

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. BARBARA CAPISTRANO, DEFENDANT AND APPELLANT.

G.R. No. 15001. March 16, 1920

Ponente: ARAULLO, J.

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ARAULLO, J.:

On the 29th of April, 1918, Barbara Capistrano made a sworn declaration before the fiscal of the city of Manila, accusing her father, Alejo Capistrano, of the crime of rape committed upon her person. After the corresponding preliminary investigation was conducted by said fiscal, the latter, on April 29, 1918, filed an information with the Court of First Instance of the same city against the said Alejo Capistrano for the crime of rape alleged to have been committed upon the person of his said daughter. On May 11 of the same year, several days before the hearing of the cause No. 16900 instituted upon said information, the said Barbara Capistrano filed a motion with the court praying for the dismissal of the cause against her father on the ground that it was not the latter who had raped her, as she has previously stated before the fiscal of the city, but a Spaniard named Juan, an employee of the Lerma Park Cabaret, Caloocan, Rizal Province, and that if she had made a different statement before at the police station, it was on account of the instructions of the said Spaniard Juan. At the hearing of the cause aforementioned, after recognizing having stated before the fiscal concerning the fact of her father having raped her on the night of April 26, 1918, saying having made similar statement before the fiscal because the Spaniard had instructed her to denounce her said father, the same Barbara Capistrano said that this statement was not true and that the truth was that which she was telling before the court, or rather that it was the Spaniard Juan who abused her person, and not her father. From this testimony, the fiscal having been obliged to move for the dismissal of the cause, same was dismissed by the court in his decree of the 15th of the same month of May, ordering Alejo Capistrano's immediate release. In view thereof, the fiscal filed against said Barbara Capistrano the information giving rise to the present cause for the crime of perjury. Said information reads as follows:

"The undersigned accuses Barbara Capistrano of the crime of perjury committed as follows:

"That on or about the 27th day of April, 1918, in the city of Manila, Philippine Islands, the said accused, declaring before the assistant fiscal of the city of Manila, Luciano de la Rosa, affirmed under oath, before the said fiscal who was duly authorized to receive oaths, that one called Alejo Capistrano, the father of the said accused, had raped her on the 26th day of April, 1918; that later after said date, or on May 15, 1918, the aforementioned accused, testifying before his Honor, Manuel Vivencio del Rosario, as the principal witness for the prosecution in the criminal cause No. 16900 of the Court of First Instance of the city of Manila, said that the real author of the crime of rape of which she had complained before the aforesaid assistant fiscal, Luciano de la Rosa, was not her aforesaid father, Alejo Capistrano, as she had then previously stated before the said fiscal, but one called Juan, Spaniard by nationality; that this last testimony, taken before the Honorable Judge, Manuel Vivencio."

The accused demurred to the foregoing information on the ground that same was fatally defective for the reason that in said information it does not appear that the testimony—taken by the accused before the court at the hearing of the aforesaid cause for the crime of rape and which was false according to the information, and expressive of

the fact that the real author of the crime of rape denounced by her before the fiscal was not her father, as she had previously declared under oath before the said fiscal, but one called Juan, a Spaniard—was a statement important and essential to the question involved in said criminal cause or raised at the hearing thereof. This demurrer was overruled by the trial court and the accused excepted to this ruling and pleaded not guilty. After the hearing of this present cause, the Court of First Instance aforesaid rendered his judgment on April 25, 1918, declaring the accused guilty of the aforementioned crime of perjury mentioned and penalized in section 3 of Act No. 1697. But in view of the fact that the accused was below 18 years of age, the court suspended the judgment, ordering the commitment of the said accused in the government's reformatory until she becomes of age, and sentencing her, furthermore, to be forever disqualified from testifying before any court of these Islands. From this judgment the accused appealed and her defense alleges that the trial court erred:

"1. In overruling the demurrer interposed against the information in question.

"2. In not reciting in the judgment that the statement of the accused before the fiscal of the city of Manila was not freely and voluntarily made but was made under third party's threats and duress.

"3. In not acquitting the accused."

