

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. MARIANO M. GALLEGOS ET AL., DEFENDANTS. MARIANO M. GALLEGOS, APPELLANT.

G.R. No. 12739, December 08, 1917

Ponente: JOHNSON, J.

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JOHNSON, J.:

Aside from the question relating to the guilt or innocence of the appellant, the principal question presented by this appeal is whether or not, in a criminal action for the crime of adultery, one of the defendants may be tried alone, where the complaint includes them both, and when for some reason or other one of the codefendants has not been arrested and brought to trial.

In the present case a complaint was presented by the offended party against the said defendants in the court of the justice of the peace of the municipality of Cebu on the 11th day of October, 1916. Upon said complaint a warrant of arrest was issued and Mariano M. Gallegos was arrested. His codefendant could not be found. A preliminary examination was given to the said Mariano M. Gallegos by the said justice of the peace, at the conclusion of which he was held for trial in the Court of First Instance.

On the 31st day of January, 1917, the offended person presented the following complaint in the Court of First Instance:

"The undersigned, as the offended husband, accuses Mariano M. Gallegos and Benita Antioquia of the crime of adultery committed as follows:

"That from the month of November, 1914, to the month of October, 1916, inclusive, in the municipality of Cebu, Province of Cebu, P. I., the said accused (Gallegos) knowing that the accused Benita Antioquia is legally married to the undersigned, said marriage not having dissolved up to this date, voluntarily, illegally, and criminally, did lie with the accused (Antioquia) several times, within and without the offended party's own dwelling, and said Benita Antioquia, on her part, being legally married to the undersigned, said marriage not having been dissolved up to the present time, voluntarily, illegally, and criminally, did lie with the accused (Gallegos) knowing full well that same was not her husband; that as a result of their illicit relation the said accused begot a daughter; in violation of the law."

Upon said complaint the defendant Mariano M. Gallegos was duly arraigned, tried, found guilty of the crime charged in the complaint and sentenced by the Honorable Adolph Wislizenus, judge, in accordance with article 433 of the Penal Code, without the concurrence of either aggravating or extenuating circumstances, to be imprisoned for a period of 3 years 6 months and 21 days of prison correctional, and to pay one-half part of the costs. In the same decision the lower court ordered that a new order of arrest be issued for the arrest of the codefendant Benita Antioquia. From that sentence the defendant Mariano M. Gallegos appealed to this court.

At the opening of the trial the attorney for the defendant Mariano M. Gallegos presented a motion asking that the

trial against him be suspended until his codefendant could be arrested and brought into court, which motion was denied by the lower court and the cause was finally brought on for trial upon the 2d day of February, 1917. The appellant now alleges that the lower court committed an error in compelling him to proceed to trial alone in the absence of his codefendant.

The record shows that the complaint was signed by the offended person and included both of the defendants, Mariano M. Gallegos and Benita Antioquia; that a warrant of arrest was issued and Mariano M. Gallegos was arrested; that Benita Antioquia, the codefendant, was not arrested, for the reason that she could not be apprehended after due diligence.

While the law provides that the complaint must be presented, in a criminal action for adultery, (a) by the offended person and (b) against both of the alleged culprits, there is no provision of law requiring that they shall be tried jointly. (Art. 434, Penal Code; sec. 1, Act No. 1773.) Not only is there no law requiring that they should be tried jointly, but there is a positive provision of law permitting them to be tried separately. (Section 33 of General Orders No. 58.)

The mere fact that article 434 of the Penal Code requires the offended husband to institute the criminal action for adultery against both of the alleged guilty parties does not necessarily prevent either of them from obtaining a separate trial, nor prohibit the court from dismissing the complaint as to one or the other under certain conditions, (U. S. vs. Topino and Guzman, 35 Phil Rep., 901.)

When the complaint was filed by the offended husband against both of the guilty parties, the proceedings then passed into the hands of the prosecuting officer who may move for a dismissal of the complaint as to one if he is satisfied that he cannot established guilty knowledge, on the part of the man, of the fact that the woman was married, and such dismissal would not of itself require the court to acquit the woman. (U. S. vs. Asuncion, 22 Phil. Rep., 358; U. S. vs. De la Torre and Gregorio, 25 Phil. Rep., 36; decision of the supreme court of Spain, January 17, 1889; decision of the supreme court of Spain, October 24, 1894.)

