

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. FAUSTO BASILIO, DEFENDANT AND APPELLANT.

G.R. No. 3752. October 09, 1907

Ponente: TORRES, J.

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TORRES, J.:

Before the Court of First Instance of Pampanga, Fausto Basilio was charged by the fiscal of said province with the crime of abuses against chastity in that, at about 6 p. m. on the 3d of April, 1906, the young woman Marcelina Dy-Oco being then and there in the house of Casimiro Macapagal, wjiich is situated in the barrio of Santa Lucia, town of San Fernando, the accused willfully and feloniously and lewdly abused the said young woman.

From the record of the case the following facts appear to have been proven: That on the evening in question Marcelina Dy-Oco was a visitor at the house of Casimiro Macapagal in San Fernando; that as she approached the door to the upper story at the side of the stairway in company with Lucia Macapagal, the daughter of the OAvner of the house, and another woman named Eugenia David, the accused, who was also in the house and apparently waiting for her near the aforesaid door, suddenly placed himself behind Marcelina and seized her by the waist, caught her breast, and kissed her, trying to drag her toward a small room of the house, and refusing to let her go in spite of the efforts made by the other women to free her from her assailant; that for this reason the women cried out and thereupon two neighbors, named Hilarion Yusi and Santiago Yusi, went to her assistance; the first named seized the accused and with a push made him release his hold.

It should be noticed, however, that the offended party was well acquainted with the accused, although she never had anything to do with him because he is married to a cousin of hers, and as he has a house of his own the statement that the accused, livfid in the house where the affair occurred is not true.

The fact described above constitutes the crime of abuses against chastity, defined and punished under article 439 of the Penal Code, inasmuch as the. external acts committed against the person of the injured party, as seen by the witnesses present, are not characteristic of the crime of attempted rape, nor of an intent to commit such offense, but do constitute the offense of abuses against chastity and are contrary to good morals.

The supreme court of Spain, upon establishing the rule as to the application of an article of the Penal Code similar to the one in force in these Islands, declared in its judgment in cassation rendered on the 7th of October, 1890, that:

"In attempted crime, it is an essential condition that the external acts which constitute the offense be directed with a constant intent toward the commission of an offense punished by law; that by reason of the absence of such intent and of its necessary tendency, and also for reasons of moral order, the voluntary desistance of the guilty party excludes the attempt from punishment; that such desistance does not imply the absolute irresponsibility of the guilty party with respect to acts previously committed by him if the same constitute by themselves a crime, for the reason that, as they were freely carried out, they Ure within the nature of a consummated crimes—that is, they involve the voluntary character of the act, and the actual damage done to a lawful right; and further, because if the desistance on account of its relation to the intended purpose weakens

the connection between the latter to the acts prosecuted and prevents the punishment of the attempt or other offense, not for the damage inflicted but in part for that intended, this in no wise affects either past or anterior acts which violated other rights."

Would the act of forcibly placing the hand between the legs of a woman over 12 years of age, or without force if she be under that age, constitute the crime of abuses against chastity or simply an offense against good morals? The supreme court of Spain has decided that the former and the more serious classification is the proper one:

"Considering that the act committed by the appellant, described in the first question in the case, it not being done over and above the clothing of the young woman, * * * is unquestionably. one of the abuses against chastity, which abuses when committed under any of the circumstances that characterize the crime of rape, among which is the use of force, constitute the crime punished by article 454 of the code, properly applied by the trial court because it has been set forth that the appellant employed force in carrying out the acts duly proven."

The accused in this case, Avho did not plead guilty, states that on the evening in question he had a conversation with the injured girl at the house of Oasimiro Macapagal, where he lived, and Avhere the said girl, whom the deponent was courting, used to call; but he denied the acts attributed to him in the complaint, and. in order to prove his allegation he cited a resident, Ramon Dayrit, who by his testimony confirmed the truth of the charge since he stated that upon hearing the noise in the house he went to it and there found Hilarion Yusi, who had seized the accused, thus confirming the fact that it was this witness who separated Fausto Basilio from the injured party, Marcelina Dy-Oco, whom he was embracing and would not release; the fact that the accused had amorous relations with the said girl, which, however, has not been proved, not being sufficient to justify the abuse committed by him. The culpability of the accused as the proven and convicted author of the crime of abuses against chastity is evident.

In the commission of this crime no aggravating nor extenuating circumstance is present; therefore, the adequate penalty should be imposed in its medium degree.

For the reasons above set forth, it is our opinion that the judgment appealed from should be affirmed. Fausto Basilio is therefore sentenced to the penalty of three years and seven months of prison correctional, to the accessory penalties of article 61 of the Penal Code, one-half of the time of his detention to be allowed in his favor, and to pay the costs of this instance. So ordered.

Arellano, C. J., Johnson and Tracey, JJ., concur.

Wiilard, J., dissents.

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