It is said in the information, as has already been seen, that when the accused testified under oath on May 15, 1918, before the Honorable Manuel Vivencio del Rosario, as a witness for the prosecution in the criminal cause No. 16900 of the Court of First Instance of the city of Manila, she said that the real author of the crime of rape which she had denounced before the assistant fiscal, Luciano de la Rosa, was not her father, Alejo Capistrano, as she previously stated under oath before the said fiscal, but one called Juan, a Spaniard, and that this last testimony taken before the Honorable Manuel Vivencio del Rosario was false for the said accused knew very well upon testifying before the said judge that the real author of the crime of which she was the victim was not the aforementioned Juan but her own father called Alejo Capistrano. But it is not alleged in the information, as the Attorney-General admitted in his brief, expressly or impliedly, that the aforesaid testimony, taken by the accused at the hearing of the cause for rape against her father, was essential and important in said cause. Wherefore, the fact alleged by the accused to support her demurrer to said information is true.

For the crime of perjury to be punishable, the false testimony willfully taken or subscribed contrary to the oath must relate to, or concern, "any material matter which he (the witness) does not believe to be true." "Perjury, as modified by statute (Act No. 1697), may be defined to be the willful and corrupt assertion to a falsehood, under oath or affirmation administered by authority of law, in a material matter, the offense being enlarged and made to extend to false oaths other than those taken in the course of judicial proceedings." Such was what this court said in the case of *United States vs. Estraña* (16 Phil. Rep., 520), citing 30 Cyc., 1433, and other cases mentioned therein. In the main body of same decision, this court said:

"In the absence of a statute to the contrary, it is well settled that an indictment for perjury must show conclusively that the testimony given or assertion made by the defendant and charged to be false was material to the issue on the trial in which he was sworn or it will be fatally defective. This may be done either by a direct allegation that it was material, or by allegations of facts from which its materiality will appear. (30 Cyc., 1433, and *U. S. vs. Singleton*, 54 Fed. Rep., 488; *U. S. vs. Cowing*, 25 Fed. Cas., No. 14880, 4 Cranch C. C. 613; *Hembree vs. State*, 52 Ga., 242; *State vs. Anderson*, 103 Ind., 170; *State vs. Gibson*, 26 La. Ann., 71; *State vs. Williams*, 60 Kan., 837; *People vs. Ah Bean*, 77 Cal., 12; *Gibson vs. State*, 47 Fla., 16; *State vs. Cunningham*, 66 Iowa, 94; *People vs. Collier*, 1 Mich., 137; *Wood vs. People*, 59 N. Y., 117; *Buller vs. State*, 33 Tex. Cr., 551, and numerous other cases cited.)"

The complaint upon which the aforesaid cause of *United States vs. Estraña* was instituted, was wanting of an allegation that the testimony of the accused, alleged to have been given falsely under oath, was material to the

issue involved therein, and this court said in that cause:

"The complaint in the case at bar is fatally defective for the want of an allegation that the testimony, alleged to be false, was material to the issues involved in the murder case. Our statute (section 3 of Act No. 1697, *supra*) specifically makes materiality an essential element of the crime of perjury and without this the crime can not legally exist."

It is, therefore, necessary that in the information filed in this instant case against Barbara Capistrano and inserted in the beginning of this decision, it should have been expressly and definitely stated that the testimony—alleged to be false according to said information, and given by the accused Barbara Capistrano before the Court of First Instance whereby she stated that the real author of the crime denounced by her was not her father Alejo Capistrano but one Juan, a Spaniard—was important and material to the issues involved in the said case for rape against Alejo Capistrano. The want of this allegation in the information makes the latter fatally defective, and in no way can it be accepted, as the Attorney-General so understands in his brief, that such an omission, in the instant case, had been cured by the allegation in same information that said testimony was false and by the admission in evidence, without the objection on the part of the defense, of the record of the case for rape against Alejo Capistrano whereby it appears, according to the fiscal, that the false testimony taken by the accused in the said case was so material that same was dismissed by the order of the court (in support of his opinion the Attorney-General invoking the aforementioned case of *U. S. vs. Estraña* and the case of *Serra vs. Mortiga* [204 U. S., 470; 11 Phil., 762]), because in either of the cases cited by the Attorney-General (the informations thereof not having mentioned the material averments, to wit, in the first of said cases that the testimony alleged to be false was material, and in the second, an adultery case, that concerning the place and the knowledge of the accused that the woman was married) no objection was interposed in the lower court at the proper stage of the proceedings to the sufficiency of the information, no demurrer was set up against said information in due time, and, consequently, in the first of the cases aforementioned, this court said: "As no objection to the sufficiency of the complaint was raised this fatal defect could have been supplied by competent testimony on the trial." Naturally, the court overruled the appellant's objection on the ground that said defect was first raised before this court when the case was before us on appeal, and this court further said (syllabus):

