3 Phil. 143

[G.R. No. 1272. January 11, 1904]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. BALDOMERO NAVARRO ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

MCDONOUGH, J.:

The defendants, Baldomero Navarro, Marcelo de Leon, and Fidel Feliciano (*alias* Bulag) are charged with the crime of illegal detention, committed, according to the information, as follows:

The said defendants, together with other persons unknown, armed with revolvers and daggers, went one night about the middle of November, 1902, to the house of one Felix Punsalan, situated in Matang-tubig, barrio of Malinta, town of Polo, Province of Bulacan, and by force and violence kidnaped the said Felix Punsalan, without, up to the date of this information, having given any information as to his whereabouts or having proven that they set him at liberty.

The defendants on being arraigned pleaded not guilty. In the course of the trial Teodoro Pangan, Gregorio Mendoza, and Flaviano Punsalan testified as witnesses for the prosecution. The witness Pangan said that one night about the middle of November, 1902, while he was asleep in the house of Felix Punsalan, situated in the barrio of Malinta, in front of Maysilo, he, being at that time a servant of the said Punsalan, was aroused by the barking of the dogs; that his master, Felix Punsalan, arose and opened the window, and, upon seeing’ some people there,asked them who they were; they answered him by asking who was with him in the house, to which he replied that his servant was there; they asked him if he had a gun, and he replied that he had no gun, and they asked him to come down and talk with them, and the said Felix Punsalan, having gone down accordingly, did not return, and the witness added that he had not seen him again since that time. This witness says that he did not see the men who called to his master from below but only heard them.

Gregorio Mendoza, the second witness, testifies that he was taken from his house one night in the month of November, 1902, by seven men, among whom were these defendants; that in addition to himself, the same party on that night kidnaped Felix Punsalan and that the latter, with the witness, were taken by their captors to Pudag-babuy where the defendant Marcelo" de Leon hung them to a tree,demanding of them that they hand over their guns; that on that same night they set the witness at liberty, but kept Felix Punsalan; that the witness did not see Punsalan again since, that time, and that before the kidnaping;he frequently saw him because he lived next door.

Flaviano Punsalan, brother of Felix Punsalan, testified that the latter was kidnaped on the night of November 17,1902, and that he had not been seen since that time; that subsequently, in January, 1903, on occasion of the witness having been called to the barracks of the Constabulary by the officers of that corps, he heard a statement made there by the defendant Baldomero Navarro in the presence of the superintendent of secret information, Captain Crame, Inspector Brown, and Interpreter Austin, in the course of which statement Baldomero Navarro stated that he was the leader of the band that kidnaped Felix Punsalan and Gregorio Mendoza, and that his companions were Marcelo de Leon, Fidel Feliciano, Remigio Delupio, and one Luis; that the said Felix Punsalan died within a, week from the time he was kidnaped, in consequence of the ill treatment received. The witness testified that Navarro made this statement freely and spontaneously, without threats or compulsion. The witness also testified that in the court of the justice of the peace in Malabon he heard one Florencia Francisco testify that when his brother, Felix Punsalan, died he was covered with bruises and was passing blood, and that his body was buried at a place called Ogong, in the village known as Cay-grande.

The defendant Marcelo de Leon, who testified as a witness in the case, stated that Felix Punsalan and Gregorio Mendoza were kidnaped by Baldomero Navarro and Mariano Jacinto, one night in November, 1902, and that the witness knew this because he also was one of the men kidnaped by these defendants.

The court below rendered judgment condemning, each one of the defendants, Baldomero Navarro, Marcelo de Leon, and Feliciano Felix (*alias* Bulag), to life imprisonment and payment of the costs of prosecution. Against this judgment the defendants appealed.

Article 481 of the Penal Code provides that a private person who shall lock up or detain another, or in any way deprive him of his liberty shall be punished with the penalty of *prision mayor.*

The second paragraph of article 483 provides that one who illegally detains another and fails to give information concerning his whereabouts, or does not prove that he set him at liberty, shall be punished with *cadena temporal* in its maximum degree to life imprisonment.

The punishment for the crime mentioned in article 483 of the Penal Code is the penalty of *cadena temporal* in its maximum degree to *cadena perpetua,* or in other words one convicted of simply depriving a person of his liberty maybe imprisoned for a term of from six to twelve years and one convicted of depriving a person of his liberty and who shall not state his whereabouts or prove that he had set said person at liberty may be punished by imprisonment for a term of seventeen years four months and one clay, to life, as in this case. In other words, for failure, on the part of the defendant to testify regarding the whereabouts of the person deprived of his liberty, or to prove that he was set at liberty, the punishment may be increased from imprisonment for a term of six years to life imprisonment.

This provision of the law has the effect of forcing a defendant to become a witness in his own behalf or to take a much severer punishment. The burden is put upon him of giving evidence if he desires to lessen the penalty, or, in other words, of criminating himself, for the very statement of the whereabouts of the victim or the proof that the defendant set him at liberty amounts to a confession that the defendant unlawfully detained the person.

So the evidence necessary to clear the defendant, under article 483 of the Penal Code, would have the effect of convicting him under article 481.

The counsel for the defendants claims that such practice is illegal, since the passage by Congress of the act of July 1, 1902, relating to the Philippines, section 5 of which provides that "* * * no person shall be compelled in any criminal case to be a witness against himself." Section 57 of General Orders, No. 58, provides that a defendant in a criminal case shall be presumed to be innocent until the contrary is proved; and section 59 provides that the burden of proof of guilt shall be upon the prosecution.

