

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
MARCIANO GONZALES, DEFENDANT AND APPELLANT.***G.R. No. 46310. October 31, 1939*

Ponente: CONCEPCION, J.

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Marciano Gonzales appealed from the judgment of the Court of First Instance of Tayabas which found him guilty of parricide and sentenced him to reclusion perpetua with the accessories of the law, to indemnify the heirs of the deceased, Sixta Quilason, in the amount of P1,000, and to pay the costs.

At the trial, the appellant testified that at midday on June 2, 1938, on returning to his house from the woods, he surprised his wife, Sixta Quilason, and Isabelo Evangelio in the act of adultery, the latter having escaped by jumping through the door of the house. He scolded his wife for such act, told her that the man was the very one who used to ask rice and food from them, and counseled her not to repeat the same faithlessness. His wife, promised him not to do the act again. Thereafter—the accused continued testifying—he left the house and went towards the South to see his carabaos. Upon returning to his house at about five o'clock in the afternoon, and not finding his wife there, he looked for her and found her with Isabelo near the toilet of his house in a place covered with underbush. When he saw them, his wife was rising up, while Isabelo, who was standing and buttoning his drawers, immediately took to his heels. The accused went after him, but unable to overtake him, he returned to where his wife was and, completely obfuscated, attached her with a knife without intending to kill her. Thereafter, he took pity on her and took her dead body to his house.

The appellant contends that, having surprised his wife in the afternoon of the date in question, under circumstances indicative that she had carnal intercourse with Isabelo, he was entitled to the privilege afforded by article 247 of the Revised Penal Code providing: "Any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill either of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of destierro. (*Italics ours.*)

We do not believe that the accused can avail himself of the aforesaid article, because the privilege there granted is conditioned on the requirement that the spouse surprise the husband or the wife in the act of committing sexual intercourse with another person; the accused did not surprise his wife in the very act of carnal intercourse, but after the act, if any such there was, because from the fact that she was rising up and the man was buttoning his drawers, it does not necessarily follow that a man and a woman had committed the carnal act.

We cannot, therefore, entirely accept the defense sought to be established by the accused, first, because his testimony is improbable. It is not conceivable that the accused had only mildly counseled his wife not to repeat committing adultery with Isabelo, instead of taking harsher measures as is natural in such circumstances, if it were true that he had surprised the two offenders in the act of adultery on returning to his house at midday on the date in question. Neither is it likely that a woman thirty years of age, like Sixta Quilason, and twenty-five-year-old

Isabelo Evangelio, both of sound judgment as is to be supposed, had dared to have carnal intercourse near the toilet of the offended party's house, a place which is naturally frequented by some persons. The circumstance that the place was covered by weeds, does not authorize the conclusion that the offenders could lay concealed under the weeds because the latter do not usually grow to such height as to conceal or cover two persons committing the guilty act. It seems that under the circumstances it is unnatural that they would execute the act in a place uncovered and open. We do not want to suppose that the sexual passion of two persons would border on madness. Secondly, because even assuming that the accused caught his wife rising up and Isabelo already standing and buttoning his drawers, the accused cannot invoke the privilege of article 247 of the Revised Penal Code, because he did not surprise the supposed offenders in the very act of committing adultery, but thereafter, if the respective positions of the woman and the man were sufficient to warrant the conclusion that they had committed the carnal act. (3 Viada, Penal Code, p. 96; People vs. Marquez, 53 Phil, 260).

Taking into account the mitigating circumstances of lack of intention on the part of the accused to commit so grave a wrong as that committed upon the person of the deceased, and of his lack of instruction, the appealed judgment is modified, and the accused is sentenced to the penalty of twelve years and one day to twenty years of reclusion temporal and to indemnify the heirs of the deceased in the amount of P1,000, with the costs. So ordered.

Villa-Real and Diaz, JJ., concur.

Avanceña and Moran, JJ., see concurring opinion.