"Where a complaint is fatally defective, either in form or in substance, and no objection is taken at the trial but is raised for the first time on appeal, it is not error for this court to refuse to sustain such objection when the fatal defects are supplied by competent proofs." (*Serra vs. Mortiga*, 204 U. S., 470, reported in 11 Phil. Rep., 762.)

In the case of *Serra vs. Mortiga* no objection was raised at the trial to the sufficiency of the complaint for adultery filed against the accused notwithstanding that same was defective, as has been already said. This court also overruled the objection for the first time raised on appeal by the accused against said complaint, and decided the case on its merits, taking into consideration the evidence presented at the hearing. Said decision was affirmed by the Supreme Court of the United States holding in the syllabus thereof the following:

"While a complaint on a charge of adultery under the Penal Code of the Philippine Islands may be fatally defective for lack of essential averments as to the place and knowledge on the part of the man that the woman was married, objections of that nature must be taken at the trial, and if not taken, and the omitted averments are supplied by competent proof, it is not error for the Supreme Court of the Philippine Islands to refuse to sustain such objections on appeal."

What occurred in the instant case is just the reverse from that which took place in the two cases aforementioned for the reason that, the fiscal having filed the information against Barbara Capistrano for the crime of perjury on May 15, 1918, and the accused having appeared thru her counsel two days after or May 17, on the 21st of same

month, three days after receiving notice of the information, said accused filed a demurrer (a copy of which was received by the fiscal and which we have already mentioned hereinbefore) on the ground that said information was defective for the want of the allegation aforementioned concerning the importance and materiality of the testimony alleged as false therein, praying for this reason the amendment thereof and the dismissal of the case with costs de officio. On the 5th of June following, this prayer was overruled by the court as improper. On the 8th of the same month the accused interposed her exception in writing to this decision. The said case was duly heard and the accused appealed from the judgment rendered thereon. She now assigns in her brief before this court as the first error alleged to have been committed by the lower court the fact that the latter has overruled the demurrer aforementioned.

Wherefore, the doctrines laid down in the two cases aforesaid are not applicable to the instance case. And if anything at all can be inferred from said doctrines, it is in the sense contrary to what the Attorney-General has said, i. e., the accused having demurred in due time to the information for being fatally and essentially defective, and having excepted to the ruling dismissing said demurrer, the omission in the information of the aforesaid allegation—the materiality and importance of the statement alleged as false therein had had not been cured by the filing of an amended information. Nor was such a defect cured by the allegation in the information that the aforementioned statement was false or by the admission in evidence without defendant's objection of the record of the aforementioned cause for rape against Alejo Capistrano. The overruling of the demurrer aforementioned having been assigned by the appellant in her brief before us as the first error committed by the lower court, this court cannot set aside the consideration of said objection in view of the appellant's appeal interposed against such decision. And one of the essential elements of the crime of perjury created by the law (art. 5392, Rev. Stat.) being the materiality or importance of the fact alleged as having been falsely uttered (*U. S. vs. Landsberg*, 23 Fed. Rep., 585), as was stated by this court in *United States vs. Estraña* (*supra*), and there being no allegation in the information relative to the materiality and importance of the testimony taken by the accused at the hearing of the case for rape against Alejo Capistrano to the issues therein involved, said information is null and void ab initio and the criminal proceedings must be dismissed.

