

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. JUAN CASIPONG AND GREGORIA HONGOY, DEFENDANTS AND APPELLANTS.

G.R. No. 6608. September 05, 1911

Ponente: TORRES, J.

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TORRES, J.:

This is an appeal by the defendants from the judgment rendered in this case by the Hon. Adolph Wislizenus. Juan Casipong later withdrew his appeal, so the judgment is final in his case (p. 16 of the record), while the appeal continues with respect to Gregoria Hongoy.

On March 5, 1909, Juan Casipong contracted civil marriage with Teodora Juanico before the justice of the peace of the pueblo of Dumanjug, Cebu, witnesses thereto being Telesforo Quirante and Macario Pasculado, as shown in the certificate issued by the acting municipal secretary of that municipality; but two weeks after the ceremony Casipong left his wife and removed to the barrio of Bolocboloc to live with Gregoria Hongoy, whereupon the offended wife went to live at her mother's. For the purpose of assuring herself that her husband was really living with another woman, according to rumors she had heard, the offended wife went in company with one Hilaria Lumban to said barrio, where she actually saw her husband, Casipong, maintaining marital relations with the aforesaid Gregoria Hongoy, and although she did not see them in carnal intercourse, still she saw the two lying side by side and on several occasions going together to different places in that barrio, and that there was no one besides them in the house where they lived.

Accordingly, the provincial fiscal on August 24, 1910, filed a complaint in the Court of First Instance of Cebu, charging Juan Casipong and Gregoria Hongoy with the crime of concubinage, and instituted this cause, wherein the judge rendered decision the same day, sentencing the defendant Casipong to one year eight months and twenty-one days of prision correccional, and the defendant Gregoria Hongoy to two years of banishment, prohibiting her during the period of the sentence from going within a radius of 25 kilometers of the place where the crime was committed, the barrio of Bituon, pueblo of Dumanjug; with half the costs against each party. From this judgment the defendants appealed, but later Casipong withdrew his appeal, as has been stated.

The crime in this case is provided for and penalized by article 437 of the Penal Code, as follows:

"The husband who shall keep a concubine in his home, or out of it with scandal, shall be punished with the penalty of prision correccional in its minimum and medium degrees.

"The concubine shall be punished with banishment."

From the text of this article it appears that it is an indispensable condition for convicting the husband of concubinage outside of his home that his conduct produce scandal and set a bad example among his neighbors, and, according to a principle laid down by the supreme court of Spain in applying this article of the Penal Code in that country to a case analogous to the foregoing, in a judgment of June 16, 1888, publicity of an immoral act

produces scandal, for by the bad example set it gives offense and wounds the virtuous sentiments of others. This principle was reiterated in another judgment of February 25, 1896.

The unlawful union of a married man with a woman not his wife, when the two live within a town and in the same house as lawful husband and wife, go together through the streets of the town, frequent places where large crowds gather, and commit acts in plain sight of the community without caution and with effrontery, is a procedure that gives rise to criticism and general protest among the neighbors and by its bad example offends the conscience and feelings of every moral person; and when these conditions attend the conduct of a married person it is indubitable that his concubinage with another woman, even though she does not live in his home, carries with it the circumstance of scandal required by the law to make his action criminal.

It is to be noted in considering such complex actions that in order to regard them as criminal it is necessary and indispensable that they be performed by a married man and a woman, or by both, the man being the active and the woman the passive agent, each with separate responsibility. Therefore, notwithstanding the man's withdrawal of his appeal and the fact that the appeal taken by Gregoria Hongoy will alone be the subject of the decision, yet the arguments bearing upon the perpetration of the crime and proof of it will necessarily affect the man who is the alleged active agent thereof.

On this hypothesis and as a result of the hearing in this case, it is impossible to affirm that Juan Casipong, husband of Teodora Juanico, has been living in concubinage with public scandal with another woman, Gregoria Hongoy, because of lack of conclusive proof demonstrating the reality of the crime with the conditions the law requires for punishing the perpetrator thereof and his concubine.

Nothing would be easier than to adduce proofs of the criminal act, if said Casipong really forsook his wife and unlawfully entered into relations with Gregoria Hongoy, for if they have lived publicly in concubinage and in sight of everybody, various witnesses, residents not only of the place of residence of the offended wife and her husband but also of the barrio of Bolocboloc, to which the unfaithful husband removed in order to live with his paramour, could have testified. The statement of the offended wife and of the witness Hilaria Lumban, who only once saw them together, is not sufficient to prove the aggregate of acts performed by the two accused, with the scandal produced by the bad example set in their neighborhood.

Under the prevailing criminal procedure, the fiscal's sphere of action is quite extensive, for he has very direct and active intervention in the trial, assuming as the Government's representative the defense of society, which has been disturbed by the crime, and taking public action as though he were the injured party, for the purpose of securing the offender's punishment, whenever the crime has been proved and the guilt of the accused as the undoubted perpetrator thereof established.

Perfunctory routine action is not sufficient performance of this duty, but a searching and intelligent prosecution is necessary. There should be an effort to submit at the trial the best and strongest evidence available, where from must necessarily appear either the guilt or the complete innocence of the accused.

In this case it would have been easy to have submitted abundant evidence that Juan Casipong forsook his lawful wife and lived in concubinage in the village of Bolocboloc with his paramour Gregoria Hongoy, for there would have been more than sufficient witnesses to testify to the actions performed by the defendants, actions not of isolated occurrence but carried on for many days in sight of numerous residents scandalized by their bad example. But from the result of the trial it is impossible to conclude that the concubinage with scandal charged against the defendants has been proved, and therefore conviction of the alleged concubine Gregoria Hongoy is not according to law.

For these reasons and from lack of proof of the facts alleged in this case, it is our opinion that the judgment appealed from should be reversed and Gregoria Hongoy acquitted, as we hereby do, with half of the costs in each instance de oficio. As the defendant Juan Casipong, through withdrawal of his appeal, is now serving sentence for a crime which is held in this decision to be not proven, this case should be respectfully brought to the attention of the Honorable, the Governor-General, so that, if he deem it just and expedient, he may pardon the said Casipong. So ordered.

Mapa, Johnson, Carson, and Moreland, JJ., concur.

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