In fact he contends that as these provisions are in conflict with those of article 483 they have the effect of repealing that section.

Under the system of criminal procedure existing here under the Spanish Government it was doubtless lawful to require a suspected or accused person to give evidence touching the crime of which he was charged or suspected.

And so in, order to arrive at a true interpretation of article 483 it is necessary to examine

that system of procedure.

In Escriche's Dictionary of Legislation and Jurisprudence, volume 3, page 577, we find the following description of the distinctive features of the inquisitorial system of criminal procedure, which constitutes the machinery by which the legislator proposed to enforce the penalty prescribed in the article under consideration. He says:

> "A criminal prosecution is divided into two principal parts or sections which are, first, the summary, and second, the plenary stages. The principal purpose of the summary trial is to inquire whether a criminal act has been committed and to determine by whom the act has been committed—that is to say, the object is to get together all the data possible for the purpose of proving that an *act* falling within the sanction of the penal law has been committed by such and such persons. In the plenary stage the purpose is a contradictory discussion of the question of the guilt or innocence of the defendant, and the rendition of a judgment of conviction or acquittal. It may well be that although it appear in the summary stage of the proceeding that the act has been performed by the accused,still in the plenary stage it may be shown that the act was not really criminal or that there was a lawful excuse for its commission.
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> "The record of the summary proceeding should contain evidence of the commission of a punishable act, all possible data tending to point out the delinquent, a record of all proceedings connected with his arrest and imprisonment, *the answers of the accused to the interrogatories put to him as to any other witness to obtain from him a statement of all he knows concerning the crime and those guilty of it.*"

The record of the proceedings described above was then sent to the prosecuting attorney, or to the private accuser and in view of the facts which appeared from the record the prosecution made out the formal charge, the facts elicited by the proceeding enabling the prosecuting attorney to determine within what article of the Penal Code the criminal act fell. After the filing of such a charge further proceedings were had in which more evidence might be taken by either party and in which the accused had his opportunity to make a defense.

The summary proceeding was secret, but the plenary stage was conducted publicly.

Article 544 of the royal decree of May 6, 1880, which provided the procedural law applicable in criminal cases in the Islands, reads as follows: "The *defendant can not decline to answer the questions addressed him by the judge, or by the prosecuting attorney, with*

the consent of the judge, or by the private prosecutor, even though he may believe the judge to be without jurisdiction, in which case he may record a protest against the authority of the court."

The author above cited, Escriche, commenting upon this obligation on the part of the defendant to testify, says that in case he stands mute the court can not put him to the torture as formerly, but can only inform the prisoner that *his silence is unfavorable to him,* that it is an *indication of his guilt,* that in consequence thereof he will be *regarded as guilty* for all the purposes of the summary, and that his silence will be taken into account with all the other evidence against him when the time comes for the rendition of judgment upon him.

Now let us apply the rules of law above indicated to the case in question, supposing that the crime had been committed prior to the passage of the Philippine bill or General Orders, No. 58. The judicial authorities having reason to believe that some one has been illegally detained or kidnaped proceed to make a secret investigation of the case, arrest the suspected culprit, and demand of him that he give any information he may have concerning the act under investigation and to state whatever may have been his own participation therein. The evidence shows that some one has been taken away from home and has not been heard of again, and the facts point to the prisoner as the presumptive criminal. He is told to state what he knows of the matter. If he does so, and proves that the person detained was liberated by him, or that such person is living in such and such a place, then the prosecuting attorney will know that he must draw a charge under the first or following sections of article 481, according to whether the facts elicited by the preliminary or summary investigation show only a detention in general, or for the specific periods of time indicated in the latter part of the section. But if the prisoner fails to prove the whereabouts of the person whom he is accused of making away with, or that he liberated him, then the prosecuting attorney has a case falling within the last paragraph of article 483.

It follows, therefore, from an examination of the old law that no prosecution under this article would have ever been possible without a concomitant provision of the procedural law which made it the duty of the accused to testify and permitted the prosecution to draw an unfavorable deduction from his refusal to do so. The crime defined by article 483 was composed of three elements:

> "(a) The illegal detention of a person by the accused.

> "(b) Lack of evidence up to the time of the summary investigation that this person had recovered his liberty.
> "(c) A failure on the part of the accused in the courseof the summary proceeding to prove that he had liberated the person detained, or to give information at that time of his whereabouts, or a refusal to give any evidence at all which left him in the same position as would an unsuccessful attempt to prove the facts above mentioned, and which were necessary to overcome the *prima facie* case made out by the proof of the first two elements."

Now every one of these ingredients of the offense must exist *before* an information can be filed for a prosecution under this article. The real trial was the plenary and was very similar to our regular trial after arraignment. But the summary, with its secret and inquisitorial methods, was vastly different from our preliminary investigation. If the right had been taken away to question the accused and compel him to testify, then element *(c)* above indicated, would have always been lacking. And that right has been taken from the prosecution by both General Orders, No. 58, and by the guaranty embodied in the Philippine bill. That being the case the crime defined in article 483 can not now be committed, because the possibility of adding to the element *(a)* arising from the act of the accused the other two elements equally essential to the offense has been forever swept away by the extension to these Islands of the constitutional barrier against an inquisitorial investigation of crime.

