it is based, that the wife be in jeopardy of punishment in the same case by reason of such testimony of her accused husband. The rule of waiver of objection to the competency of witnesses generally does not require this prerequisite in the case between husband and wife. Rather the rule makes the determination of the question hinge around the consequences which by common sense, in justice and in fairness, should be deemed to have been expected by the spouse who first testified naturally to flow from his act of giving that testimony. At any rate, the trial court not only had the power to allow the State to utilize the wife as rebuttal witness, but also the discretion to permit "new additional evidence bearing upon the main issue in question." But even restricting the wife's testimony to merely contradicting her husband's version that she was the one who killed their child, there is evidence beyond reasonable doubt that appellant was the killer. With the testimony of both spouses upon the point, instead of that of the accused husband alone, let justice take its course.

As to Exhibit D, this document was a part of the record of the case in the justice of the peace court which was

expressly presented by the prosecution as evidence in the Court of First Instance.

But after all has been said and done, in justice to the accused, we believe that, whether we are dealing with a simpleton or an eccentric, or we have here one of those well-nigh inexplicable phenomena in human conduct where the judge finds himself at a loss to discover an adequate motivation for the proven acts of the accused,—indulging all reasonable intendments in favor of appellant, we are of opinion that when he committed the crime charged against him he must have been suffering from some illness (of the body, the mind, the nerves, or the moral faculty) as is contemplated in paragraph 9 of article 13 of the Revised Penal Code as a mitigating circumstance, namely, "such illness of the offender as would diminish the exercise of the will-power of the offender without however depriving him of consciousness of his acts."

Article 246 of the Revised Penal Code punishes parricide by the penalty of reclusion perpetua to death. Article 63, paragraph 3, of the same Code, provides that when the commission of the act is attended by some mitigating circumstance and there is no aggravating circumstance, and the law prescribes a penalty composed of two indivisible penalties, the lesser penalty shall be applied; in this case, in view of the above indicated circumstance and there being no aggravating circumstance, the lesser penalty is reclusion perpetua, which was the penalty correctly applied by the trial court, which penalty, of course, carries with it the accessory penalties provided for in article 41 of the said Code. The accused should also be sentenced to indemnify the heirs of the deceased Romeo Francisco in the sum of P2,000, and to pay the costs.

As above modified, the appealed judgment is affirmed, with costs against appellant. So ordered.

Moran, C.J., Paras, Perfecto, Bengzon, and Tuason, JJ., concur.
Briones, J., concurs in the result.

PADILLA, J.:

I concur in the result. To my mind the evidence is sufficient to support the judgment of conviction without taking into consideration the testimony of the appellant's wife in rebuttal. I agree with Mr. Justice Feria in his dissent that she is incompetent to testify against the appellant, her husband, there being an objection to her testifying against him.

CONCURRENTES Y DISIDENTES

PABLO, M.:

Concurro con la opinion de la mayoria en cuanto condena al acusado. En mi opinion aun sin tener en cuenta la declaracion de la esposa del acusado en contra-pruebas, obra en autos concluyente prueba que establece la culpabilidad del acusado.

En cuanto a la interpretacion de la Regla 123, articulo 26, seccion (d), concurro con la disidencia del Magistrado Sr. Feria. La declaracion de la esposa debe ser excluida como prueba contra el acusado, por inadmisibie.

DISSENTING

FERIA, J.:

Without necessity of discussing the merits of the case and deciding whether the appellant's conviction by the Court of First Instance must be affirmed or reversed, for the majority has decided to affirm it and it would be useless now for the undersigned to dissent from or concur in the conviction of the appellant, we dissent from the new theory enunciated in the majority opinion that the appellant's testimony to the effect that his wife was the one who unintentionally inflicted the wound which caused the death of the child, capacitated his wife to testify as a witness on rebuttal against her husband, and "constituted a waiver of all objections to her testimony."

