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[G.R. No. 2045. September 20, 1905]

ADRIANO MORTIGA, PLAINTIFF AND APPELLEE, VS. VICENTE SERRA AND MARIA OBLENO, DEFENDANTS AND APPELLANTS.

D E C I S I O N

WILLARD, J.:

The evidence both for the Government and for the defendants proved that the latter had been living together as husband and wife since the year 1899.

Of the assignment of error made by the defendants in this court, the first one, to the effect that the husband never made the complaint in the action, is not supported by the record. That record shows that on the 15th day of January, 1904, he signed, swore to, and presented to the justice of the peace of Camalig a written complaint. The record also shows that on the 24th of February, 1904, when the proceedings were remitted by the justice of the peace to the Court of First Instance, another written complaint was presented, signed by his attorney and by himself, and sworn to.

Other objections to the complaint based upon an insufficient statement of the facts constituting the offense can not be considered here, because they were not presented in the court below. (United States vs. Sarabia,^[1] 3 Off. Gaz., 403.)

The evidence in the case is sufficient to show that the defendant, Vicente Serra, knew that his codefendant was married. They lived together in the same pueblo with the complaining witness. The mother of the defendant Maria, a witness for the defense, testified that when the relations between the defendants commenced, they fled from Camalig to

Marinduque.

The principal claim of the defendants is that the husband consented to the adultery. We do not think that this is established by the evidence. The husband testified that he had never consented to these illicit relations, and he stated that on account of the official positions occupied by the defendant Vicente, and for other reasons, he did not commence proceedings in court before 1904, because he feared that such action on his part would place him in a dangerous position. The offense was committed in 1899, during the time of the revolutionary government in Albay. At that time the defendant Vicente was a major under General Paua. When the revolutionary government was overthrown and the American government established, the defendant Vicente was made chief of police of the town of Camalig. After he had ceased to be chief of police he was still accustomed to carry a revolver. About this time also occurred the reconcentration in Albay. We have already held in the case of Gali vs. Sahagun^[1] (1 Off. Gaz., 658) that a delay of seven months in presenting a complaint was not sufficient evidence to prove that the husband had consented to the adultery, and in this case, considering the unsettled state of affairs in Albay in 1899, and for some time thereafter, and the authority which the defendant exercised in the town, we do not think it can be said that the failure of the husband to present a complaint proved that he gave such consent to the adultery as is mentioned in the Penal Code.

The penalty which the law provides for this offense committed under the circumstances shown in this case, should have been imposed in the medium grade, and we fix it at three years six months and twenty-one days. The judgment of the court below is modified by imposing that sentence instead of the one imposed by the court below, and with such modification the said judgment is affirmed, with the costs of both instances against the appellants.

Arellano C. J., Torres, Mapa, Johnson, and Carson, JJ., concur.

^[1] 4 Phil. Rep., 566.

^[1] 2 Phil. Rep., 425.

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