2 Phil. 588

[G.R. No. 1201. October 19, 1903]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. JUAN MELCHOR, DEFENDANT AND APPELLANT.

D E C I S I O N

MCDONOUGH, J.:

This is an appeal from a judgment of the Court of First Instance convicting the appellant of homicide, and sentencing him to imprisonment for twelve years and one day, and to pay the widow of the deceased 500 pesos.

The killing of Gregorio Raymundo took place January 1, 1903, in the pueblo of Binmaley, Pangasinan, under such circumstances as to make it homicide, unless the testimony of the defendant be believed. He swore that on returning from the nipa plantation, in the afternoon of that day, he noticed something wrong in his house, and that on hurrying into it he discovered Raymundo in the act of adultery with the wife of the defendant; that he took a club with which to hit Raymundo, who then tried to stab defendant with a bolo; that they fought, and after a while the defendant got the bolo, chased Raymundo and killed him with it.

The proof on behalf of the prosecution shows that no previous ill will existed between defendant and the deceased; that they lived near each other, and that their wives were sisters. No attempt was made on the part of the Government to contradict the testimony of the defendant or to impeach his veracity. Unless the defendant's statement be discredited there would seem to be no motive for the crime, and, if we credit his statement, the conviction must be reversed.

The first witness called by the public prosecutor was the wife of the defendant, and, after asking her the usual preliminary questions, her further testimony was objected to by counsel for the defendant, and she was excused by the court from testifying under section

58 of General Orders, No. 58, on the ground that this objection made her incompetent as a witness.

This section reads as follows: “Except with the consent of both, or except in case of crime committed by one against the other, neither husband nor wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both shall be parties.”

But in this decision the learned judge who tried the case laid stress on the fact that as the defendant had objected to the testimony of his wife this action on his part was to be considered as an unfavorable circumstance against him.

The learned Solicitor-General also takes this view of the effect of the objection of the defendant to his wife as a witness, and cites as an authority to sustain this construction the case of Toomey *vs.* Lyman (15 N. Y. Sup. Ct., 883).

An examination of that case shows that it is not an authority in this case because the absentee was qualified to testify. It was a civil action brought to set aside a transfer of property made in fraud of creditors, and the husband of one of the parties, although he was a competent witness, was not called by the wife.

Neither the Code of Civil Procedure nor the Penal Code of New York disqualifies a husband or wife from being a witness for or against each other, except as to confidential communications. (N. Y. Code of Civ. Proe, sec. 828; N. Y. Penal Code, sec. 715.)

The policy of the common law, excluding a husband or wife from being a witness against the other, was founded on the identity of their legal rights and interests, as well as of public policy. It was considered essential to the happiness of social life that the confidence subsisting between husband and wife should be protected and cherished in its most unlimited extent, and to break down or impair the great principles which protect the sanctities of the relation would be to destroy the best solace of human existence. (1 Greenleaf on Ev., sec. 335.)

This policy of the common law was followed in General Orders, No. 58.

The defendant simply exercised his legal right in objecting to the testimony of his wife, and a hostile presumption should not be drawn from such action on his part.

In the case of Graves *vs.* The United States (150 U. S., 118) during the summing up before

the jury the district attorney commented on the failure of the defendant, who was charged with murder, to have his wife in court, so that she could be pointed out to the witnesses for the prosecution for the purpose of identifying her as being present with the defendant at the place where the murder was committed.

The defendant was convicted, and on appeal to the Supreme Court of the United States one of the errors alleged was the permitting of the district attorney to make those comments, and the court reversed the conviction for this error alone, though many others were alleged.

Mr. Justice Brown, in delivering the prevailing opinion of the court, said:

> "In this case the wife was not a competent witness, either in behalf of or against her husband. If he had brought her into court neither he nor the Government could have put her on the stand, and he was under no obligation to produce her for the purposes assigned by the district attorney. * * * Permission to make this comment was equivalent to saying to the jury that it was a circumstance against the accused that he had failed to produce his wife for identification, when, knowing she could not be a witness, he was under no obligation to do so."

The wife of the defendant, Melchor, in this case became disqualified to testify for the prosecution on the objection of the defendant in the exercise of his legal right.

It was said by Mr. Justice Brewer, in a dissenting opinion in the Graves case, *supra*, that "if it be developed that a witness exists, presumably *under the control of the defendant*, who can thrqw light upon a vital matter, and he is not produced, may not the jury fairly consider that fact?"

We can not say, as a matter of fact, or even presume, in this case that the wife of the defendant, Melchor, was under his control. She was doubtless interested in shielding herself from the shame as well as from the crime of adultery. She might have been alienated from him, and, therefore, a hostile witness interested in protecting her own reputation and that of her paramour.

We can not, therefore, infer guilt from a failure on the part of the defendant to permit the prosecution to examine this disqualified witness.

If a defendant should try to prove his defense by other witnesses, and should not testify in

his own behalf, and the court below should say: "You should not take advantage of your privilege not to testify; if you were innocent you would have testified; you did not do so; therefore I take that as a circumstance against you and find you guilty," would not the defendant's privilege not to testify be detrimental to him instead of beneficial?

And so the privilege given to a husband or wife would be of no advantage if the Government could call either of them as a witness against the other, and, objection being made by the defendant, draw from such objection an inference of guilt.

We are of opinion, therefore, that the judgment convicting the defendant of homicide should be reversed, and that the defendant should be convicted under the provisions of article 423 of the Penal Code and punished with the penalty of banishment, following the precedent of this
court in the ease of The United States *vs*. Vargas et al. (1 Off. Gaz., 434).[1]

The judgment of the court below is reversed and the defendant is condemned to the penalty of *destierro* for the term of two years four months and one day, and to pay to Luisa Zamora, the widow of the deceased, 500 pesos, and, in case of insolvency, to subsidiary destierro for a term which can not exceed one-third of the above penalty, lie being prohibited from entering within a radius of 25 kilometers from the pueblo of Binmaley, in the Province of Pangasimm, during the term aforesaid, with costs to the appellant.

Arellano, C. J.. Torres, Cooper, Willard, and *Mapa, JJ.,* concur.

Johnson, J., did not sit in this case.

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[1] Page 194, *supra*.

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