The pertinent portion of the majority decision reads as follows:

"The reasons given by law text-writers and courts why neither a husband nor wife shall in any case be a witness against the other except in a criminal prosecution for a crime committed by one against the other have been stated thus: First, identity of interests; second, the consequent danger of perjury; third, the policy of the law which deems it necessary to guard the security and confidences of private life even at the risk of an occasional failure of justice, and which rejects such evidence because its admission would lead to domestic disunion and unhappiness; and, fourth, because, where a want of domestic tranquility exists, there is danger of punishing one spouse through the hostile testimony of the other. (70 C. J., 119)'

"However, as all other general rules, this one has its own exceptions, both in civil actions between the spouses and in criminal cases for offenses committed by one against the other. Like the rule itself, the exceptions are backed by sound reasons which, in the excepted cases, outweigh those in support of the general rule. For instance, where the marital and domestic relations are so strained that there is no more harmony to be preserved nor peace and tranquility which may be disturbed, the reason based upon such harmony and tranquility fails. In such a case identity of interests disappears and the consequent danger of perjury based on that identity is non-existent. Likewise, in such a situation, the security and confidences of private life which the law aims at protecting will be nothing but ideals which, through their absence, merely leave a void in the unhappy home."

The new theory of the majority is evidently untenable, for it is predicated upon the incorrect premise or assumption, that the above-mentioned reasons or grounds of the incapacity of one of the spouses to testify against the other in a proceeding in which the latter is a party, are also applicable to testimony of one spouse against the other who is not a party to the cause in which it is offered or given, as in the present case. This premise or assumption is incorrect, for said reasons do not apply to the latter case. Were it applicable, the law would have also disqualified one spouse to give testimony which in any way disparages or disfavor the other although the latter is not a party to the cause; but the law does not so. The prohibition contained in section 26 (d) of Rule 123 only relates to cases in which the testimony of a spouse is offered for or against the other in a proceeding to which the latter is a party (U.S. vs. Concepcion, 31 Phil., 182; People vs. Natividad, 70 Phil., 315). And the reason is obvious. Although the testimony of the husband against his wife who is not a party to the case is admissible; yet, as said testimony can not be used as evidence against the wife in a civil case or criminal prosecution against her, it would not effectively strain the marital and domestic relations; lead to domestic disunion and unhappiness; disturb the peace, harmony, and tranquility of the family, and destroy the identity of interest.

Such testimony, far from producing said results, might have a different effect. Where one of the spouses testifies in his defense that the other spouse, who is not a party to the case, is the one who committed the crime charged, his testimony, if believed by the Court, would result in the acquittal and release of the defendant spouse and enable the accused, if confined in prison, to join again his spouse, without placing the latter in danger of being prosecuted and convicted by his testimony. In the present case, the testimony of the appellant does not require any rebuttal by his wife, because, according to the clear provisions of law, the latter can not testify against her husband appellant, and the courts should take it into consideration in determining the probative force of such a

testimony. And it does not call for a denial by the wife in herself or own defense, because it can not be used or admitted without her consent as evidence in a criminal case instituted against her for her son's death.

Under the new theory of the majority, the prosecutor of one spouse who, in order to free himself from liability as defendant in a criminal case would testify, as the appellant has testified, that his other spouse who is not a party to the case is responsible for their child's death, may take advantage of such testimony to induce that other spouse to testify in her defense according to the prosecution, and the latter in so testifying would naturally accuse the defendant to be the guilty party in order to save himself or herself from criminal liability.

Who may give the assurance that the defendant's wife in the present case did testify the way she testified against her husband, not because her husband is really guilty, but because she wanted to defend and save herself, taking into consideration the way the question were propounded to her by the prosecution and her answers thereto? The prosecution asked her: "The accused testified here that you were the one who inflicted the wound at the back of Romeo Francisco, is that right?" and she answered: "No sir he was the one who inflicted the wound to my son Romeo Francisco." "P. Did you see him inflict the wound to the child?—R. Yes sir." (P. 23, st. notes.) Who may dispel from the mind the doubt that the prosecution in the court below, believing erroneously, but in good faith, that the testimony of the appellant in his defense is admissible against and tended to make his wife criminally responsible, imparted such wrong belief to and induced her thereby to testify imputing the commission of the crime to her husband although he is not guilty, just to save herself?