However, it being undeniable that the testimony taken under oath by the accused before the Court of First Instance at the hearing of the cause for rape against Alejo Capistrano and alleged as false in the information, dealt with an important and essential matter involved therein, for by virtue of said testimony the cause was dismissed by the court, and the accused having raised in her appeal, discussed by the Attorney-General in his brief, the question whether or not the appellant was guilty of the crime of perjury and should be convicted of said crime, we now proceed to the consideration of this particular.

For this object we hereby reproduce the brief statement of facts incorporated by the trial court in his judgment and taken from the results of the evidence adduced at the trial, in the following terms:

"When this cause was called for a hearing, the accused appeared with her counsel Gonzales, and the Government was represented by Assistant Fiscal De la Rosa.

"The evidence adduced in this cause conclusively establish the fact that on the 27th of April of this year, the accused Barbara Capistrano and the policeman Varsovia appeared before the office of the prosecuting attorney of this city to file a complaint against one Alejo Capistrano, the father of the accused Barbara Capistrano, for the crime of rape committed by the former upon the person of the latter.

"After taking the oath required by law before the corresponding official or the assistant fiscal of this city, Luciano de la Rosa, Barbara Capistrano declared before the said officer the following: that between 11 and 12 o'clock on the night of April 26 of the present year, she was raped by her father Alejo Capistrano in a house on calle Dimas-Alang, Caloocan.

"In view of the foregoing statement of Barbara Capistrano the assistant fiscal De la Rosa, having found reasonable grounds for proceeding against the person mentioned by Barbara Capistrano in her said statement, filed the corresponding information. appearing on page 1 of the criminal cause No. 16900, accusing Alejo Capistrano of the crime of rape.

"The case for rape was heard before this court on May 15, 1918, and after taking the necessary oath, the offended party, Barbara Capistrano, testified before the court in substance as follows: that she made a statement before the prosecuting attorney accusing her father of the crime of rape for the reason that she had been induced to do so by a Spaniard, but that her statement before the fiscal that her father was the author of the rape upon her person was not true; that her father was not the one who raped her but the Spaniard aforesaid.

"At the hearing of this crime the accused testified and again swore before the court that what she in reality stated before the fiscal was what the said Spaniard, Juan Sol by name, had insinuated to her; that when she declared before the fiscal, the Spaniard aforesaid was not present; that her statement before the said Fiscal was not the truth but that, for her fear of Juan Sol, on account of the latter's threat upon her, she stated the person who raped her was her father."

It follows, therefore, that the accused Barbara Capistrano stated under oath two contradictory statements: one before the assistant prosecuting attorney of the city who conducted the preliminary investigation before filing the information against her father Alejo Capistrano for rape, statement whereby she was accusing the latter of the said crime; and another before the Court of First Instance at the hearing of the same cause for rape, saying that the one who raped her was not her father but one called Juan Sol, and that for her fear to the latter who had threatened her, she made the former statement before the fiscal of the city, imputing the commission of the said crime to her father.

According to section 3 of Act No. 1697, a person is guilty of the crime of perjury and must be punished by the penalty mentioned in said Act, "who, having taken an oath before a competent tribunal, officer, or person, in any case in which the law of the Philippine Islands authorizes an oath to be administered, that he will testify, declare, depose or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true. * * *"

The testimony of the accused taken under oath, which is alleged as false in the information, was the second statement or that one taken by her before the Court of First Instance at the hearing of the cause for rape, and the one alleged in said information as true was her statement under oath before the fiscal of the city at the preliminary investigation. Wherefore, in order to hold the accused guilty of the crime of perjury, it was necessary to prove that she did not believe said testimony as true or, what amounts to the same thing, that which she testified to before the Court of First Instance was not true.