Under the present system the information must charge the accused with acts committed by him prior to the filing of the information and which of themselves constitute an offense against the law. The Government can not charge a man with one of the necessary elements of an offense and trust to his making out the rest by availing himself of his right to leave the entire burden of proceeding on the prosecution from beginning to end.

In this case the prosecuting attorney charges the accused with kidnaping some person and with not having given any information of the whereabouts of that person, of having proved that he—the accused—has set him at liberty. To make out a case the Government must show that the prisoner has been guilty of every act or omission necessary to constitute the crime of which he is charged, and it will not be disputed that the exercise of an absolute right cannot form part of a crime. In this case the Government has proved that the defendant was guilty of a breach of his duty to respect the rights of others by showing that he,with others, carried a certain individual away from his house against his will, the accused not being vested with authority to restrain his fellow-citizens of liberty. It is impossible for the Government to prove the other elements of the crime, because the acts necessary to

constitute them must be anterior in point of time to the trial, and must constitute some breach of duty under an existing law. It has been demonstrated that the omission which, under the former law constituted the two remaining elements, is no longer penalized but is nothing more than the exercise of one of the most essential rights pertaining to an accused person.

The provision that no one is bound to criminate himself is older than the Government of the United States. At an early day it became a part of the common law of England.

It was established on the grounds of public policy and humanity—of policy, because if the party were required to testify, it would place the witness under the strongest temptation to commit the crime of perjury, and of humanity,because it would prevent the extorting of confessions by duress.

It had its origin in a protest against the inquisitorial methods of interrogating the accused person, which had long obtained in the continental system. (Jones's Law of Evidence, sec. 887; Black's Constitutional Law, 575.)

In other words, the very object of adopting this provision of law was to wipe out such practices as formerly prevailed in these Islands of requiring accused persons to submit to judicial examinations, and to give testimony regarding the offenses with, which they were charged.

In Emery's case (107 Mass., 172) it was said that the principle applies equally to any compulsory disclosure of the guilt of the offender himself, whether sought directly as the object of the inquiry, or indirectly and incidentally for the purpose of establishing facts involved in an issue between the parties.

If the disclosure thus made would be capable of being used against him as a confession of crime, or an admission of facts tending to prove the commission of an offense, such disclosure would be an accusation against himself.

In the present case, if the defendant, as said before, disclosed the whereabouts of the person taken, or shows that he was given his liberty, this disclosure may be used to obtain a conviction under article 481 of the Penal Code.

The decision of the case of Boyd *vs.* The United States (116 U. S., 616) is authority for the contention in the present case. There the question raised was one of a violation of the

revenue laws, it being claimed that false entry of merchandise had been made, the punishment for which was fixed by law at a fine not exceeding $5,000 nor less than $50, or by imprisonment.

It became important on the part of the prosecution to show the quality of the goods imported. Section 5 of the Revenue Law, passed in June, 1874, authorized the district attorney to obtain an order of court requiring the defendants to produce their invoices, books, papers, etc., to be examined by the district attorney in order to obtain such evidence as he desired. Such an order was served on the defendant. The invoices were produced under protest, the objection being that their introduction in evidence could not be compelled and that the statute was unconstitutional as it compelled the defendant to testify against himself.

The law provided that for a failure or refusal to produce the invoices the allegations stated by the district attorney as to what he expected to prove by them should be taken as confessed, *unless the failure or refusal of the defendant to produce the same shall be explained to the satisfaction of the court.*

The court stated that a compulsory production of a man's private papers to establish a criminal charge against himself, or to forfeit his property is unconstitutional.

The law, it is true, only required the defendant to produce the invoices, *but it declared that if he did not do so then the allegations which it is affirmed the district attorney will prove shall be taken as confessed.* "This," said the court, "is tantamount to compelling their production for the prosecution will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of."

Precisely the same principle of law applies to the case at bar. If the defendant does not do certain things, if he does not make certain statements or proofs, he is severely punished.

It may be said that the defendant is only required to speak on one point in the case, that the prosecution must prove the illegal detention, and that the burden of showing the whereabouts only is put upon the defendant.

Chief Justice Marshall, in the trial of Aaron Burr, expressed his views on this question as follows:

> "Many links frequently compose the chain of testimony which is necessary to

> convict an individual of a crime. It appears to the court to be the true sense of the rule that no witness is compelled to furnish any one of them against himself. It is certainly not only a possible but a probable case that a witness by declaring a single fact may complete the testimony against himself as entirely as he would by stating every circumstance which would be required for his conviction. The fact of itself would be unavailing, but all the other facts without it would be insufficient. While that remains concealed in his own bosom he is safe, but draw it from thence and he is exposed to a prosecution."[1]

If it be urged that the defendant is not compelled to testify, that he may remain mute, the answer is that, the illegal detention only being proved by the prosecution, if he does not make certain proof, if he remains mute, then not only the presumption but the fact of guilt follows as a consequence of his silence, and such a conclusion is not permitted under American law.

In the case of the People *vs.* Courtney (94 N. Y., 490), decided by the court of appeals of the State of New York, the question to be determined was whether or not a law permitting a person charged with crime to testify in his own behalf was constitutional or not. The law in question provided also that his omission or refusal to testify "should create no presumption against him." Judge Andrews, in rendering the decision of the court, stated: "A law which, while permitting a person accused of a crime to be a witness in his own behalf, should at the same time authorize a presumption of guilt from his omission to testify, would be a law *adjudging guilt without evidence,* and while it might not be obnoxious to the constitutional provision against compelling a party in a criminal case to give evidence against himself, would be a law reversing the presumption of innocence, and would violate the fundamental principles binding alike upon the legislature and the courts."