It is plain that if the wife testified against her husband, it was because the fiscal erroneously assumed in his interrogatory above quoted that the appellant later imputed to her the crime charged, for the testimony of the appellant quoted below clearly belies the fiscal's assumption:

"P. Please tell the Court what happened when you sat beside your wife?

"Sr. Fiscal: Objection, no basis.

"Court: He may answer.

"R. When I sat beside my wife and our son was lying face downward on the bed I was joking my wife because at that time I was drunk.

"P. What was the relative position of your son with respect to you and your wife?—R. I am going to demonstrate our relative positions, (the accused was facing his wife and the wife was facing in the opposite direction and the son was between them lying face downward and little bit behind on the bed). I used to touch her, so she swung her hand backward towards me, then I stood up and evaded the blow. Later on I heard the boy cried.

"P. What hand did your wife swing, left or right hand?—R. Her right hand.

"P. Is this the very scissors when she swung her arm?—R. Yes, sir.

"P. After she swung her arm what happened?—R. The child cried.

"P. Then what happened?—R. When I stood up our child was already wounded so I became obfuscated.

"P. Then what happened?—R. I got hold of the scissors that she was holding and stabbed her and then stabbed myself."

Besides, it is to be borne in mind that the capacity or incapacity of one of the spouses to testify against the other is governed by the statute in force and the Court should construe the statute such as it is, and not as it should. It is for the law-making power to evolve new theories and enact law in accordance therewith. The provisions of section 26 (c), Rule 123, were copied from those of section 383 (3) of Act No. 190, as amended, and the latter were in turn

taken from similar provisions of law in force in the States of the Union, which are based on the common-law. Under the common-law, husband and wife are absolutely incompetent against each other except in a civil case instituted by one against the other, or in a criminal case for a crime committed by one against the other; and the consent of a spouse can not render the other spouse competent. But in many states, statutes were enacted granting exceptions upon the common-law rule and enabling one of them to testify against the other with the consent of the latter in civil case, or the consent of the other or both in criminal cases. Under such statute, one spouse who calls the other as a witness thereby consents that the latter shall testify; and if the adverse party offers one of the spouses against the other and the latter does not object, then he or she is presumed to have consented to it.

In the case of *Toskstein vs. Birmmerle* (150 Mo., 491; 131 S. W., 126), it was held that incompetency of a wife continues as at common-law where she is not rendered competent under the provision of the enabling statute. In the case of *Conley vs. State* (176 Ark., 654; 3 S. W. [2d], 980), the Supreme Court of Arkansas ruled that statutes providing that no person shall be excluded from testifying in prosecution for violation of Liquor Act do not change the general rule that a wife cannot testify against her husband in a criminal prosecution. And in another case entitled *Connecticut Fire Ins. Co. vs. Chester P. & Ste. G. R. Co.* (171 Mo. App., 70; 153 S. W., 544), it was held that unless wife comes within exceptions of the enabling statute granting exceptions upon the common-law rule excluding her testimony in an action in which her husband is interested, the wife can not testify.

Therefore, inasmuch as our statute on the matter, or section 26 (d), Rule 123, provides that a wife cannot be examined for or against her husband without his consent except in a criminal case for crime committed by one against the other, and the appellant in the present case objected strenuously to the testimony of her wife against him, her testimony is inadmissible and can not be taken into consideration in the decision of the case. We can not, by any process of reasoning or stretch of imagination, construe said provision so as to capacitate a wife to be a witness against her husband if the latter, in testifying in his own defense, says that his wife was the one who accidentally inflicted the fatal wound on their small child. We can not evolve a new theory, however reasonable and plausible it may be, and apply for the first time as if it were the law in the present case against the appellant. It may be a good theory or a sufficient reason for amending the law in order to include it as one of the exceptions of the rule incapacitating one spouse to testify against the other; but we can not legally apply it as a law now against the appellant, a defendant in a criminal case.