Imperial and Laurel, JJ., see dissenting opinion.

CONCURRING OPINION

AVANCEÑA, C. J.:

I agree with the majority decision as to the result. I do not believe the testimony of the accused, the only evidence in his defense, that at noon of that day he found his wife in his house having carnal intercourse with Isabelo Evangelio, and that in the afternoon, some hours thereafter, he saw them in the underbush near the toilet, Isabelo buttoning his drawers and his wife rising up from the ground. Isabelo denied these facts. The accused, immediately after his wife's death, told his sister-in-law and the barrio lieutenant that she had committed suicide. Subsequently, in the justice of the peace court, he pointed to Isabelo as the killer of his wife.

CONCURRING OPINION

MORAN, J.:

I concur in the dispositive part.

The husband has no right to take the life of his wife. He has no right to do so even on the ground of conjugal infidelity. The law does not punish such infidelity by death. Much less, therefore, can the husband punish it by that penalty. The law nevertheless establishes one exception, whereby it justifies, the husband if the latter kills his wife upon surprising her "in the act of committing sexual intercourse with another person." (Article 247, Revised Penal Code.) It is because the law, in such a case, considers the husband as acting in a justified burst of passion. But to avail himself of the exception, the husband has to show that he has acted within its just bounds, that is, that he has surprised his wife in the carnal act with another, or under circumstances which unmistakably evidence the execution of the carnal act.

I agree that for a husband to be justified, it is not necessary that he sees the carnal act being committed by his wife with his own eyes. It is enough that he surprises them under such circumstances as to show reasonably that the carnal act is being committed or has just been committed. Thus, for instance, if the offended husband, as in the case of *U. S. vs. Alano*, 32 Phil., 381, had seen the supposed adulterer on top of his wife, there would be sufficient ground to justify him, although he had not seen the copulation with his own eyes. If the husband surprises his wife with another in scant apparel in a hotel room and kills her, there would also be sufficient ground to justify him. (See *U. S. vs. Feliciano*, 36 Phil., 753.)

In the present case, the acts attributed to the deceased and Isabelo Evangelio do not conclusively show that they had committed adultery in the underbush. From the fact that, in a open field, she was rising up and pulling down her skirt while he was buttoning his drawers nearby, it does not necessarily follow that they had carnal intercourse. It does not appear in what position she was found before she rose up, or how she stood up and pulled down her skirt. She could have been in an ordinary sitting position before rising up and, to avoid raising her skirt, she held it down when she stood up. And as to him, the fact that he was buttoning his drawers only means that they were unbuttoned, but anyone may be in such circumstance without having carnal intercourse with any woman. It may be that the woman, in the afternoon in question, was sitting near the toilet of her house, and that while in this position, Isabelo Evangelio, who answered the call of nature in another place, approached her buttoning his drawers, and she then stood up. And this hypothesis is entirely consistent with the presumption of innocence in favor of both.

It is true that, at noon time, the deceased and Isabelo Evangelio committed adultery in the conjugal house of the offended husband. But this is no evidence that they committed adultery in the afternoon of the same day. An accused cannot be found guilty of one crime just because he committed the same crime before. One of the rules covered by the principle *res inter olios acta* is to the effect that "evidence that one did or committed to do a certain thing at one time is not admissible to prove that he did or committed to do the same or a similar thing at another time." (Elliott on Evidence, p. 216.) The adultery committed at noon time only makes the acts executed by the deceased and Isabelo Evangelio in the shrubbery highly suspicious. But mere suspicions do not justify a husband in killing his wife.

