

JUANARIA FRANCISCO, PLAINTIFF AND APPELLANT, VS. LOPE TAYAO, DEFENDANT AND APPELLEE.*G.R. No. 26435. March 04, 1927*

Ponente: MALCOLM, J.

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As rightly stated by counsel for the appellant in his well, prepared brief, the present appeal raises only a question of law, which is whether or not, under the facts, the plaintiff is entitled to a decree of divorce in accordance with the Philippine Divorce Law. The related question resolutive of the appeal is whether or not the wife can secure a divorce from the husband, where the latter has been convicted of adultery and not of concubinage, although the acts for which the husband was convicted of adultery may also constitute concubinage,

Juanaria Francisco, the plaintiff, and Lope Tayao, the defendant, contracted marriage in the City of Manila in 1912. They separated in 1917. The husband then removed to Zamboanga. There he was later prosecuted for having committed adultery with a married woman named Bernardina Medrano, wife of Ambrosio Torres, at whose instance the criminal complaint was instituted. As a result of that proceeding, Lope Tayao, together with his coaccused Bernardina Medrano, was sentenced by the late Judge Ponciano Reyes to suffer three years, six months, and twenty-one days imprisonment prison correccional, and to pay the costs. (Exhibit A.)

On these facts, the action of Juanaria Francisco, the plaintiff, against Lope Tayao, the defendant, to have the bonds of matrimony between them dissolved was instituted in the Court of First Instance of Manila and was there denied by Judge of First Instance Revilla. The trial judge based his decision principally on the point that the plaintiff was not an innocent spouse within the meaning of sections 1 and 3 of the Divorce Law. This finding, as well as the dismissal of the complaint, is challenged by the plaintiff on appeal.

In the Philippine Islands, the causes for divorce are prescribed by statute. (19 C. J., 36; *Benedicto vs. De la Rama* [1903], 3 Phil., 34, reversed by the United States Supreme Court for other reasons). The grounds for divorce are two: Adultery on the part of the wife or concubinage on the part of the husband. (Villanueva, *La Ley de Divorcio*, pp. 27, 46, and 47.) The Philippine Divorce Law, Act No. 2710, is emphatically clear in this respect. Section 1 of the law reads: "A petition for divorce can only be filed for adultery on the part of the wife or concubinage on the part of the husband * * *." Note well the adverb "only" and the conjunctive "or." The same thought is again emphasized in section 3 of the Divorce Law which provides that "The divorce may be claimed only by the innocent spouse, provided there has been no condonation of or consent to the adultery or concubinage, as the case may be. * * *." Later on comes section 8 providing that "A divorce shall not be granted without the guilt of the defendant being established by final sentence in a criminal action"—that is, in relation with section 1 of the same law, by final sentence in a criminal action for adultery on the part of the wife or concubinage on the part of the husband. Act No. 2716, amendatory of article 437 of the Penal Code, adds nothing to the Divorce Law except as it clarifies the meaning of concubinage.

Counsel argues along the line that the plaintiff is here the innocent spouse and that the acts for which the

defendant was convicted of adultery also constitute concubinage. But the undeniable fact remains that the defendant was prosecuted for, and was convicted of, the crime of adultery and not the crime of concubinage. The criminal case was instituted on the complaint of the injured husband. It was not instituted by the injured wife which is essential for the proper initiation of a prosecution for concubinage. (Albert, *The Law on Crimes*, pp. 406, 407; 3 *ViadaCodigo Penal*, pp. 114 et seq.; *U. S. vs. Rivera and Vitug* [1914], 28 *Phil.*, 13.)

In its last analysis, what counsel is asking this court to do is to sit as a trial court to convict the defendant of the crime of concubinage, although no prosecution for the same has been instituted by the aggrieved wife and no hearing has been had or judgment rendered in a lower court. This the appellate court cannot do. What counsel also desires this court to do is to add a third cause for divorce to the law and to insert two words in section 1 of the Divorce Law so that it will read: "A petition for divorce can only be filed for adultery on the part of the wife or husband or concubinage on the part of the husband." This likewise the court cannot do. It would amount to judicial amendment of the law.

For somewhat different reasons but with the same result, the judgment appealed from must be affirmed without special pronouncement as to costs in this instance.

Avanceña, C. J., Johnson, Street, Villamor, Ostrand, Romualdez, and Villa-Real, JJ., concur.

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