But the majority, not being sure of its stand on the admissibility of the testimony of the wife against her husband, further states:

"At any rate, in the instant case the wife did not testify in the direct evidence for the prosecution but under circumstances presently to be stated. It will be noted that the wife only testified against her husband after the latter, testifying in his own defense, imputed upon her the killing of their little son. (P. 15, *ibid.*) By all rules of justice and reason this gave the prosecution, which had theretofore refrained from presenting the wife as a witness against her husband, the right to do so, as it did in rebuttal; and to the wife herself the right to so testify, at least, in self-defense, * * *." (P. 704, *ante.*)

To this we may reply that, in the first place, the testimony of the wife to the effect that her husband was the one who inflicted and she saw him inflict the wound on Romeo Francisco that caused the death of the latter (pp. 23, 24, *st. notes*), is not a rebutting but a new additional evidence bearing upon the main issue whether or not the defendant is guilty of the offense charged. For according to section 3 (c), Rule 115, the prosecution may, after the defendant has presented evidence in support of his defense, "offer rebutting testimony, but rebutting only, unless the court, in furtherance of justice, permit them to offer new additional evidence bearing upon the main issue in question." Her testimony would have been in rebuttal only if she had limited herself to say that she did not inflict the Wound on her son. And in the second place, to make the testimony of the wife admissible in rebuttal against

the appellant, would be to amend the provision of said section 26 (d) of Rule 123 and establish another exception, that has never been adopted by the statutes anywhere in the States of the Union and in this jurisdiction.

And not being sure as to the scope of a rebuttal testimony, the majority opinion adds the following:

"When the husband testified that it was his wife who caused the death of their son, he could not, let us repeat, justly expect the State to keep silent and refrain from rebutting such new matter in his testimony, through the only witness available, namely, the wife; nor could he legitimately seal his wife's lips and thus gravely expose her to the danger of criminal proceedings against her being started by the authorities upon the strength and basis of said testimony of her husband, or to bear the moral and social stigma of being thought, believed, or even just suspected, to be the killer of her own offspring. * * * And if the wife should, in such a case and at such a juncture, be allowed to testify upon rebuttal, the scope of her testimony should at least be the same as that of her husband. This is only simple justice and fairness dictated by common sense. Since the husband had testified that it was his wife who caused the death of the little boy, she should be allowed to say that it was really her husband who did it. * * * At any rate, the trial court not only had the power to allow the State to utilize the wife as rebuttal witness, but also the discretion to permit 'new additional evidence bearing upon the main issue in question.' But even restricting the wife's testimony to merely contradicting her husband's version that she was the one who killed their child, there is evidence beyond reasonable doubt that appellant was the killer."

It is elemental that the scope of a rebuttal is circumscribed to contradicting or destroying the evidence of the adverse party tending to prove new matter in favor of the latter, and can not extend to disproving directly the main issue in question, that is, the guilt of the appellant in the present case. Evidently, the testimony of the husband that his wife was the one who unintentionally inflicted the wound which caused the death of their child, can not "gravely expose her to the danger of criminal proceeding against her," and "to bear the moral and social stigma of being thought, believed, or even just suspected to be the killer of her own offspring;" because said testimony is not admissible against his wife in that or in any other cases, and everybody is presumed to know the law that incapacitates the wife to testify against her accused husband and contradict what the latter may testify against her however false it may be.

The conclusion in the majority decision that, if not in rebuttal, the court had discretion to permit the prosecution to present the testimony of the wife, as additional evidence bearing upon the main issue in question, is absolutely untenable, since we have already shown that such a testimony is inadmissible as evidence, and this court has already decided in the case of *People vs. Natividad* (above cited), squarely applicable to the present case, that "a wife can not testify against her husband in a criminal case in which the latter was charged with having killed the child of the former."

The matter under discussion is the incompetency of the wife to testify, directly or in rebuttal, in the present case against her husband, and not the guilt or innocence of the appellant. Hence the last statement in the above quoted decision of the majority that "even restricting the wife's testimony as merely contradicting the husband's version that she was the one who killed their child, there is other evidence beyond reasonable doubt that the appellant is the killer," is out of place for it has no bearing on the issue. The conclusion of fact on which a sentence declaring a defendant guilty must be positive and not argumentative. And if the appellant is to be convicted on the strength of other evidence, aside from the testimony of the appellant's wife, the decision should express clearly and distinctly the facts and the law on which the decision convicting the appellant is based, as required by section 12, Article IX of the Constitution.