DISSENTING OPINION

IMPERIAL, J.:

At noon time on June 2, 1938, the appellant, on returning to his conjugal house from the woods where he had been working, surprised his wife Sixta Quilason, the deceased, and her paramour, Isabelo Evangelio, in the act of adultery. Upon seeing him, Evangelio escaped through the door of the house. The appellant approached his wife and merely scolded her for the act she had committed, making her understand that she would not get anything from continuing her illicit relations with Evangelio because the latter was without means of livelihood and used to ask rice and food from them. The deceased promised the appellant not to fail him again. After resting for a while, the appellant again left the house towards, the South to see and look after his carabaos. At five o'clock in the afternoon, he returned to his house and, not finding his wife therein, looked for her in the neighborhood, finding her again with Isabelo Evangelio. On this occasion he found his wife raising herself up in a shrubbery near the toilet of the conjugal home, pulling down her skirt with her hands, and Isabelo Evangelio standing near her buttoning his drawers. The latter took to his heels upon noticing the presence of the appellant. The latter gave chase, but as he was unable to overtake Evangelio, he returned to where his wife was and in a fit of passion attacked and killed her with his knife, thereafter taking her dead body home.

Upon the facts above set out, the majority decision finds the appellant guilty of parricide, and considering in his favor the mitigating circumstances of lack of intention to cause so grave a wrong as that committed and of his lack of instruction, sentences him to the indeterminate penalty of twelve years and one day to twenty years of reclusion temporal, to indemnify the heirs of the deceased in the amount of P1,000, and to pay the costs. The majority decision denies to the appellant the benefit afforded by article 247 of the Revised Penal Code to this effect:

"ART. 247. Death or physical injuries inflicted under exceptional circumstances.—Any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill either of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of destierro.

"If he shall inflict upon them physical injuries of any other kind, he shall be exempt from punishment.

"These rules shall be applicable, under the same circumstances, to parents with respect to their daughters under eight years of age, and their seducers, while the daughters are living with their parents.

"Any person who shall promote or facilitate the prostitution of his wife or daughter, or shall otherwise have consented to the infidelity of the other persons shall not be entitled to the benefits of this article."

In my opinion the proven facts bring the appellant within the purview of article 247 and make him deserving of the benefit therein provided. The legal provision should not be interpreted so literally and strictly as is done in the majority decision. The latter declines to give the benefit because it finds that the appellant did not surprise his wife and her paramour in adultery or in the very act of committing it. It seems to me that the privilege or benefit extends not only to the act of adultery, but also to any plain and positive facts which lead to no other reasonable conclusion than that the adultery has been committed. If the legal provision should be interpreted literally and narrowly, as has been done, then it would likewise not be an act of adultery if a husband surprises his wife under another man, both of them being naked, while the offended husband has not seen the consummation of the carnal act. Thus viewed, the result is a departure from the intention and purpose of the legal provision. Taking into account the position of the deceased and her paramour, what they were doing with their clothes, and the solitary place covered with underbush, there could be no other conviction than that they had just committed the carnal act, which is what warrants the imposition of a lighter penalty under article 247.

The deduction made that the guilty parties could not have executed the carnal act in that place finds no support in the reality of the facts or in the lessons of experience gained through a reading of the judicial annals. Adultery is not always committed in a ready and luxurious room, or in a comfortable bed embellished with carvings.

The appellant, in my opinion, should be sentenced only to two years, four months and one day of destierro, in the manner provided by the Revised Penal Code, with the costs.

DISSENTING OPINION

LAUREL, J.:

I am unable to agree with the decision of the majority of my brethren in this case and I find it my duty to express my dissent.

I am of the opinion that the benefit of article 247 of the Revised Penal Code should be extended to the appellant who should accordingly be sentenced to suffer the punishment of destierro in the manner prescribed by law. It is true that this article of the Code is limited in its application to cases where the offended spouse surprises the other "in the act of committing sexual intercourse," but considering the purpose which the legislator must have had in

