3 Phil. 244

[G.R. No. 1275. January 23, 1904]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. MELENCIO TUBIG, DEFENDANT AND APPELLANT.

D E C I S I O N

MCDONOUGH, J.:

The appellant, Melencio Tubig, who was a soldier of the Eighth Company of Native Scouts, Macabebes, by information filed in the Court of First Instance of San Isidro February 15, 1902, was charged with having on the 23rd day of November, 1901, in the pueblo of Bongabon, Province of Nueva Ecija, assassinated one Antonio Alivia.

At the opening of the trial on November 22, 1902, at San Isidro, the counsel for the accused made a motion that to the plea of the defendant of "not guilty" there be attached the further plea that he was once before in jeopardy for the same offense, because the accused was tried before a court-martial, was convicted, and served the sentence of one year that was imposed on him, and that consequently, having been once convicted of the offense, according to General Orders, No. 58, he can not be tried a second time for the same offense. The accused, therefore,moved that the case be dismissed, and in support of his motion he read Exhibit No. 1, showing the facts and circumstances of his former trial and conviction.

The fiscal opposed the motion for a dismissal of the case, alleging that, at the time of the former trial of the accused,the province in which the crime was committed was under civil jurisdiction for the purpose of trying the case; that the court-martial was without jurisdiction in the case; that, therefore, the former trial is not a

bar to further proceedings, and that the accused had not been in jeopardy.

It was in open court agreed between the Government and the accused that Exhibit No. 1, being "General Orders, No. 6, Headquarters Second Separate Brigade, Department of North Philippines," dated May 8, 1902, is a correct statement of the facts in relation to the former trial.

The motion was denied and the prosecution proceeded with the trial.

The testimony of the witnesses for the prosecution tended to show that about 8 o'clock in the evening, November 23, 1901, at a place called Bongabon in the Province of Nueva Ecija, the accused, while on the street outside the shop of the deceased (Antonio Alivia), called to him, and when he came out of the house and approached the accused the deceased received a thrust in the abdomen from the accused, administered with a stick which he carried in his hand, having a blunt end, and not being "as thick as the wrist" of the witness, the wife of the deceased, and about a yard in length. After receiving this thrust Antonio immediately entered his house, complained that he had been internally injured, and died within a short time—that same evening.

There was no discussion and no quarrel between the accused and the deceased, according to the testimony of the wife of the latter. This witness testified that the accused seemed to be angry when he thrust the stick at her husband and called him a shameless fellow.

The deceased was not armed and did not try to defend himself.

In his own behalf the defendant testified that he was a member of the Eighth Company of Native Scouts and was formerly stationed at Bongabon, and that he did not know the deceased and did not assault or thrust anybody in that town. He stated that on that occasion an individual whom he did not know tried to assault him; that it was dark, about 8 o'clock at night; that he defended himself; that three attacked him in the street; that he did not remember the date, but it was in October, 1901; and that he defended himself with his fists, but did not kill anyone.

He further testified that he had been tried by court martial on account of this occurrence and was convicted and sentenced to one year's confinement in prison, and that after serving seven months' imprisonment he was set free.

He further testified that he plead not guilty in the court martial.

Upon this evidence the defendant was convicted in the Court of First Instance and sentenced to imprisonment for a term of twelve years and one day.

From this sentence the defendant has appealed to this court, and he now asks for a reversal of that judgment.

The principal question to be determined by this court is whether or not the defendant was placed in jeopardy when tried, convicted, and sentenced by the court-martial.

In the case of the United States *vs.* Colley,[1] decided by this court December 12, 1903, it was held that where a court-martial had jurisdiction to try a soldier for assassination or murder under the provisions of the fifty-eighth article of war, and did try, convict, and sentence him, that such trial constituted jeopardy, and this court affirmed the judgment below, discharging the accused for the reason that he could not be twice put in jeopardy for the same offense.