There are numerous cases, after the complaint has been properly presented, where one or the other of the alleged guilty parties in a criminal action for adultery may be tried and sentenced separate from the codefendant. For example, where one of the parties died after the commencement of the action, or where the man was ignorant of the fact that the woman was a married woman at the time of the commission of the alleged criminal act. (U. S. vs. Asuncion, 22 Phil. Rep., 358; U. S. vs. De la Torre and Gregorio, 25 Phil. Rep., 36; decision of the supreme court of Spain, January 17, 1889; decision of the supreme court of Spain, October 24, 1894.)

In view of the foregoing, we are of the opinion that the lower court did not commit an error in requiring the appellant to proceed to trial alone in the absence of his codefendant.

The appellant further alleges that the lower court committed an error in permitting the case to be tried by a private attorney and in excusing the prosecuting attorney from attending the hearing.

The record shows that at the commencement of the trial, the prosecuting attorney asked permission to be absent or to retire from the court room for the time being, and to leave the representation of the prosecution to the private attorneys for the offended person. Said permission was granted and no objection or protest was made by the defendant nor by his attorney. We believe, however, that even if the defendant had objected to the permission granted by the court allowing the prosecuting attorney to be absent, that the error assigned could not in any way affect the sentence of the lower court. Section 38 of General Orders No. 58 expressly permits the court to appoint an attorney to perform the duties of the prosecuting attorney at the trial if the latter is absent. (U. S. vs. Fernandez, 1 Phil. Rep., 539; U. S. vs. Labial and Abuso, 27 Phil. Rep., 82; U. S. vs. Despabiladeras and Laxamana, 32 Phil.

Rep., 442.)

In the latter case (*U. S. vs. Despabiladeras and Laxamana*, supra), the precise question presented here was discussed and decided. In the course of that decision, we said:

"It is every day practice in this jurisdiction, as well as in the United States generally, for the prosecuting attorney to turn over the active conduct of criminal cases (especially those in which the offenses charged are of the nature of those known as private offenses under the Spanish Penal Code) to counsel employed by private prosecutors; and we see nothing objectionable in this practice, provided always that the fiscal retains control of the prosecution, and assumes full responsibility therefor."

The appellant further contends that the lower court committed an error in permitting the prosecution, after it had closed its case, to present additional proof relating to the jurisdiction of the court.

Section 31 of General Orders No. 58 provides, among other things (a) That the counsel for the United States must offer evidence in support of the charge; (b) that the defendant, or his counsel, may offer evidence in support of the defense, and (c) that the parties may then respectively offer rebutting testimony, but rebutting testimony only, unless the court, in furtherance of justice, permit them to offer new and additional evidence bearing upon the main issue in question. Said section clearly provides that, in the furtherance of justice, the court may grant either of the parties the right and opportunity to adduce additional evidence bearing upon the main issue in question. The question of the jurisdiction of the court is always a question of importance; and if evidence is necessary to prove that fact, as it is in all criminal cases, so far as the place of the commission of the crime is concerned, and the prosecution fails to prove that fact, in the interest of justice the court may always permit it to present additional evidence, if that fact appears before the trial of the case is closed. And, moreover, an examination of the record shows that, without the additional proof, the court had a right to take judicial notice of the fact, from the evidence adduced, that the crime committed, if committed at all, was within its jurisdiction. (*U. S. vs. Chua Mo*, 23 Phil. Rep., 233; sec. 275, Code of Civ. Proc.; *Marzon vs. Udujan*, 20 Phil. Rep., 232; *U. S. vs. Lim Soon*, 34 Phil. Rep., 668.)

Courts should be permitted to give a liberal interpretation to the law permitting them to take judicial notice of the facts of public knowledge, especially if a technical interpretation would have the effect of defeating the very purpose and object of the law. (*People vs. Etting*, 99 Cal., 577; *People vs. Faust*, 113 Cal., 172.) In the case of *Master vs. Morse* (18 Utah, 21), it was held that courts might take judicial notice of the fact that certain cities have been divided into lots, blocks and streets, and that judicial notice would be taken of such division. (*Board vs. State*, 147 Ind. 476; *Gilbert vs. National Cash Register Co.*, 176 Ind., 288.)

Upon the question whether or not the defendant was guilty of the crime charged in the complaint, the evidence shows beyond a reasonable doubt that he committed the acts described in the complaint in the manner and form therein described.

Therefore, the sentence of the lower court is hereby affirmed, with costs. So ordered.

Arellano, C. J., Carson, Araullo, Street, Malcolm, and Avancena, JJ., concur.

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