

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. MARCELINO COLLADO (ALIAS NINOY), DEFENDANT AND APPELLANT.

G. R. No. 41248. September 14, 1934

Ponente: DIAZ, J.

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DIAZ, J.:

Taking advantage of the fact that Paula Bautista, a young married woman, was alone in her house which is situated in the eastern part of the town of Bacnotan of the Province of La Union, with no companion but her three-year old child who was then asleep, the accused, between 3 and 4 in the afternoon of July 31, 1933, went to the house of said woman on the pretext of asking for a glass of water, stealthily approached her and, without giving her an opportunity to defend herself, embraced and kissed her and caught hold of her breasts. When Paula Bautista recovered from the shock, she defended herself as best she could and in spite of the fact that the accused threatened to kill her with a dagger if she did not accede to his desires, she bit him on the right side of the chest thereby forcing him to release her instantly. Simultaneously therewith, she cried for help and, picking up a bolo nearby, she tried to strike him with it. However, the accused, who is stronger and more agile than she, succeeded in holding her by the arms and they were found in this position by Crispulo Ariola who was the first to come to her aid. Realizing that his designs had been frustrated and having been surprised in such situation by Ariola, he did not go down the stairs but jumped from the house to the ground, fleeing from the scene of the crime with the utmost speed. These are the facts as found by the trial court in which this court agrees after having carefully reviewed the record and the evidence.

In view of the above facts, the trial court sentenced the accused to an indeterminate penalty of from two months and one day of *arresto mayor* to two years, four months and one day of *prisión correccional*, with the corresponding accessories of the law, with costs. Not agreeing with the sentence imposed upon him, the accused appealed therefrom to this court, assigning in his brief four alleged errors as committed by the trial court.

In support of his contention that the trial court actually committed the errors assigned by him, the appellant cites some portions of his own testimony and later alleges that the crime imputed to him is absolutely improbable on the ground that at that time he knew that about 6 meters from the house of the offended party Paula Bautista, her cousin Crispulo Ariola and the witness for the defense Paulino Palaroan were conversing, claiming furthermore that at the time when he is alleged to have committed his acts of lasciviousness on the offended party, which is referred to in her testimony, the witness for the defense Laureano Nebrija was in her house, thus conveying the idea that it would have been folly on his part to commit the crime with which he is charged.

The fact that when he went to the house of the offended party the accused knew that said two witnesses Ariola and Palaroan were not far away, does not make it improbable for him to have committed the crime charged, because, inasmuch as the offended party was alone in the house and furthermore her husband was absent, having gone to Manila about a month ago to work as an agent, and, in addition thereto, the accused had threatened to kill

her if she did not accede to his desires, at the same time showing her a dagger, he must have believed that she would neither offer any resistance nor give a cry of alarm. Moreover he might have thought that said two witnesses Ariola and Palaroan would not continue conversing at the same place after he had left them.

That the witness for the defense Laureano Nebrija was not in the offended party's house when the crime was committed, should be believed notwithstanding the fact that he testified that he was present and witnessed said incident from the beginning, because aside from his testimony and that of the appellant, there is nothing in the record to prove the contrary. Ariola and Palaroan did not testify that they had seen said witness come out of the offended party's house either before or after the appellant had escaped therefrom, in spite of the fact that they were only 6 meters away. Furthermore, Crispulo Ariola and Luis Cariaso, the other witness for the prosecution who was the second to come to the aid of the offended party, testified that when they went up into the house they found only said offended party and her small child, not mentioning the appellant who, as was stated, fled as soon as he saw Crispulo Ariola come up into the house. Furthermore, leaving aside the witness Palaroan's statement to the fiscal when the latter summoned him to testify on what he knew about the incident that he knew nothing about the case, Palaroan could not help but admit that after he had arrived at his boarding house which is about 25 meters from Paula Bautista's house and also after said witness Ariola had gone up into the latter house, he saw the appellant walking rapidly. This shows that the appellant actually came out of said house with the utmost speed and that Palaroan left Ariola when the appellant went to the offended party's house to ask for a glass of water.

On the other hand if, according to the appellant's version, all that happened consisted in the offended party having reproached him because she had heard, that he had been spreading false reports that she was his mistress or that the two were maintaining illicit relations, it does not account for the fact that before reproaching him she permitted him to drink water in her house. The evidence shows that upon going up into the house, the appellant asked the offended party for a drink which, according to him was given him. What really happened, according to the evidence, is that the appellant upon seeing that the offended party, whom he had courted before her marriage, although in vain because she paid no attention to him, was alone, he was led into temptation, thus again proving the old adage that "opportunity makes the thief".

There is no doubt but that the offended party cried for help notwithstanding the witness Palaroan's testimony that he heard no such cry coming from the offended party's house. Her cry was heard by Crispulo Ariola and Luis Cariaso and, if we are to believe said witness Palaroan, it was also heard by Ariola's father named Agaton Ariola at his house about 25 meters distant from that of the offended party. Palaroan testified that while he and Crispulo Ariola were 6 meters from the offended party's house and therefore nearer to said house than Agaton Ariola, Palaroan heard Agaton Ariola tell his son Crispulo to go and find out what was happening at the offended party's house. This shows that said offended party actually cried for help for, otherwise, Agaton Ariola, who was very much farther than said witness Palaroan, could not have heard it.

The foregoing proven facts really constitute the crime of acts of lasciviousness defined in article 336 of the Revised Penal Code and punished therein with prision correccional. Inasmuch as the aggravating circumstance of dwelling had been proven at the trial, although it was not alleged in the information, it should have been taken into consideration by the trial court on the ground that the appellant had committed the crime in the offended party's own dwelling. In the case of *United States vs. Campo* (23 Phil., 368), this court, in view of the reasons therein stated, held that although a complaint or information contains no allegation that generic aggravating circumstances of any kind were present in the commission of the crime, said circumstances may be proven at the trial and, if proven, must be taken into consideration in imposing the corresponding penalty.

Wherefore, the sentence appealed from is modified by imposing upon the appellant an indeterminate penalty of from six months of arresto mayor to four years, two months and one day of prision correccional, with costs. So

ordered.

Avancena, C. J., Street, Abad Santos, and Vickers, JJ., concur.

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