4 Phil. 456

**[ G.R. No. 2032. April 25, 1905 ]**

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. ANTONIO NUBLA, DEFENDANT AND APPELLANT.**

**D E C I S I O N**

**MAPA, J.:**

This defendant is charged with the crime of housebreaking for having entered the house of the sisters Pilar and Ignacia Sy Pico against their will. This fact was fully proven in the trial in the court below and the judge so considered it and sentenced the defendant to the penalty of two months and one day of *arresto mayor*, in accordance with the provisions of paragraph 1 of article 491 of the Penal Code.

The Government in this instance asks that the penalty prescribed in paragraph 2 of said article be imposed on the defendant, it having been established that said defendant exercised violence toward the persons of the injured parties in the commission of the crime with which he is charged; that this circumstance qualifies the case as that especially provided for and punished with greater severity in paragraph 2 of that article. The court below found that this case did not fall within the provisions of paragraph 2, because the violence was not employed as a means to consummate the crime, but was an act entirely independent of same and posterior to its commission.

It is not necessary to discuss this question. Be our opinion about it what it may, it remains that we can not sentence the defendant in accordance with paragraph 2 of article 491 for the reason that the defendant is not charged in the complaint with the crime to which said paragraph 2 refers, viz, housebreaking executed with violence and intimidation, since the complaint does not mention this circumstance which characterizes and determines the concrete and specific crime provided for and punished in said paragraph 2. Upon the charges in the complaint it follows that the crime charged is simply that of housebreaking, without violence or intimidation, provided for and punished in paragraph 1 of said article,

and, therefore, the defendant would be prejudiced in one of his inherent rights if he were sentenced for a crime more serious, as is provided for and defined in paragraph 2 of the same article, and with which he has not been charged. The crime provided for in the latter paragraph can not be considered as included in that charged in the complaint for the reason already given—that it is invested with more gravity for the purposes of the code.

The aggravating circumstance of having executed the crime with offense and disregard for the sex of the injured parties, laying hands on them, and illtreating them, must be taken into consideration against the defendant. Therefore, the penalty provided for by law shall be imposed on him in its maximum degree. This penalty is that of *arresto mayor* and a fine of from 325 to 3,250 pesetas.

Therefore, we impose on the defendant the penalty of six months of *arresto mayor* and a fine of P600, Philippine currency, with subsidiary imprisonment in case of his insolvency at the rate of one day for each 12½ pesetas which remains unpaid, the duration of which subsidiary imprisonment shall not exceed one-third of the time of the principal penalty. The judgment appealed from being thus modified is hereby affirmed, with the costs in this instance against the defendant. So ordered.

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

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