mind in extending the extraordinary or special attenuating circumstance to the offended spouse, this requirement should not invariably be given a literal interpretation, but each case should be subjected to the rigid judicial scrutiny to prevent abuse but not to frustrate the legislative rationale. To require performance of carnal act before the offended spouse could raise the chastising hand is to require the impossible in the majority of cases. Under the reasoning of the majority of my brethren, if a married woman at the appointed hour, in response to a common purpose, should meet her paramour at a designated place, both to enter a room alone, then and thereafter to undress themselves, perform mutual acts of the character of *abusos deshonestos*, all in preludiis to the carnal act, the offended husband must look on in the meantime and wait until the very physical act of coition takes place, if he were to receive the benefit of the special attenuation provided in section 247 of the Revised Penal Code. This interpretation is far from being rational and certainly does violence to the reason and purpose of the law. The circumstances are not for mature reflection or for the husband to engage in mathematical calculation. Precision was not contemplated by the legislator and could not have been. When, as expressed in the *Exposicion de Motivos del Proyecto de la Comision de Codification*, amendatory to the Spanish Penal Code of 1870, the offended spouse "en un triste momento vea desmoronarse la felicidad de su hogar y obre a impulsos de verdadero y sincero dolor", watchful waiting cannot be the rule. To receive the benefit of section 247 of the Revised Penal Code it is not necessary that the act be in *ipsis rebus venereis*, but it is sufficient that—borrowing the expression of the Romanists—it be in *preludiis vel paulo post*, provided that in the language of Pessina (*Elementi*, 2.º p. 57) "el acto no pueda explicarse mas que como efecto del lazo criminoso del adulterio" or in the language of Groizard (*Vol. 4*, p. 673) "los complices se encientren en situacion y condiciones de los que DIRECTAMENTE se infiere que con aquel proposito se han reunido". (Capitalizing and unitalicizing are mine.) Upon the facts of the present case, it is uncontradicted that the wife and her paramour were surprised near the toilet of the house of the couple, amidst growing shrubs, late in the afternoon while "la mujer estaba levantandose (s. n., p. 27) * * * bajando su saya (s. n., p. 29) * * * mientras que el hombre estaba abrochando sus pantalones" (s. n., pp. 25, 27) and they were hardly one foot apart from each other. Added to this, the paramour was a frequent visitor of the house (s. n., p. 26), the fact that, at noon of the same day, June 2, 1938, both were surprised "uno encima de la otra" (s. n., p. 23), and the further fact that the husband had no other motive—at least nothing was proved or shown, on the contrary they lived happily for fifteen years—for killing his wife, and the only conclusion is—unless we wish to live in blissful ignorance of the frailties of human nature—that the deceased Sixta Quilason and her paramour Isabelo Evangelio met at the place for one single and clear purpose, to commit adultery, and that they committed it. Taking into consideration the acts of the parties, their behavior and appearances, the surrounding circumstances, the entire *res gestae*, it is clear to a rational mind that they had committed the adulterous act. It is not necessary that the husband should be actual and living witness to the act of copulation to entitle him to the benefits of article 247 of the Revised Penal Code.

The laws of Solon, the Roman Law, the laws among the Goths and other ancient laws—not excluding our own native laws, view the infidelity of the wife with severity; and there are modern codes which justify the killing of the wife and her paramour who are caught in the act of adultery, such as the penal codes of Chile, Colombia and Ecuador. In Argentina and Switzerland the same result is reached by judicial determination, because the crime is deemed committed in a state of mental disequilibrium. The theory of exemption based on psychical considerations has not been accepted in the Anglo-American countries nor in the majority of the Latin countries of Europe. Like the penal codes of Portugal, Italy, France and Belgium, our Revised Penal Code considers the crime as a special one, because of the extraordinary concurrent circumstances of attenuation such as uncontrollable passion, absence of criminal malice, and psychical emotions. But whatever may be the case, fundamentally and rationally, the codes and laws of all countries express the same sentiment: the condemnation of the iniquity at demolition of the fundamental unit of social order and the destruction of the felicity of family and home. The responsibility of the offended husband has been of varying degrees. Not to speak of the influence of

Christianity upon the institution of marriage, the same development is observable in the field of criminal legislation in the Spanish peninsula from the Fuero Juzgo, through the Fuero Real, Las Siete Partidas, the Penal Codes of 1822, 1848, 1850 and 1870 down to the Spanish Penal Code of September 8, 1928.