"A conviction for perjury cannot be sustained merely on the contradictory sworn statements of the defendant, but the state must prove which of the two statements is false and must show that statement to be false by other evidence than the contradictory statement. * * * Of course where perjury is charged in giving testimony contrary to that given on a prior examination, the accused is entitled to show that his statements on the prior examination were induced by threats and duress; and after adducing evidence in support of this contention, he properly may insist that the court explicitly instruct the jury to determine whether or not such testimony was voluntary. (21 R. C. L., 271, citing *People vs. McClintic* [Mich.], 160 N. W., 461; *L. R. A.* [1917C], 52 and note; *Billingsley vs. State*, 49 Tex. Crim., 620, 95 S. W., 520, 13 Ann. Qas., 730.)"

In *People vs. McClintic* (supra) the court held the following:

"1. Perjury; Contradictory Statements; Effect.—Contradictory statements under oath will not alone convict one

of perjury. (For other cases, see Evidence XII I, in Dig. 1-52 N. S.)

"2. Evidence; Perjury; Cause of Contradictory Statements.—Upon trial of one for perjury, evidence is admissible that statements contradictory to those alleged to be false, which were made under oath before a committing magistrate, were induced by threats and duress. (For other cases, see Evidence XI t, in Dig. 1-52 N. S.)

"3. Criminal Law; Perjury; Instructions.—Instructions in a prosecution for perjury in giving testimony at a criminal prosecution contrary to that given before a committing magistrate, and which is claimed to have been given under duress, must explicitly inform the jury to determine whether or not such testimony was voluntary. (For other cases, see Trial HI e, 5, in Dig. 1-52 N. S.)

In the syllabus of *Billingsley vs. State* the following is said:

"4. Perjury; Evidence; Contradictory Statements.—A conviction for perjury cannot be sustained merely upon the contradictory sworn statements of the defendant, but the state must prove which of the two statements is false and must show that statement to be false by other evidence than the contradictory statement."

The evidence adduced by the prosecution in this cause consisted: 1. In presenting the transcription of the stenographic notes certified to by the respective stenographers and taken at the hearing of the cause for rape against Alejo Capistrano. In this transcription appears the fiscal's exposition of the motion filed by the accused for the dismissal of the same cause (rape) on the ground that her father was not the auror of the said crime but one called Juan a Spaniard, in contradiction with her statement at the preliminary investigation conducted by the said fiscal; the fiscal's prayer to accept the said statement of the accused; the said testimony under oath taken by her before the court wherein she made the same statement which is briefly and substantially mentioned in a paragraph of the judgment hereinbefore inserted. 2. In presenting the cause No. 16900 of the said court against Alejo Capistrano for the aforementioned crime of rape, wherein the information against the latter and the aforesaid testimony of the accused appear, and the decision or order of the court dismissing said cause in view of said testimony. 3. And the testimony of the policeman Osmundo Varsovia taken at the hearing of the present cause for perjury, the terms of which appear in the paragraph of the judgment hereinbefore inserted, and the testimony of the stenographer who took the record in the said cause and transcribed the testimony of the accused, certifying this last particular and the fact that said accused testified under oath.

In short, therefore, the prosecution confined itself in proving that the accused stated under oath the two contradictory statements aforementioned and that the accused stated to the policeman Varsovia, on the morning of April 27, 1918, that her father Alejo Capistrano raped her between the hours of 11 and 12 of the previous night, as well as the fact that the same policeman was present when the accused took her oath before the fiscal prior to the latter's taking the declaration of the accused in the aforesaid preliminary investigation. The foregoing is not proving, as it can be clearly seen, which of the two contradictory statements of the accused was the false statement or showing the falsity of either upon other evidence distinct from the same contradictory statements. It is simply showing or exposing said two statements in order to point out that the accused, declaring under oath in one or the other, made two statements contradictory with each other and involving one and the same fact.

