

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. GABINO ALQUEZA, DEFENDANT AND APPELLANT.

G.R. No. 28995. August 04, 1928

Ponente: ROMUALDEZ, J.

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ROMUALDEZ, J.:

Notwithstanding the accused's protests of innocence, he was sentenced by the Court of First Instance of Zambales to seventeen years, four months and one day reclusion temporal, with the accessories of the law, to endow the offended party in the sum of P500, to support the offspring, if any, and to pay the costs, for the crime of rape, with the aggravating circumstance of abuse of confidence.

In this appeal, the defendant reiterates his protests of innocence, imputing two errors to the trial court: in finding the evidence to be sufficient, and in holding that the facts in the case constitute the crime of rape.

Counsel for the defense finds signs of improbability in the accused having committed the crime in a small house at a time when his own wife was in the same house; in the fact that the offended party was not physically examined until after thirty-eight days from the occurrence, and in not offering resistance. But, as a matter of fact, at the time of the incident the accused's wife, a sickly woman, was in one of the kitchens of the house, some 7 varas distant, according to the accused himself, from the room where the act took place, or some 6 meters, according to the mother of the offended party, the latter being at that time a girl of 14 years of age, and physically weak.

With these circumstances in his favor, the accused thought not to attract his wife's attention, who at that time was cooking, and for greater safety, put a piece of cloth into the offended party's mouth, that the latter might not be able to scream.

As to the physical examination, the provincial fiscal stated at the trial that it was not promptly submitted because no one requested it—due, no doubt, to the lack of knowledge of its necessity on the part of the interested parties,—and it was only when the case came up before the Court of First Instance and it was discovered that it had not been made, that the physical examination was effected. The lack of a prompt examination is no argument against the prosecution.

As regards the resistance offered by the offended party, it appears from the record that she did resist. After the offended party had verbally and actively refused the accused's illicit proposal, was thrown to the floor, held there and gagged with a piece of cloth; she was weeping, and as soon as her mother arrived she complained of the outrage.

We find the evidence sufficient and the facts proven constitute the crime of rape.

The lower court took into account the abuse of confidence as an aggravating circumstance.

We take it that in this particular case the fact that the accused lived in the same house as the offended party is not

enough, in itself, to hold that there is such aggravating circumstance, for after all, that house did not belong to the offended party (pp. 22, 61, 62, t. s. n.). As this court said in the case of *United States vs. Cabaya Cruz* (4 Phil., 252), it might serve to describe the accused's conduct as disgraceful, but not as an abuse of confidence, for which it is required to show what was the confidence reposed in the accused, and that it facilitated the commission of the crime, in order that it might be judged whether or not he had abused such confidence.

We hold that the crime proven in the record is rape without any modifying circumstance, of which the herein appellant is guilty.

Wherefore, the judgment appealed from is modified, and under the provisions of article 438 of the Penal Code, the accused is hereby sentenced to fourteen years, eight months and one day reclusion temporal, the judgment being affirmed in all other respects, with costs against the appellant. So ordered.

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

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