It is sought, however, to distinguish this Tubig case from the Colley case for the alleged reason that at the time of the commission of this offense the civil courts were open in the Province of Nueva Ecija, and that therefore the military authorities had no legal right to try the accused by court-martial, and that the court which tried him was, consequently, wholly without jurisdiction.

As a matter of course, if the court-martial had no jurisdiction whatever to hear and determine the case the defendant was not placed in jeopardy by the proceedings and determination of the military court.

It becomes necessary, then, to examine this question of jurisdiction.

We have before us Exhibit No. 1, all the facts mentioned in which were admitted to be true. This, however, does not include the conclusions of law of the Judge-Advocate- General, mentioned in said exhibit, which is in the form of a general order, issued by Brigadier-General Bisbee, and contains not only facts relating to the case but the
legal views of the Judge-Advocate-General and citations from decisions of other cases intended to support the conclusion of law reached by the Judge-Advocate-General.

The admitted facts stated in the said order and fairly deducible therefrom are as follows:

First. In December, 1901, Private Melencio Tubig, Eighth Company, Native Scouts, Macabebes, was tried by a general court-martial convened at San Isidro, Nueva Ecija, for "murder" in violation of the fifty-eighth article of war.

Second. He was found guilty, excepting the word "murder" and substituting therefor the word "manslaughter."

Third. He was sentenced to be dishonorably discharged from the service of the United States, forfeiting all pay and allowance, and to be confined at hard labor at such place as the reviewing authority may direct for a period of one year.

Fourth. The San Isidro, Nueva Ecija, military prison was designated as the place of confinement, and from this fact it follows that the reviewing authority approved of the finding and sentence of the court-martial.

Fifth. The proceeding of the court-martial case, having been forwarded to the Judge-Advocate-General, United States Army, Washington, D. C, he returned the same to the commanding general Second Separate Brigade, Department of the North Philippines, with a "fifth indorsement" to the effect that "the prisoner was convicted of manslaughter in violation of the fifty-eighth article of war, which

provides that in time of * * * insurrection * * * 'manslaughter' * * * shall be punished by the sentence of a general court-martial, when committed by persons in the military service of the United States, and the punishment in any such case shall not be less than the punishment provided for the like offense by the laws of the State, Territory, or District in which such offenses may have been committed."

The Judge-Advocate-General held that, inasmuch as the sentence imposed on the prisoner was only one year's imprisonment, whereas under the provisions of the Penal Code of the Philippine Islands (arts. 25-28, and 404), the minimum punishment should have been twelve years and one day, "the court in the present case has violated the statute which gave it jurisdiction over the offense of the prisoner and the sentence therefore is illegal and in operative. 'It being impossible to reconvene the court on account of the departure of the Twenty-second Infantry for home, the prisoner should be set at liberty.' "

Under the Army Regulations (arts. 71, 991) the Judge-Advocate-General's Department is the bureau of justice, and he is the custodian of the records of all general courts-martial, etc. The officers of this department render opinions upon legal questions when called upon by proper authority, but even though the opinion, of the department,
as in this case, be contrary to the view of the law taken by the court-martial, the reviewing authority is not bound to follow the opinion, especially where such authority has confirmed the proceedings and sentence of the court, as was done here. This opinion does not nullify the judgment of the court. In fact, after action taken by a reviewing officer and notice of the same, the notice is beyond recall.

General Davis, in his excellent work on military law (second edition) states, at page 541, that: "When the final approval of the sentence (or other action taken) has been once officially communicated to the accused, the function and authority of the reviewing authority *as such* over and respecting the same is exhausted and can not be reviewed. An approval can not then be substituted for a disapproval or *vice versa,* nor can an approved punishment be mitigated or commuted."

Under the one hundred and twelfth article of war the officer authorized to order the general court-martial may mitigate the punishment adjudged by the court, except the punishment of death or dismissal of an officer, and it was doubtless under this article that the accused was set at liberty.

The complicated and complex tables and rules of the Penal Code of these Islands, for determining the terms of imprisonment to be imposed for crimes and the mitigating and aggravating circumstances applicable to the same, might well mislead a nonresident judge not familiar .with the practice of the courts under Spanish rule.

