

THE PEOPLE OP THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. BITUANAN (MORO), DEFENDANT AND APPELLANT.*G. R. No. 34510. August 31, 1931*

Ponente: MALCOLM, J.

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Moro Bituanan and Mora Sabay were married by Datu Alon according to Moro customs and usages. According to the same customs and usages, the Datu divorced the couple. Twenty days afterwards, Bituanan caught Sabay and a Moro by the name of Ali Sabpa sleeping on the same bed. Thereupon, Bituanan attacked Ali Sabpa and Sabay, killing the former and wounding the latter.

In the Court of First Instance of Cotabato, Judge of First Instance Natividad found Bituanan guilty of the crime of murder; but taking into consideration the provisions of section 166 of the Administrative Code of Mindanao and Sulu, sentenced the accused to twelve years and one day of imprisonment, reclusion temporal, with the accessory penalties, to indemnify the heirs of the deceased in the sum of P500, and to pay the costs. It is the sole contention of counsel for the accused, on appeal, that the decision of the lower court should be modified by applying article 423 of the Penal Code to the admitted facts. Said article provides that "Any husband who, having surprised his wife in the act of adultery, shall kill her or her paramour in the act, or shall inflict any serious physical injuries upon either, shall suffer the penalty of destierro."

The marriage of Bituanan and Sabay, performed according to the rites of the Mohammedan religion, was valid. (*Adong vs. Cheong Seng Gee* [1922], 43 Phil., 43.) This is so because of the nature of the provisions of the Philippine Marriage Law. The grounds for divorce in the Philippines, as prescribed by statute, are two only—adultery on the part of the wife, or concubinage on the part of the husband, as determined by a proper court. (*Francisco vs. Tayao* [1927], 50 Phil., 42.) Granting, without necessarily having to decide, that Bituanan and Sabay were, accordingly, not legally divorced, it only need be said that there is no evidence in the record showing that Bituanan surprised Sabay and Ali Sabpa in the act of adultery when he killed the latter. The privilege given in article 423 of the Penal Code extends solely to the case of a husband who surprises his wife in the act of actual adultery, that is, actual carnal knowledge with her paramour. (5 Viada, *Codigo Penal Comentado*, 5th ed., pp. 188-190, citing decisions of the Supreme Court of Spain.)

Judgment will be affirmed, with the costs of this instance against the appellant.

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

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