It is the duty of the prosecution, in order to convict one of a crime, to produce evidence showing guilt beyond a reasonable doubt; and the accused can not be called upon.either by express words or acts to assist in the production of such evidence; nor should his silence be taken as proof against him. He has a right to rely on the presumption of innocence until the prosecution proves him guilty of every element of the crime with which he is charged.

In the language of Mr. Justice Bradley, in the Boyd case,"any compulsory discovery by extorting the party's oath * * * to convict him of a crime * * * is contrary to the principles of free government; it is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American, It may suit the purposes of despotic power but it can not abide the

pure atmosphere of political liberty and personal freedom."

The judgment of the Court of First Instance is reversed and the defendants are found guilty of the crime defined and punished by article 482 of the Penal Code; applying the aggravating circumstance of nocturnity each and everyone of them is condemned to eighteen years of *reclusion temporal,* with the legal accessory penalties, and to the payment of the costs of both instances.

Arellano, C.J., Cooper and *Johnson, JJ.,* concur.

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[1] 25 Fed. Cases, 40.

MAPA, *J.*, with whom concur Willard and

Torres, *JJ.*, dissenting:

When a person is illegally detained he may recover his liberty or he may not be seen or heard of again. In the first case the crime would fall within the provisions of articles 481, 482, and 483, paragraph 1 of the Penal Code,according to the circumstances of the case. The maximum penalty which could be imposed upon this hypothesis would be that of *reclusion temporal*, fixed by article 482.

If the person detained is not seen or heard of again,the crime is unquestionably a more serious one, and the code, in order to be consistent with the system adopted by it of making the penalty attached to crimes correspond to the extent and degree of the harm occasioned thereby, necessarily had to fix a heavier penalty upon the illegal detention of a person followed by his complete disappearance, than in any of the cases in which the person detained recovers his liberty. "The disappearance of a person who has been illegally detained by another," says Groizard, in his Commentaries on the Penal Code, volume 5, page 633, "is certainly sufficient to cause alarm to society. It constitutes a natural increase of the mediate harm caused by the crime of illegal detention, and gives rise to a well founded presumption of an increased extent of immediate harm."

The greater the harm caused by the crime, the greater and more severe the penalty attached to it. This is the system invariably followed by our code.

It appearing, then, that the code fixes the penalty of *reclusion temporal* when the person detained recovers his liberty if his detention has lasted more than twenty days, or any other of the aggravating circumstances expressed in article 482 concur, it was logical and unavoidably necessary, in order not to destroy the unity of the system referred to, that the code should fix a heavier penalty than *reclusion temporal* for a case in which the person detained has disappeared, owing to the greater gravity with which this circumstance invests the crime. This would be so if only on account of the fact while the illegal detention continues, while the person detained remains in the power of his captors, he continues to be exposed to the danger of being a helpless and defenseless victim of violence and ill treatment of every kind, including the loss of his life. Hence the code has fixed the penalty of *cadena temporal* in its maximum degree to life imprisonment (*cadena perpetua*) when the person detained disappears.

"One who illegally detains another," says paragraph 2 of article 483, "and fails to give information concerning his whereabouts, or does not prove that he has set him at liberty, shall be punished with *cadena temporal* in its maximum degree to life imprisonment *(cadena perpetua*)."

The fact that Felix Punsalan was kidnaped by the accused in November, 1901, having been fully proven, and the fact that he has disappeared and that nothing has been heard of him up to the present time having been also proven, we think that the case should be determined in accordance with the provisions of article 483 above transcribed, and that the defendants should be sentenced to the penalty of life imprisonment (*cadena perpetua*), taking into consideration the aggravating circumstance of nocturnity, inasmuch as they have not given information as to the whereabouts of Punsalan, and have not proven that they set him at liberty.

In the opinion of the majority of the court this article "has the effect of forcing the defendant to become a witness in his own behalf or to take a much severer punishment. The burden is put upon him of giving evidence if he desires to lessen the penalty, or in other words of in criminating himself, for the very statement of the whereabouts of the victim or the proof that the defendant set him at liberty, amounts to a *confession* that the defendant unlawfully detained the person." As a consequence of this interpretation, the majority are of the opinion that this article has been repealed by section 5 of the Philippine bill, enacted July 1,

1902, which provides that no person shall be compelled in any criminal case to be a witness against himself, and by the provisions of sections 57 and 59 of General Orders, No. 58, which provide that the defendant in a criminal case shall be presumed to be innocent until the contrary is proved, and that the burden of the proof of guilt shall be upon the prosecution. "It follows, therefore, from an examination of the old law," say the majority, "that no prosecution under this section would ever have been possible (par. 2, art. 483) without a concomitant provision of the procedural law, which made it the duty of the accused to testify and permitted the prosecution to draw an unfavorable inference from his refusal to do so." If the right had been taken away to question the accused and compel him to testify, the majority of the court are of the opinion that one of the essential elements of the crime denned and punished by article 483 would always have been lacking, and that right they say *has* been taken from the prosecution by both General Orders, No. 58, and the guaranty embodied in the Philippine bill.

