

THE UNITED STATES AND MARIA AUREUS, PLAINTIFFS AND APPELLEES, VS. WENCESLAO MERCADO AND VICENTA REY, DEFENDANTS AND APPELLANTS.

G.R. No. 3228. August 03, 1909

Ponente: JOHNSON, J.

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JOHNSON, J.:

The defendants were charged with the violation of the provisions of article 437 of the Penal Code, in the following language:

"That for nearly two years prior to the time of the filing of the amended complaint, the said accused have lived, and were living together in concubinage in a house situated on property owned by the plaintiff and her above-named husband, in the sitio of Manangle, within the limits of Sipocot, Ambos Camarines, Philippine Islands, thereby causing a public scandal, and deserting the plaintiff from that time until this date, for which reason she was obliged to return to the home of her parents in the pueblo of Libmanan in the said province; all contrary to law."

After hearing the evidence, the lower court found the defendants guilty of the crime charged in the complaint, and expressly finding that there were no aggravating circumstances, and applying the provisions of article 11 of the Penal Code as an extenuating circumstance, sentenced the defendant Wenceslao Mercado to be imprisoned in the provincial jail of the Province of Ambos Camarines for a period of eight months of prison correccional and to pay one-half of the costs, and in case of insolvency to suffer subsidiary imprisonment for the payment of said costs at the rate of 12½ pesetas per day. The lower court sentenced the said Vicenta Rey to be banished from the territory surrounding the barrio of Manangle, jurisdiction of Sipocot, of the Province of Ambos Camarines, within a radius of 25 kilometers, for a period of six months and one day, and to pay one-half the costs, and in case of insolvency to suffer subsidiary banishment at the rate of 12½ pesetas per day, for the payment of one-half of the costs.

From this sentence of the lower court the defendants appealed, making one assignment of error only, to wit, that the lower court committed an error in declaring the defendants guilty of the crime of adultery.

From a reading of the above complaint, it will be noted that the defendants were charged with the violation of the provisions of article 437 of the Penal Code. An examination of the record brought to this court discloses the following facts:

First. That Maria Aureus and Wenceslao Mercado were married in the Province of Ambos Camarines on the 3d day of February, 1883; that the said marriage had never been annulled.

Second. That some time before the time of the alleged commission of the crime charged in the complaint, the said Maria Aureus and her husband, Wenceslao Mercado, had separated and were living apart.

Third. That some time before the said separation of Aureus and her husband Mercado, the husband (Wenceslao

Mercado) had employed the defendant, Vicenta Rey, and her husband to work for him, and that they (Vicenta Rey and her husband) had continued in his employment until the death of the husband of the said Vicenta Rey.

Fourth. The accused, Vicenta Rey, continued to live in the house of the defendant Mercado after the separation of the latter from his wife and after the death of her husband.

Fifth. The evidence shows, beyond peradventure of doubt, that the defendants at various times and for a great many months committed the acts described in the complaint presented against them in the lower court. We find, therefore, that they are guilty of the crime charged in said complaint beyond peradventure of doubt.

The lower court found that there were no aggravating circumstances. With this finding we agree. The lower court gave the defendants the benefit of the provisions of article 11 as an extenuating circumstance. We do not believe, and so hold, that it was the intention of the Legislature that the provisions of article 11 should be extended to the persons named therein for crimes of the character with which these defendants are here charged. There being, therefore, neither aggravating nor extenuating circumstances, the penalty imposed should be in the medium degree of prision correccional. (See art. 437, Penal Code.)

The sentence of the lower court is, therefore, hereby modified and the defendant Wenceslao Mercado is hereby sentenced to be imprisoned for the period of two years of prision correccional and to pay one-half the costs. The defendant Vicenta Rey is hereby sentenced to two years, four months, and one day of banishment from the barrio of Manangle, of the jurisdiction of Sipocot, of the Province of Ambos Camarines, and from the territory surrounding said barrio within a radius of 25 kilometers. The lower court imposed subsidiary imprisonment and banishment for the payment of costs. Subsidiary imprisonment or subsidiary banishment can not be imposed for costs in favor of the State. Articles 49, 50, and 51 of the Penal Code contain the provisions applicable to the imposition of the payment of costs and for subsidiary imprisonment, etc.

Article 49 provides the order of the payment of the pecuniary liability of the accused in criminal cases.

Article 50 contains the provisions with reference to the circumstances under which the accused may be required to suffer subsidiary imprisonment, etc., and for the nonpayment of some of these pecuniary liabilities.

Article 51 expressly mentions, by reference, the pecuniary liability for which a defendant may be required to suffer imprisonment. The costs incurred by the State are not included, and therefore subsidiary imprisonment can not be enforced for the payment of costs in favor of the State. Subsidiary imprisonment may be enforced for the payment of costs of a private accuser. Had the lower court rendered a judgment in the present case for costs incurred by a private accuser, he might have imposed subsidiary imprisonment for the payment of the same. There is nothing in the record which shows that such a judgment was rendered.

With reference to the right to impose subsidiary imprisonment for the payment of costs, see 1 Viada 429-431; 2 Groizard, 474; 4 Escriche, *Diccionario de Legislacion y Jurisprudencia*, 932. Escriche, after discussing the cases in which subsidiary imprisonment may be imposed for the payment of fines, etc., says:

"It is to be regretted that said responsibility was not made to cover all other costs including those incurred in the defense of the accused, as otherwise attorneys, solicitors, and the court personnel have no way to secure the settlement of their fees."

The lower court, therefore, had no right to impose the penalty of subsidiary imprisonment and banishment upon the defendants. The sentence of the lower court is therefore hereby modified and the defendant, Wenceslao Mercado, is hereby sentenced to be imprisoned for a period of two years of prision correccional and to pay one-half the costs of both instances, and the said Vicenta Rey is hereby sentenced to be banished from the territory surrounding the barrio of Manangle, jurisdiction of Sipocot, of the Province of Ambos Camarines, within

a radius of 25 kilometers, for a period of two years, four months, and one day, and to pay one-half the costs in both instances.

Arellano, C. J., Torres, Carson, and Moreland, JJ., concur.

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