In our case, I observe that the Spanish Penal Codes of 1848 (art. 339) and 1850 (art. 348) and 1870 (art. 438) require for purposes of special attenuation that the husband surprise en adulterio a su mujer and that the Spanish Penal Code of 1870 as reformed by the Comision Codificadora de las Provincias de Ultramar which was in force at the time of the revision of our penal laws in 1930 also borrowed the same language which remained until the enactment of Act No. 3195 of the Philippine Legislature. Perusal of this Act will reveal that the changes consisted in extending the benefit of the original article 423 of the Penal Code to both husband and wife, and for this reason, the phrase "in the act of adultery" was changed to "in the act of committing sexual intercourse", and the clause "shall kill * * * in the act" was changed to "shall kill * * * in the act or immediately thereafter", so that the law now as embodied in section 247 of the Revised Penal Code is as follows:

"Death or physical injuries inflicted under exceptional circumstances.—Any legally married person who, having surprised his spouse in the act of committing sexual intercourse with another person, shall kill any of them or both of them in the act or immediately thereafter, or shall inflict upon them any serious physical injury, shall suffer the penalty of destierro.

"If he shall inflict upon them physical injuries of any other kind, he shall be exempt from punishment.

"These rules shall be applicable, under the same circumstances, to parents with respect to their daughters under eighteen years of age, and their seducers, while the daughters are living with their parents.

"Any person who shall promote or facilitate the prostitution of his wife or daughter, or shall otherwise have consented to the infidelity of the other spouse shall not be entitled to the benefits of this article."

In *United States vs. Alano* the offended husband was charged with the crime of homicide and sentenced by the lower court to the penalty of fourteen years, eight months and one day of cadena temporal, to the accessory penalties, and to pay the costs. The facts in that case, as related in the decision of this court acquitting the offended husband on appeal, are as follows:

"About 5 o'clock in the afternoon of July 27, 1914, Modesta Carballo, a friend and comadre of Teresa Marcelo, who had a store near a cinematograph on Calle Tennessee of the district of Malate, went to Teresa's house on the same street to make her a present of five tickets for admission to the said cinematograph. When Maria Remigio, her husband F. M. Cleach, and Maria's sister, Antonina Remigio, returned home and learned of the present, they got ready to go to the cinematograph; but Tomas Ramos and his wife, Ricarda Garces, who also both lived in that house, did not do so, because the former was in a billiard hall at the time, and the latter was lying sick in a room of the house. In obedience to the suggestion of her husband, the defendant Teresa Marcelo did not accompany the party to the cinematograph, as one of her children was sick, but still a little while afterwards Modesta Carballo approached the house where the defendant was, to call Teresa, who then told Modesta that she would not go to the cinematograph, for the reason mentioned. Thereupon the defendant Eufasio Alano and his wife Teresa Marcelo amused themselves at the card game of "black jack." About half past seven that evening the defendant, feeling tired, went to bed, while his wife remained at the window looking out and a little while afterward told her husband that she would go down for a moment to the Chinese store near by, which she did.

"As Teresa Marcelo was slow in returning and her sick child was crying, Eufasio Alano left the house to look for her in the Chinese store situated on the corner of Calles Dakota and Tennessee, and, not finding her there, went to look for her in another Chinese store near by, with the same result. He therefore started to return home through an alley where he tripped on a wire lying across the way. He then observed as he stopped that among some grass near a clump of thick bamboo a man was lying upon a woman in a position to hold sexual

