2 Phil. 419

[G.R. No. 1179. August 18, 1903]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. ARTHUR FITZGERALD, DEFENDANT AND APPELLANT.

D E C I S I O N

TORRES, J.:

Between 11 and 12 o'clock on the night of November 15, 1902, for some reason which does not appear, hard words passed between the defendant, Arthur Fitzgerald, and the deceased, Charles Marsh, followed by a heated dispute. This took place in the distillery situated near the government building in the city of Iloilo. On this account another American, Samuel Brown, ordered the two to leave the premises, stating that he would not allow such conduct there. Marsh then stepped into the interior *patio* but Fitzgerald refused to go out. Brown then seized him and pushed him toward the door, and told him to go to the ice plant near by. The accused, however, refused to go, and, remaining in the distillery, continued to insult Marsh, who thereupon returned, and, approaching the accused, struck him a blow which knocked him down. Fitzgerald, however, immediately arose, and saying, "I will show you sons of b—s," ran toward the ice plant in search of a revolver which he had, and immediately returned, shouting, "Who's the boss now?" Just at this time Marsh stepped out of the distillery. He had scarcely walked 15 feet when, hearing the accused utter these words, he turned to look at him. Just at this moment the accused fired at him with the revolver. The bullet took effect in the left side, just below the nipple. The wound received was necessarily of a mortal character, and Marsh died in less than two hours. The bullet had pierced the diaphragm and traversed the left kidney, and remained embedded in the left lumbar region next to the vertebral column, according to the statement of the physician who held the post-mortem examination.

After this attack the accused turned toward two other Americans who were in the distillery, named Walter W. Dun and Enloy B. Withers, and fired another shot at them, but without

effect Then shouting, “Where is the other son of a b—,” he commenced to search for some one, apparently for Brown. He happened to run across the fireman and aimed his revolver at him, but the fireman seized him by the arm, and another workman there who came running up on hearing the noise succeeded in taking the revolver from the accused, who then returned to his house, where he was later arrested.

The facts stated, fully proven by the testimony of several eyewitnesses and of several other witnesses who learned the facts and who saw the body of the deceased, constitute the crime of homicide, defined and punished by article 404 of the Penal Code, there not having occurred in the commission of the crime any qualifying circumstance to elevate it to a higher category.

The defendant plead not guilty, and alleged that after he had been knocked down and beaten by Marsh he got up and tried to escape, believing that he was followed by Marsh and by other men in the distillery, and for that reason, upon stepping out of the ice plant, he fired in the air with a revolver which he had found in a drawer there, until he was seized by two Filipinos, who took the weapon from him, and that just at this moment the reyolver went off again; that he did not aim at the deceased and had no intention to do him any harm; that when he stepped out of the ice plant he saw something under the porch of the government building, and then it was that he raised his hand with the revolver to fire in the air, but does not know which way the bullet went.

The judge below found the accused guilty and condemned him to sixteen years of reclusion temporal in Bilibid Prison, Manila, or in any other prison designated by law, with the corresponding accessories, and to the costs of the trial. Against this judgment the accused appealed.

Notwithstanding the denial and exculpatory allegations of the accused, his guilt as principal by direct participation of the violent death of Charles Marsh is unquestionable, for this fact is proven in the record by the testimony of several witnesses who saw what occurred, and even heard the threatening words uttered by the accused. The record does not contain sufficient evidence to indicate that the accused was a habitual drunkard. On the contrary, several witnesses affirmed that he was not in the habit of getting drunk, and therefore, apart from the legal presumption in his favor, we are of the opinion that we should consider in his behalf the mitigating circumstance No. 6 of article 9 of the Code, there being no evidence that the vice of drunkenness was habitual with the accused. We can not, however, consider the other mitigating circumstance of lack of intention to cause so great an evil to

the deceased, because one who attacks another with so deadly a weapon as a revolver must know that the most probable result of such an aggression is the death of the person attacked.

We can not consider the presence of the other mitigating circumstance set up by the defense—that is, that there was provocation or threats on the part of the deceased. It has not been proven that this circumstance was present, for it has been impossible to determine the origin of the affray; nor can we consider the circumstance of passion and obfuscation, because, although it is true that the accused was knocked down, this was the.result of the quarrel and fight between the two. When men quarrel and come to blows we can not say that one of them, with respect to the other, acted under the impulse of passion and the loss of self-control, as this circumstance must be the result of powerful motives which impel the defendant to commit the act.

Finally, we can not consider tJiat in the commission of the crime there were present any of the circumstances which exempt the defendant from criminal responsibility, in view of the heated dispute and the insults which were bandied between the defendant and the deceased. Furthermore, the law does not consider drunkenness as a complete defense, but merely as a mitigating circumstance, because one under the influence of liquor can not be regarded as entirely bereft of sense and reason.

For the reason stated, and considering the concurrence of one mitigating circumstance only, without any aggravating circumstance to offset its effects, we are of the opinion that the judgment appealed should be reversed, and that the defendant should be condemned to twelve years and one day of rcclumon temporal, with the accessories of absolute, temporal disqualification during its full extent, and subjection to the vigilance of the authorities during the period of the penalty and for an equal period there-after, to count from the time of the termination thereof, and to the payment of 1,000 pesos to the heirs of the deceased and to the costs of both instances. So ordered.

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

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