But, moreover, the accused in her testimony at the hearing of the case for rape said, among other things, that nothing took place between her and her father on the 26th of April of that year, 1918; that on the next day she went to the fiscal's office to file a complaint against her father, accusing the latter what the Spaniard told her to do; that the Spaniard, after having abused her person, told her to accuse her father before the fiscal, and recounted what she then told the fiscal against her father; that on April 26 she did not sleep in the house No. 25 on calle Dimas-Alang but in the dance hall, in the house of one Pedro de los Santos; that everything she had said before the fiscal relative to the case of her father being the author of the said crime of rape was not true; that she knew

the Spaniard called Juan, who was not a cook in the Dimas-Alang dance hall; that it was not her father who abused her person but the said Spaniard; that all that she stated before the fiscal was what she receive from the instruction of the said Spaniard Juan; and that before going to the fiscal's office she had been instructed by the Spaniard to declare against her father, and the real author of said rape was not her father but the said Spaniard, called Juan. And finally, upon being asked by the fiscal "Which is true, your statement before the fiscal accusing your father as the author of the crime of rape or this statement of yours before the court accusing the said Spaniard?" she replied: "The truth is what I have stated here." In view of this statement the court handed down the order aforementioned, dismissing the case for rape and decreeing the release of the accused Alejo Capistrano.

In the testimony given by her at the hearing of the present cause for perjury, the accused reiterated what she has said before, i. e., that it was not her father who raped her but a Spaniard; that she stated before Fiscal De la Rosa that her father had committed upon her the said rape, but that afterwards she said that it was not her father because she was told by her aunt to tell the truth; that the Spaniard was the real author of said rape; that she does not know the name of the Spaniard for she could not remember it, but that she could recognize him should she see him. And when asked by counsel for the defense to look around that place whether she could find the Spaniard to whom she was referring and to tell where the latter was, she answered: "There he is," pointing at Juan Sol, who was then present at the hearing; and upon being immediately asked why it was that she told the fiscal it was her father who raped her when in reality it was that Juan Sol, the Spaniard, who committed said crime, she replied: "Because this gentleman was threatening to kill me in case I would not tell it was my father;" she further said that said threat took place on the day the rape was committed and that under this influence she made the statement before Fiscal De la Rosa accusing her said father; that the Spaniard Juan Sol was then carrying a penknife with which he threatened her, and that this threat was made by said Spaniard after the consummation of the criminal act.

As it appears from the foregoing facts, the accused has explained why at the preliminary investigation before the fiscal of this city she accused her father as the author of the crime of rape of which she was the victim, her reason being that she was instructed, intimidated and threatened by said Spaniard with a penknife, which he had at the time she was raped and after this act had been committed, in order that she should declare in that sense. She also said that after having given said statement, her aunt Petra de los Santos told and admonished her to tell the truth. She had repeatedly stated at the hearing of the case for rape as well as at the hearing of this case for perjury that the Spaniard Juan Sol was the one who raped her and not her father Alejo Capistrano. Finally, at the hearing of this case and in the presence of Juan Sol himself, she had the courage to point out the latter as the author of the crime of rape, saying furthermore that this gentleman was threatening to kill her should she not say that it was her father who had raped her.

With the means within her reach, the accused then proved that her statement at the preliminary investigation before the fiscal of the city, accusing her father and not the Spaniard Juan Sol, as the author of the rape of which she was the victim, was made on account of the duress and threats the latter made upon her so that she should declare in that sense—a fact which, having taken place without any eyewitness, was not possible to be related by any one other than the own testimony of the accused taken under oath as a witness in her own behalf at the hearing. But she presented another evidence of great importance at the very time of the hearing by pointing out Juan Sol, who was present at that moment, as the very person who had raped her and who afterwards had intimidated and threatened her in order that she should declare in the manner she did before the fiscal of the city, as has been said before. Moreover, counsel for the defense presented in evidence on that very occasion the proceeding No. 3511 of the Court of First Instance of Rizal entitled "The United States vs. Juan Sol" for rape, consisting of 12 pages, i. e., the criminal cause against said Juan Sol for the rape committed upon the person of the accused. And when the defense rested, they stated that there appears in the said criminal proceeding a prosecution for rape against said individual (Juan Sol). However, the said proceeding was not forwarded, together

with the present case, to this court.