Article 554 of the compilation of rules concerning criminal procedure, approved by the royal decree of May 6, 1880, cited in the majority opinion, by providing that "the defendant can not decline to answer the questions addressed him by the judge or by the prosecuting attorney with the consent of the judge, or by the private prosecutor, even though he may believe the judge to be without jurisdiction, in which case he may record a protest against the authority of the court," does in fact appear to support the opinion of the majority with respect to the obligation which it is assumed rested upon the accused under the old system of procedure to appear as a witness. This provision of law, however, carefully considered, lacks a great deal of having the meaning and scope attributed to it in the majority opinion, for neither the article in question nor any other article in the royal decree cited, or any other provision of law of which we are aware, provides for any penalty in case the accused should refuse to testify. Far from it, paragraph 2 of article 545 of the royal decree in question provides that *"in no case shall the defendant he questioned or cross-examined,"* and article 541 in its last paragraph provides: *"Nor shall the defendant be in any way threatened or coerced."* Article 543 provides that a judge who disregards this precept shall be subject to a disciplinary correction unless the offense is such as to require still heavier punishment.

The use of threats or coercion against the accused being prohibited in absolute and precise terms, how could it be lawful to threaten him, as Escriche states in his Dictionary of Legislation and Jurisprudence, cited by the majority in support of their opinion (a work which, by the way, was written long before the enactment of the procedural law in force in the Philippines at the time General Orders. No. 58, was published)—how could it be lawful,

we say, to coerce the accused by informing him that "his silence is prejudicial to him, that it is an indication of his guilt, that he will be thereby considered guilty, and that his refusal to testify will be taken into consideration, together with all other evidence against him when the time arrives for rendering judgment?" Would this not be an actual coercion, and a coercion of the worst kind, inasmuch as it implies a threat, also prohibited by the law, of a certain and sure conviction, for the purpose of constraining and compelling the accused to testify? Would not the judge making such a threat become subject to the punishment prescribed by article 543 above cited?

Escriche himself, in his article on criminal procedure in the work above mentioned, in speaking of the testimony of defendants says that *"all coercion is prohibited by law." "This"*

he adds,
"has done away with all physical or moral compulsion to obtain testimony." And in paragraph 70 of the same article he also says as follows: "If the defendant remains silent when called upon to plead, and refuses to answer the charges made against him by the judge, he can not be compelled to answer * * *; nor does it appear that this can be regarded as a plea of guilty, or that the accused can be considered as the author of the crime on that account."

Providing for the case of the accused refusing to testify, article 392 of the Law of Criminal Procedure of 1882 provides that "when the accused refuses to answer or pretends to be insane, or dumb, the judge shall warn him *that notwithstanding his silence the prosecution will continue."* This is the only thing which can be done in such,a case—the only thing the law permits—and anything which may be done beyond that for the purpose of bringing pressure to bear, no matter how light, upon the accused to constrain him to testify would be unjust and illegal.

If, therefore, the law prescribes no penalty for the refusal of the accused to testify, and if an accused person who does so refuse can not be compelled to do so in any way, if the only procedure which the law authorizes, if the only action which the judge can take in that case is to continue the prosecution notwithstanding this denial, how can it be successfully contended that the accused was obliged to testify? If the law had assumed to impose upon him such an obligation it would have prescribed some adequate means of enforcing it, for there can not be an obligation in the true legal sense of the word without the coexistence of some penalty by which to enforce its performance.

Thus, for example, the law in imposing upon witnesses the obligation to testify, at the same time prescribes a penalty for one who refuses to perform this duty. Article 560 of the compilation says that "all persons residing in Spanish territory, whether natives or foreigners, who are not under disability, shall be obliged to respond to a judicial citation to testify as to all matters within their knowledge concerning which they may be questioned." And article 567 provides that "he who, not being under disability, shall fail to respond to the first judicial citation * * *, or should refuse to testify as to facts concerning which he may be interrogated * * * shall be subject to a fine of not less than 25 nor more than 250 pesetas; and if he should persist in his resistance he shall in the first case be taken before the court by the officers of the law and prosecuted for the crime defined and punished in paragraph 2 of article 383 of the Penal Code (art. 252 of the Code of these Islands), and in the second case shall also be prosecuted for the crime defined and punished in article 265 of the same Code." (Art, 368 of the Philippine Code.)

This provision of law certainly constitutes a significant contrast to the absence of any other similar coercive provision which might produce the effect of compelling accused persons to testify against their will, and this demonstrates that the law did not propose to impose upon them such an obligation.

To such a degree has the law carried its respect for the conscience of accused persons and for their natural desire to refrain from incriminating statements that it absolutely prohibits the administration of an oath even in cases in which such persons voluntarily offer to testify. (Art. 539 of the Compilation, par. 17 of the royal order *(auto acordado)* of 1860, and art. 9 of the royal cedula of 1855), thus leaving them entirely at liberty to testify as they may see fit, whether false or true, without the fear, which necessarily produces a certain moral pressure, of thereby incurring the guilt of perjury. On this account, and of the fact of the absolute prohibition of using any threats or coercion against them, the practical result was that not only might accused persons testify with impunity as to whatever they might see fit, even if false, when voluntarily offering themselves as witnesses, but that they could never be compelled against their will to testify at all. This is equivalent to saying that accused persons were not under any obligation to testify.

We have stated that the law did not authorize the drawing of any inference as to the guilt of the accused from his silence, and we insist that such is the case. We believe that no provision of law can be cited in support of the contrary proposition. To what has been said above upon this point we may add that among the means of proof of the guilt of the accused expressly mentioned in article 52 of the provisional law for the application of the Penal Code

in the Philippines, the silence of the accused or his refusal to testify is not included.