intercourse with her, but they both hurriedly arose from the ground, startled by the noise made by the defendant in stumbling. Alano at once recognized the woman as his wife, for whom he was looking, and the man as Martin Gonzales, who immediately started to run. He was wearing an undershirt and a pair of drawers, which lower garment he held and pulled up as he ran. Enraged by what he had seen, the defendant drew a fanknife he had in his pocket and pursued Martin Gonzales, although he did not succeed in overtaking him, and, not knowing where he had fled, returned to the house, where he found his wife Teresa in the act climbing the stairs. He then reprimanded her for her disgraceful conduct and immediately stabbed her several times, although she finally succeeded in entering the house, pursued by her husband and fell face downwards on the floor near the place where the sick woman Ricarda Garces was lying. The latter on seeing this occurrence, began to scream and started to run, as did also Teresa Marcelo who had arisen and gone down the stairs out of the house; but her infuriated husband again assaulted her and when she reached the ground she fell on one of the posts beside the stairs. When the defendant saw her fall, he entered the house, took some clothes and started out in the direction of Fort McKinley."

There are three salient points in the Alano case to which I direct particular attention in support of the view that I entertain and in refutation of the argument of the majority in the case at bar. (1) in the Alano case the "man was lying upon a woman in a position to hold sexual intercourse with her * * * near a clump of thick bamboo * * * but they both hurriedly arose from the ground, startled by the noise made by the defendant in stumbling." The parties there were not surprised in the act of copulation but merely "in a position to hold sexual intercourse." Indeed, the act of the man placing himself upon a woman is not necessarily the act of coition itself, but is a mere preliminary to that act. There, this court did not give a literal interpretation to the legal provision involved. (2) In the Alano case it should be observed that the act of adultery occurred in the neighborhood of Calles Dakota and Tennessee, in the district of Malate, in the City of Manila, whereas the case at bar occurred no less than in one of the remote barrios of the municipality of Sariaya, Province of Tayabas. The majority in the case at bar finds it incredible that the act of adultery could have been perpetuated under the circumstances testified to by the defendant, and says:

"Como tampoco es verosimil que una mujer, como Sixta Quilason, de unos de 30 años de edad, e Isabelo Evangelio, de unos 25 anos de edad, ambos de discrecion suficiente, como es de suponer, se hayan atrevido a tener un ayuntamiento carnal, nada menos que cerca del retrete de la casa del ofendido, que es de suponer, es un lugar frecuentado por algunas personas. La circunstancia de que el sitio estaba cubierto de malezas, no autoriza la conclusion de que los culpables podrian estar cubiertos por las malezas, porque las malezas no suelen tener mucha altura para ocultar o cubrir a dos personas que esten en position deshonesta. Parece que entales casos, no es lo natural que ejecuten el acto en un sitio descubierto o visible. No queremos suponer que pueda rayar en locura el impetu pasional de dos personas."

The occurrence in the Alano case is not very different from that of the case at bar. If in the former case it did take place—as found by this court—in plain Malate, City of Manila, why could it not have taken place in a sparsely populated barrio of Sariaya, Tayabas? The fact that Sixta Quilason was thirty years of age and her paramour Isabelo Evangelio was but twenty-five years, does not prove what the majority calls "discretion suficiente" but rather the youth of the actors and everything that youth implies. (3) In the Alano case the offending wife was killed not in the place where she was surprised with her paramour but in the conjugal home after she had fled, pursued by her husband; whereas, in the present case, the deceased Sixta Quilason was killed on the very spot where she was found with her paramour Isabelo Evangelio.

The majority does not give credit to the testimony of the accused in the present case. I do. I accept his testimony because (a) it is not contradicted or disproved in its material details by the prosecution, (b) I find nothing inherently improbable or incredible in that testimony, (c) it was given under the solemnity of oath at a formal trial, and (d) it is substantially a reiteration of his sworn statement (Exhibit G—June 3, 1938) and (s) the alleged report (Exhibit F) concerning the suicide appears to have been made by the lieutenant of barrio of Concepcion-Banahaw

of that municipality.

In view of the result reached by the majority in this case, I also express the opinion that this is a matter that may properly be brought to the attention of His Excellency, the President of the Philippines, for such action as he may deem proper to take in the premises.

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