On the other hand, the prosecution presented no other evidence, as has been said before, than the two contradictory statements of the accused; and according to the doctrines laid down by American courts in the two decisions hereinbefore inserted, it must prove by other evidence than the two contradictory statements themselves, which of them was false or more properly speaking, that the false statement, according to the allegation in the information, was the one given by the accused before the court of first instance at the hearing of the cause for rape aforementioned and in which she testified that it was not her father who raped her but the Spaniard Juan Sol. The prosecution did not only fail to present evidence tending to prove the existence of said falsehood, but when it should have produced as a witness Juan Sol, who was in the court room and was pointed out by the accused with her finger as the author of the rape of which she had been the victim, and when it was within its power to produce said man on the witness-stand, who must be the first to protest and reject the said imputation in the presence of the court, did not avail itself of these evidence in order to contradict and belie the clear and definite statement made by the accused against the said Spaniard not only in the sense that the latter had raped her but also in that he had induced and compelled her, by threats and duress, to declare at the preliminary investigation before the fiscal that which was true according to the information, an affirmation which the prosecution was in duty bound to prove by producing the said Juan Sol as a witness. And having failed to do so, such a failure is fatal to the prosecution.

In the judgment appealed from, the lower court did not pass upon the question whether the statement of the accused at the preliminary investigation before the fiscal of this city was given voluntarily or not. This the lower court must have done according to the doctrine laid down in *People vs. McClintic* (supra) mentioned in the above-inserted paragraph of 21 R. C. L., 271, and, even disregarding this doctrine, in view of what the accused has testified to relative to the threats and duress made upon her by Juan Sol, in connection with the absence of any evidence on the part of the prosecution to rebut the testimony of the accused respecting that particular.

On the other hand, after considering as real and true the facts recited by the accused at the preliminary investigation before the fiscal of the city in the presence of the policeman Varsovia, the lower court in the same decision declares that later when they had possessed their right spirit, and by means of undue influence, undoubtedly the influence exercised by the father of the accused, the latter falsely took her oath at the hearing of the case for rape, saying that she was not raped by her said father but by a Spaniard called Juan Sol. The court further adds that the father of the accused induced her daughter to tell a falsehood at the hearing of the said cause in order to free himself thereof. These assertions of the trial court do not find any support or basis in the evidence for there is not a word of record expressing, or even indicating, that Alejo Capistrano, the father of the accused, had exercised upon the latter undue influence or employed means to induce her to the a falsehood at the hearing of the case for rape aforementioned, as the judgment of the lower court speaks. The lower court's assertion in this sense is completely inaccurate and with this inaccuracy is certainly contrasted the fact that in the said judgment no mention has been made, for the just and upright appreciation of the facts submitted during the trial, concerning the insufficiency of the evidence of the prosecution in not presenting as witness Juan Sol in order to rebut and impugn, as has been already said, what the accused has testified to regarding the particular aforementioned.

In the face of the notorious insufficiency of the evidence for the prosecution and the effect of the evidence adduced by the accused, it not being, on the other hand, improbable that the accused, a young woman 14 years of age, would have declared in the terms she did before the fiscal of the city at preliminary investigation of the cause for rape against her father Alejo Capistrano, compelled by threats alleged by her to have been made upon her by Juan Sol, nor is it also improbable that the latter was the one who had raped her and not her own father, and it not being proven that when the accused testified under oath before the court of first instance at the hearing of the said cause for rape, giving the statements which gave rise to the dismissal of said cause, she would have transgressed

the truth, and there being on the contrary, sufficient reasons leading us to believe, with sufficient ground, that she (the accused) was induced or compelled by threats and duress, to state what she had stated before the fiscal of the city at the preliminary investigation of the cause for rape aforesaid—it is not proper to hold the accused guilty of the crime of perjury aforementioned nor to impose upon her any penalty for said crime.

For the foregoing reasons and considerations, we reverse the judgment appealed from and acquit the accused, with the costs of both instances de officio. So ordered.

Arellano, C. J., Johnson, Street, Malcolm, and Avanceña, JJ., concur.

DISSENTING

TORRES, J.:

I dissent from the foregoing decision, which, in my opinion, should be rendered in the light of the final judgment handed down in the cause for rape.

Judgment reversed, defendant acquitted.

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