The evidence given before the military court is not before this court, but if it were similar to that in the civil court and the court gave credit to the testimony of the defendant, as it had a right to do, it would have lawfully imposed the sentence of imprisonment for one year; in fact, it could have made the penalty less.

The learned Judge-Advocate-General, in passing on this case, expressed the opinion that the sentence of the court-martial was necessarily void and inoperative, because not in conformity with the local law with respect to the penalty, and stated that in no case could the punishment for homicide under the Philippine Code be less than twelve years and one day. That penalty could have been imposed but so could a lighter one, depending on the view the court took of the proven facts.

Paragraph 4 of article 8 of the Penal Code of the Philippine Islands provides for a complete exemption from criminal responsibility for those who act in defense of their persons or their rights, provided that the following circumstances are present: *(a)* An unlawful aggression; *(b)* a reasonable necessity for the use of the means employed to impede or repel it; *(c)* lack of sufficient provocation on the part of the person defending himself.

Article 86 provides that if an act is found to be in some degree criminal, because of the absence of some of the requisites to a complete exemption, but a majority of these requisites are present, the

courts may then in-their discretion impose a penalty inferior in one or two grades to that designated by the law for the offense.

Article 91 provides that whenever the law prescribes a penalty inferior or superior in one or more grades to some other determinate penalty, the inferior or superior penalty will be taken from the scale in which the determinate penalty is found.

Now let us apply these rules to the crime of homicide. The court finds, for instance, that the defendant killed the deceased; that the deceased was the assailant; that the means employed in repelling the attack were reasonably necessary under the circumstances, but also finds that the defendant provoked the attack. This would be a case in which article 86 would be applicable because of the concurrence of two of the three circumstances, which, taken together, would entirely relieve the defendant of criminal responsibility. Article 404 imposes the penalty of reclusion temporal for the crime of homicide. To determine the penalty two grades lower we turn to article 91 and find that the penalty of *reclusion temporal* is found in scale No. 2. The penalty two grades lower in that scale is *prision correctional*. The minimum degree of *prision correccional* covers a period of from six months and one day to two years and four months. If the court found in favor of the defendant any one of the mitigating circumstances mentioned in article 9, or saw fit to apply article 11, in the absence of aggravating circumstances the penalty would be inflicted in the medium degree. (Art. 81, par. 2.) It follows, therefore, that the evidence adduced at the trial before the court-martial may have disclosed the commission of the homicide under such circumstances as to have justified the court in imposing upon the defendant the penalty of one year of *prision correccional* in strict conformity with the statute.

The question raised by the fiscal in the Court of First Instance, that the court-martial had no jurisdiction to try, convict, and sentence the accused, because civil courts had been established and were open in the Province of Nueva Ecija at the time of the commission of the offense, is next to be considered.

It is true that such courts did exist in that province, established by the military arm of the Government and by acts of the Civil Commission, appointed by the President as Commander in Chief. By his direction, as far back as May, 1898, the Secretary of War, through General Merritt, announced the occupation of the "enemies' territory" and, among other things, stated:

> "Though the powers of the military occupation are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of persons and property and punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent. * * * The judges and the other officials connected with the administration of justice may, if they accept the authority of the United States, continue to administer the ordinary law of the land, as between man and man, under the supervision of the American commander in chief." (1 Off. Gaz., Jan. 1, 1903, p. 1.)

To the like effect was General Orders, No. 92, issued by General MacArthur, in August, 1900, which recited:

> "During the existence of the military government in these Islands the duty devolves upon the military authorities to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence and to punish, or cause to be punished, all disturbers of the public peace and criminals. To this end local civil tribunals, where1 the same have been reconstituted, may take cognizance of and try offenses within their jurisdiction, or, when in their judgment it may be expedient, the department commanders may cause such offenses to be brought to trial before duly constituted military commissions or provost courts." (See Off. Gaz., Jan. 1, 1903, pp. 23, 24.)