In corroboration of the assertions heretofore made we refer to a work published in 1883 by the editorial staff of the Review of Legislation and Jurisprudence, under the title of "Law of criminal procedure," in which, in the chapter in,which the subject of the testimony of the accused is dealt with (vol. 1, p. 257), the following statement is made:

> "Is the accused under any obligation to testify? This is the first doubt which arises in examining the subject with which this chapter deals. The law does not solve the question expressly, and consequently we must endeavor to discover whether this obligation is imposed indirectly. We are of the opinion that it is not, inasmuch as obligations, and more especially with respect to the penal law, are not to be presumed. Nor do we attribute the lack of the provision to which we refer to carelessness or oversight on the part of the legislator, both because it is such a serious matter and because it is expressly provided that the accused is under no obligation to testify, and because our former laws and the law of Aragon, before the laws of other European countries, relieved accused persons from the obligation of taking an oath in order not to place them in the predicament of either telling a falsehood and thereby committing perjury, or of declaring themselves to be guilty of a crime of which they are charged. That is to say, our ancient laws of Aragon and the other laws of Europe which copied the provisions of the laws of Aragon when providing that accused persons should not be required to take an oath, or, permitted to do so, were based upon the principle which is at the present time recognized by all criminologists of Europe, that the accused should not be required under penalty to aid in the prosecution of the crime of which he is charged. Upon these principles, which at the present time are beyond question, *it can not be inferred that the accused is under obligation to testify.*
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> "For the purpose of supporting this contention we have still many other reasons. Upon the supposition that the law imposes upon the defendant the obligation to testify, what penalty exists for the failure to perform this obligation ? None, absolutely none; so that assuming the obligation to exist, if the accused should refuse to testify, he might do so with absolute immunity, for in such case there is no coercive measure which can be used since the abolition of torture. Consequently if our law had imposed the obligation of testifying upon accused

> persons, they would have provided some adequate penalty. And not only is this conclusion to be reached from an examination of all modern systems of law, without any exception, but it is based upon the express provisions of the law we are commenting upon in article 392 and the last paragraph of article 689 [should be 389], which provides that no coercion or threats can be used against the accused, and to endeavor to compel him to testify would certainly be a coercion. If the accused refuses to testify, notwithstanding his silence, the prosecution will continue *without any prejudice whatever to the defendant.* It is true that article 693 provides that the presiding judge shall demand a categorical answer from the accused, but in case the accused refuses to give such answer there is no penalty other than that of article 798, to wit, that the prosecution shall continue, even although the accused shall refuse to answer the questions addressed to him by the presiding judge. Consequently this appears to decide the question in favor of our contention. *If the accused refuses to testify, that is his privilege,* but the trial will continue down to final judgment."

With respect to the legal presumption of the innocence of the accused in the absence of proof to the contrary, this is not a new principle in the law of criminal procedure of the Philippines, nor was it introduced here by General Orders, No. 58, as might be inferred from the majority opinion. Centuries ago the Code of the *Partidas,* which for a long time constituted an integral part of the laws of this Archipelago, solemnly recognized this principle by establishing in a number of its provisions that no person should be considered as guilty of a crime except upon proof of his guilt, and that proof to such degree as to exclude all doubt, proof " as clear as light." "A criminal charge," says Law 12, title 14, third *partida,* "brought against anyone * * * must be proved openly by witnesses or by writing, or by the confession of the accused, and not upon suspicion alone. For it is but just that a charge brought against the person of a man, or against his reputation, should be proved and established by evidence *as clear as light,* evidence not leaving *room for any doubt.* Wherefore the ancient sages held and decided that it was more righteous to acquit a guilty man, as to whom the judge could not find clear and manifest evidence, than to convict an innocent man even though suspicion point his way."

Again, the provisional law for the application of the Penal Code which was in force here at the time of the publication of General Orders, No. 58, also required, in order to authorize the conviction of the defendant, that his guilt be established by some of the means of proof enumerated in article 52 of that law. In default of this proof the presumption prevailed that

the accused was innocent and the law required his acquittal.

In Escriche's Dictionary of Legislation and Jurisprudence, above cited, in the article on Criminal Evidence, paragraph 5, the author says: "Until it appears to a certainty that the accused is guilty, it would be a crime to condemn him to suffer any penalty whatever; because he may be innocent, and *every man has a right to be so considered until the contrary is established by proof."*

It follows then that if the accused could under no circumstance be compelled to testify against his,will under the procedural law prior to General Orders, No. 58, and of that procedure the principle of the presumption of the innocence of the accused until the contrary is proven formed part, and that notwithstanding this the provisions of paragraph 2 of article 483 existed, it is logical to conclude, against the opinion of the majority, that in establishing that precept the legislator in no wise took into consideration the supposed obligation of the accused to testify as to the charge against him, and did not consider it incompatible with that presumption of innocence, for then as now the accused was under no obligation to testify, and then as now the presumption referred to constituted a fundamental right of the accused under the law of procedure.

Passing from this aspect of the question, we will now consider the provisions of paragraph 2 of article 483 of the Penal Code in connection with section 5 of the Philippine bill enacted July 1, 1902.