The majority's conclusion that the testimony of the appellant to the effect that the cause of the death of their child was the wound unintentionally inflicted by his wife, constituted a waiver of all objection to her testimony, is without any foundation in fact and in law; because the defendant had strongly and persistently objected to his wife

taking (the witness stand (st. nts., p. 23), and no law, court or authority, from time immemorial up to the present, has ever recognized such testimony as a waiver. The only cases in which the incapacity of one of the spouses to testify against the other is considered waived according to law, are those stated in section 1205, of Wharton on Criminal Evidence, Vol. 3, 11th ed., quoted in the very opinion of the majority, which says the following:

"SEC. 1205. Waiver of incompetency.—Objections to the competency of a husband or wife to testify in a criminal prosecution against the other may be waived as in the case of other witnesses generally. Thus, the accused waives his or her privilege by calling the other spouse as a witness for him or her, thereby making the spouse subject to cross-examination in the usual manner. It is well established that where an accused introduces his wife as a witness in his behalf, the state is entitled to question her as to all matters germane and pertinent to her testimony on direct examination. It is also true that objection to the spouse's competency must be made when he or she is first offered as a witness, and that the incompetency may be waived by the failure of the accused to make timely objection to the admission of the spouse's testimony, although knowing of such incompetency, and the testimony admitted, especially if the accused has assented to the admission, either expressly or impliedly."

But the decision, after quoting subsequently section 1149 of the same work, which refers to waiver of objection to competency of a witness in general, concludes by saying "It will be noted, as was to be expected, that in the last quoted-section, the author mentions certain specific cases where the courts concerned hold that there was waiver, but for obvious reasons neither the author nor the said courts have attempted to make an enumeration of all possible cases of waiver. In the very nature of things, it would be impossible to make a priori such a complete enumeration and to say that it is exclusive." The last quoted section in the decision reads in its pertinent part as follows:

"SEC. 1149. Waiver of objection to incompetency.—A party may waive his objection to the competency of a witness and permit him to testify. A party calling an incompetent witness as his own waives the incompetency. Also, if, after such incompetency appears, there is a failure to make timely objection, by a party having knowledge of the incompetency, the objection will be deemed waived, whether it is on the ground of want of mental capacity or for some other reason. * * *"

The cases of waiver specified by Wharton in sections 1149 and 1205 of his work on criminal evidence above quoted, are the only cases of waiver of the objection to the competency of one spouse to testify against the other, as well as of the objection to the competency of any other witness to testify. Not only Wharton but all works on criminal evidence enumerate only those cases, because there are no other cases provided for by the statutes or declared by the courts in their decisions. Authors or writers on evidence do not generally evolve and formulate new legal theories but only expound those based on positive laws as the latter have been interpreted and construed up-to-date by the courts. It is to be presumed that during several centuries in which the rule excluding the testimony of one spouse in a case in which the other is interested has been in force, a case similar to the present must have arisen, and it would be too presumptuous to assume that this Court is the first to find correctly that the case is one of the exceptions upon said rule. For the majority can not point out a single decision in support of the exception which the majority intends to establish now for the first time.

The above mentioned cases of the objection to the competency of one of the spouses to testify against the other are the only ones, and no writers on evidence nor courts did or could enumerate or recognize other cases, since no legislative or law making power had so provided; because what is called waiver is merely or nothing more than the consent of one spouse that the other testify in a case in which he or she is interested or a party, consent provided for as exception by law. As the consent may be either express or implied: express when the spouse who is a party presents the other spouse to testify, and implied when the adverse party or the prosecution presents the other spouse as a witness, and the spouse against whom the other is to testify does not object; so the waiver may

also be express and implied. And, therefore, just as there can not be any other way of giving such consent than those above stated, so there is no other case of waiver under the laws now in force.

Therefore, this Court must, in the interest of justice, reject the testimony of the defendant's wife, admitted as rebuttal evidence over the objection of the appellant, and considered by the majority as corroborative of the defendant's extrajudicial confession Exhibit C, and decide whether this confession alone is sufficient to support the appellant's conviction.

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