Subsequently the Civil Commission passed acts relating to these civil courts and made provision for carrying them on, appointing judges, etc.

But in establishing and maintaining these courts, the United States Government did not give up its authority and jurisdiction to try and punish its own soldiers during the existence of an insurrection in these Islands. Such authority was conferred by act of Congress through the fifty-eighth article of war, and it was under that article that the accused was tried.

In the case of Coleman *vs.* Tennessee (97 U.S., 509) it was said that :

> "The right to govern the territory of an enemy, during its military occupation, is one of the incidents of war, being a consequence of its acquisition, and the character and form of the government to be established depend entirely upon the laws of the conquering state, or the orders of its military commander. By such occupation the political relations between the people of the hostile country and their former government or sovereign are for the time severed, but the municipal laws—that is, the laws which regulate private rights, enforce contracts, punish crime, and regulate the transfer of property—remain in full force so far as they affect the inhabitants of *the country among themselves,* unless suspended or superseded by the conqueror.

> "And the tribunals by which the laws are enforced continue as before, unless thus hanged. In other words, the municipal laws of the State and their administration remain in full force so far as the inhabitants of the country are concerned, unless changed by the occupying belligerent.

> "This doctrine does not affect in any way the *exclusive* character of the jurisdiction of military tribunals over the officers and soldiers of the army of the United States

> during the war; for they are not subject to the laws nor amenable to the tribunals of the hostile country."

The answer, therefore, to the argument of the prosecution in this case, that the court-martial was without jurisdiction, because of the existence of civil courts, is that an insurrection existed in these Islands when the crime was committed, in November, 1901, and when the defendant was tried by court-martial in December, 1901.

We need no proof touching the date of the beginning of this insurrection against the Government of the United States. Its existence is a fact in our domestic history which the court is bound to notice and to know.

> "When the party in rebellion occupy and bold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against the sovereign * * * the contest is war." (Prize cases, 2 Black, 635.[1])

This condition of affairs existed in and about Manila early in 1899. Gen. George AV. Davis states in an official report that:

> "During the winter of 1898-99, the city, of Manila was practically in a state of siege, as far as communicating with the interior was concerned; the American troops and the insurgents holding lines respectively that had been arranged and defined by the commanding general of the respective forces.
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> "The insurrectionists prevented communication by water with the interior, and no person could enter or leave the city save by permission of the Filipinos. * * *
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> "On the night of February 4, 1899, an insurgent passed quite 150 yards within the American line, and refused to halt when challenged by

> the picket; was fired upon, where
> upon the native troops opened fire generally, which was replied to by the United States forces and the truce was broken." (Official Gazette, January 1, 1903, p. 10.)

From that day the fighting continued, and the insurrection did not end officially until the President proclaimed it at an end, July 4, 1902. It is necessary to refer to a public act of the Executive Department to fix the date of the closing of the war. (Freeborn *vs.* The Protector, 79 U. S., 700.)

If it be alleged that, notwithstanding the insurrection,there were no actual hostilities in Nueva Ecija at the times above mentioned, the answer is that the condition of hostility remained impressed on the whole island until it was removed by the proclamation of the President. (Mc-Clelland's case, 10 Ct. of Cls., 68; Philipps *vs.* Hatch, 1 Dill., 571.)

> "We must be governed by the principle of public law applicable alike to civil and international wars, that all the people of each state or district in insurrection against the United States must be regarded as enemies, until by the action of the legislature and the executive or otherwise, that relation is thoroughly and permanently changed." (U.S. *vs.* Alexander, 2 Wallace, 404.)

The conclusion follows then that the court-martial had jurisdiction of the person of the defendant and of the charge of murder that was made against him; that his trial took place before the court upon such charge; that he plead " not guilty f and that upon the evidence he was found guilty of manslaughter; was sentenced to imprisonment ; that the finding and sentence of the court was duly approved, and that he was imprisoned and remained in prison until the sentence was remitted by military authority.