Pacheco, in commenting upon article 413 of the penal code of Spain, which is the equivalent of article 483 of the Code of the Philippines, in his work entitled "The Penal Code" (fifth edition, vol. 3, p. 258), says that this article is based upon "the hypothesis *that the person detained has completely disappeared."* Then the author adds: "The law considers the person guilty of this detention to be guilty by presumption of killing the person detained, unless he proves that he set that person at liberty." Such is the essence of the crime punished under the provisions of article 483. It does not consist solely in the detention, but in the detention followed by the disappearance of the person detained. It is indispensable to prove these two facts, for neither of them alone are sufficient to authorize the application of the article. But, these facts having been proven, upon that proof alone, and without the necessity of any further evidence, then, as stated by the author cited, we have the crime punished by the article in question, and as a consequence a case calling for the application of the penalty prescribed by that article. This being so, if for the purpose of convicting the accused the prosecution has only to prove the" two facts above mentioned, this is doubtless because

these facts and these facts alone are sufficient to constitute the crime under consideration.

Hence it is not true, as stated in the majority opinion, that one of the constituent and essential elements of the crime is the fact that the accused has failed to give information as to the whereabouts of the person detained, or failed to prove that he has set him at liberty. This fact, that is to say, the fact of having given or failed to give information as to the whereabouts or liberty of the person detained, is entirely foreign to the essence of the crime. Not only is it not a necessary element for the existence of the crime, but is, on the contrary, a defense, or, as Groizard says in his Commentaries to the Penal Code (vol. 5, p. 632), an *exception* which the law grants the defendant as a means by which, if he avails himself of it and establishes it by proof, he may avoid the penalty prescribed in that article. "In order that this exception be available," says that author, "it must be shown by competent evidence that the act alleged in defense was actually performed." It is unnecessary to add that a defense available to the accused is not and can not be an integral element of the crime, its direct and immediate effect being, as it is, to overcome the criminal action arising from the crime.

It having been demonstrated that the wording of article 483 of the Code, to the effect that if the person guilty of illegal detention. *"does not give information as to the whereabouts of the person detained, or proof that he set him at liberty"* had for their purpose the establishment of a defense of whicli the accused may take the benefit, and that they do not constitute an essential element of the crime in question, it is not possible in our opinion to interpret these words in the sense of imposing upon the defendant an obligation of testifying as to those facts—an obligation which did not exist under the old system of procedure, as we have demonstrated—because the use of a defense allowed by the law would lose its character as such if its use were obligatory.

But it is said that if the accused does not give information of the whereabouts of the person detained, or does not prove that he set him at liberty, he becomes subject to the penalty of paragraph 2 of article 483, which is much heavier than that prescribed by articles 481 and 482, to which he would be subject in the contrary case. True. But what is intended to be inferred from this? Is it contended that upon this supposition the accused is convicted by reason of the fact that he does not give information as to the whereabouts of the person detained, or proof that he set him at liberty? Is it meant that the prosecution has only to prove this fact in order to obtain a conviction? Is it meant that the law punishes as a crime the silence of the accused, as the majority opinion would lead us to infer? Far from it. Nothing could be further from the true meaning of article 483 under consideration. What is

therein punished is the *disappearance* of the person detained. This it is which constitutes the crime defined in that article, and this it is which must be proven by the prosecution. If the prosecution does not prove the detention of the supposed victim, and does not moreover prove his *disappearance,* no matter how complete the silence of the accused or how obstinate his refusal to give information as to the whereabouts or liberty of the person detained, there can be no possibility of his conviction under the article in question. This conclusively shows that the ground of the conviction would not be the silence of the accused, but the proof offered by the prosecution upon the two facts above mentioned, which are, as we have stated, essential elements of the crime we are now considering.

For this reason it was that in the case of the United States *vs.* Eulogio de Sosa, for illegal detention, decided February 6,1903, the court acquitted the defendant, declaring that there was no ground upon which he could be convicted under the provisions of paragraph 2 of article 483, giving among others the reason that *"there was not sufficient evidence that the whereabouts of Nicasio Rafael are unknown"* Rafael being the person detained. Mr. Justice Willard, who wrote the opinion of the court, in that opinion said: *"The mere fact that the accused has not given information as to the whereabouts of the person sequestered is not sufficient to authorize a conviction."* He also expressly laid down the rule that in order to justify a conviction it is necessary that it *"appear to the satisfaction of the court that the person has disappeared."* It is not necessary to add, for it is self-evident, that this decision implies the proposition that paragraph 2 of article 483 of the Penal Code has not been repealed by the Philippine bill of July 1,1902. The sense of the decision is that if the disappearance of Nicasio Rafael had been proven, it would have been proper to convict the accused in accordance with the provisions of the article of the Code under consideration.

It is clear that the accused can overcome the evidence of the prosecution in whole or in part, either by proving that lie had not committed the alleged detention, in which case his innocence would be completely established, or else by limiting his proof to showing that it is not true that the person detained has disappeared, as, for instance, proving the whereabouts of the latter, in which case the gravity of the crime would naturally be reduced. Whatever the evidence may be, total or partial, demonstrative of the complete innocence of the accused, or only of a lesser degree of guilt, the law admits this defense either as a total defense or to attenuate the penalty, as the case may be. In the latter case, which is the one to which article 483 expressly refers, the accused may prove the whereabouts of the person detained, or show that he placed him at liberty. And because the law makes provision for this case, which is certainly favorable to the accused, who under such a hypothesis would be responsible solely for the fact of the detention and not for the

disappearance of the person detained, because the law expressly grants and authorizes this exception or defense on behalf of the accused, we do not believe that the law can be accused of injustice, or that it can not be considered as incompatible in the slightest degree with section 5 of the Philippine bill cited in the decision.

It would be, on the contrary, highly unreasonable and unjust if such a means of defense were denied to the accused—if solely upon proof by the prosecution of the disappearance of the person detained, the accused should be held under all circumstances responsible for this crime,even though he might show by competent evidence the whereabouts of the person or proof that he had set him at liberty.

It is said that this exculpatory evidence required by article 483 would be accusatory for the purpose of article 481, because the mere statement as to the whereabouts of the victim or proof that the accused had set him at liberty implies the confession that the accused did kidnap that person.

This argument would be weighty if the introduction of this testimony were not wholly voluntary or optional on the part of the accused. The law gives him this means of defense. It is for him to determine whether it is for his benefit to avail himself of it or not.In the course of the trial the accused has an opportunity to inform himself of the evidence for the prosecution, and in view of that evidence to adopt such a plan of defense as may best suit him. If the evidence of his guilt is insufficient, if the prosecution does not prove the detention, and furthermore the disappearance of the supposed victim, the accused even if guilty, may remain silent, and certainly will do so as to the whereabouts or liberation of the person detained, and may do so with the complete assurance that his silence will not in the slightest degree be prejudicial to him, and that he can not by virtue of that silence be sentenced to any penalty whatever.

If on the contrary he sees that the evidence of the prosecution is conclusive, if he sees that it clearly establishes his guilt, if he feels that it is absolutely convincing, if in fine he feels that he is helpless to overcome that evidence completely, would he not instinctively realize, no matter how obtuse he may be, that inasmuch as it is no longer possible for him to avoid conviction, it would be better for him to elect to suffer the lesser penalty by giving information as to the whereabouts of his victim? If he does so he does so freely and for his own convenience, and not because he is presumed by the law without evidence to be guilty, for it has been demonstrated that then as now the presumption of the innocence of the accused was a principle deeply rooted in the former system of procedure. Upon this

supposition, even if the accused does by implication admit the fact of the illegal detention he would be benefited thereby, because he would thus avoid the heavier penalty imposed for the disappearance of the person detained, and which we assume has been established by the prosecution by sufficient evidence.

And what, we ask, but this very thing, occurs with respect to the allegation and proof of mitigating circumstances? A defendant who alleges mitigating circumstances by implication admits the commission of the crime with which he is charged, and seeks solely by means of that allegation to obtain a reduction of the penalty. Can it be said on that account that the law which establishes mitigating circumstances is unconstitutional and unjust? Can it be said with reason that such a law *compels* the accused to incriminate himself because it puts before him the alternative of suffering the entire penalty prescribed for the crime, or of alleging some mitigating circumstance, confessing the commission of the offense in order to obtain a reduction of the penalty? We can not in truth see any difference whatever between the confession of guilt implied by allegation of a mitigating circumstance and that involved in the fact of giving information of the whereabouts of the person detained, in crimes of illegal detention.

Apart from this, it is not true that such a statement always implies the confession of illegal detention. On the contrary, it would be in many cases a complete denial of it. In the present case, for example, the accused, without testifying at all, might have proved that Felix Punsalan is living at such and such a place in the Province of Bulacan, without this statement necessarily carrying with it the conclusion that they admit even by implication that they had sequestered him, for they might very well have knowledge of his present whereabouts without having been guilty of sequestering or detaining him. And if the proof should be sufficient to show that Punsalan was in that place during all the month of November, 1901, the date on which the crime in question is alleged to have been committed, and that he remained there, entirely at liberty from that time down to the present, this fact would show furthermore the falsity of the alleged illegal detention of that individual.

The natural tendency of an accused person is to evade,if possible, the penalty. If the evidence for the prosecution is such as to make it impossible to evade the penalty, then his tendency is to elect to suffer the lightest penalty which the law authorizes. In the case of paragraph 2 of article 483 of the Penal Code, the law does not condemn the accused because of his remaining silent during the trial or because he fails to give information of the whereabouts of the person detained. If the law convicts him it is upon the supposition that

the prosecution has fully established the fact of the illegal detention and the fact of the disappearance of the person detained. It does not convict the accused without evidence or by reason of his silence. It convicts him when those two facts which constitute the crime defined in that article have been proven.

But the law, while demanding that proof from the prosecution, at the same time takes into consideration that it may be overcome by the accused, if not with respect to the fact of the detention itself, which may be absolutely proven, at least with respect to the disappearance of the victim, and therefore the law commands that the accused be heard and that the evidence which he may offer on the point be considered, when he—admitting his guilt of illegal detention in view of the evidence for the prosecution—voluntarily determines to give information as to the whereabouts or liberation of the person detained. The law grants him this exception or defense, but does not impose it upon him. It constitutes a right but not an obligation.

For the reasons stated we find no incompatibility between the provisions of paragraph 2 of article 483 of the Penal Code and section 5 of the Philippine bill of July 1, 1902. And taking into consideration the legal doctrine that *"posteriores leges ad priores pertinent, nisi contrario sint"* we are of the opinion that it has not repealed by implication—and it certainly has not done so expressly— the provision in question of the Penal Code.

If this article had so been repealed and its principles could not therefore be applied to these accused, neither could they be punished, strictly speaking, under article 482 of the code, cited in the decision of the majority, because that article is based upon the fundamental supposition that the person detained has recovered his liberty, which is not the fact in the case at bar.

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