Such a judgment rests on the same basis and is surrounded by the same considerations which give conclusiveness to the judgments of other

legal tribunals, including as well the lowest as the highest under like circumstances. (Ex parte Reed, 100 U.S., 13.)

The defendant, therefore, was put in jeopardy by his military trial and was punished. He was again put in jeopardy by his second trial for the same offense and was sentenced to a term of imprisonment, thus subjecting him to a second penalty. This is contrary to law. The judgment of conviction is therefore reversed and the defendant is acquitted.

Cooper, Willard, and *Johnson, JJ.,* concur,

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[1] Page 58, supra.

[1] 90 U. S. Rep., 635.

TORRES, *J.,* *concurring;*

In this case, which comes from the court of Nueva Ecija, the prosecution is for the crime of homicide committed by a soldier on an inhabitant of the town of Bongabon, Province of Nueva Ecija.

In November, 1901, a criminal case was commenced for the investigation of the crime by a court-martial, which convicted the defendant, Melencio Tubig, of the offense and sentenced him to one year of imprisonment at hard labor and to dishonorable dismissal from the Army.

This judgment, appears to have been affirmed by the superior authorities, for the defendant, after conviction, commenced to serve his time in the prison of San Isidro the capital of the province.

The record having been sent to the Attorney-General of the United States at Washington, this officer referred it to the commanding general of the second brigade, with an opinion in which he stated that

the court-martial which tried the case had violated the law from which it derived jurisdiction, and that its judgment was illegal and unenforceable because it was not in accord with the Penal Code in force, and, as it was impossible to reconvene the court-martial, because the Twenty-second United States Infantry had returned to the United States, that the defendant should be released, which was accordingly done.

Notwithstanding this, in February, 1902, an information was filed by the provincial fiscal charging Melencio Tubig with the crime, of murder. On this charge he was tried, notwithstanding the fact that the counsel for the defense set up a plea of jeopardy, and judgment was rendered on November 24 of the same year by which the accused was convicted of the crime of homicide and sentenced to twelve years and one day imprisonment at hard labor in Bilibid Prison.

If the decision rendered by the court-martial imposing upon the accused, Tubig, the penalty of one year's imprisonment for the crime of homicide became final and continued to be final notwithstanding the opinion of the Attorney-General of the United States, then a prosecution for the same offense could not be legally instituted in the court of Nueva Ecija. This is especially true because in March of that year a question of jurisdiction was raised by a military officer, as appears from an official letter of
the provincial fiscal addressed to the Attorney-General.

If the judgment was reversed or annulled for the reason stated by the Attorney-General of the United States at Washington, that did not authorize the judge of First Instance of Nueva Ecija to try the defendant for the crime of homicide upon which he had already been tried by a court-martial.

That the defendant was discharged, because after the annulment of the judgment by which he was sentenced to a year's imprisonment it was found impossible to reconvene the court-martial by reason of the absence of the officers who had constituted it, or because it was found proper to liberate him by reason of his having been pardoned, is a fact

which could by no means justify the prosecution of this case in the said court for the same crime which had already been a subject of prosecution by the military authorities.

It is not necessary to discuss at the present time whether the court-martial had jurisdiction or not to try Melencio Tubig, because the military prosecution has been terminated by the final judgment, and the Attorney-General at Washington did not hold that the trial was illegal, but only that the judgment was, because not in conformity with the Penal Code in force in this territory.

Furthermore, it is a general rule of criminal procedure that when a court trying a ease is without jurisdiction such court should be requested to inhibit itself, and a plea to the jurisdiction should be presented, thus raising the issue. But it is improper to commence another prosecution for the same offense upon which the accused is being tried by the court without jurisdiction, because nobody may be tried or punished twice for the same criminal act.

Finally, it is to be observed that questions as to jurisdiction can only be raised with respect to pending cases and not with respect to crimes upon which a trial has already been had.

For the reasons stated I am of the opinion that the proceedings below in this case should be set aside with the costs *de oficio,* and that the defendant should be immediately discharged.

Arellano, C.J., dissents.

Date created: January 10, 2019