

[G.R. No. 1615. January 16, 1905]

**THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. ANDRES ASCUE,
DEFENDANT AND APPELLANT.**

D E C I S I O N

MAPA, J.:

We accept the statement made in the judgment of the court below as to the guilt of the defendant in the killing of Vitaliano Ramos, which gave rise to the complaint. The evidence fully justifies the said statement, and it should, therefore, be affirmed.

The court below classified the facts in the case as constitutive of the crime of murder, appreciating the presence of the circumstances of treachery (*alevosia*), premeditation, and nocturnity, considering the first as constitutive of the crime and the latter two as aggravating of the penalty thereof. We agree with the legal classification of the offense, but not with the whole appreciation of the circumstances present in the commission of the same. Of course the premeditation is to be appreciated; the acts executed by the defendant to carry out his designs, telling the wife of the deceased of his intention to kill her husband in order to possess her person, seeking the person who was to carry out his designs, planning with said person the particulars for the commission of the crime, accompanying him on the very moment of its commission in order to witness the realization of his criminal purpose, after having spent with him the hours immediately preceding the same, as the evidence in the case discloses in an indubitable manner, all of them prove clearly and evidently that the resolution taken by the defendant to kill the deceased had been considered, meditated, and persistent, and this is what constitutes

premeditation for the purposes of the Penal Code. This circumstance is what classifies the crime as murder in the present case.

With regard to the circumstance of treachery (*alevosia*), the case does not furnish sufficient particulars whereby its presence in the commission of the crime may be appreciated. The only eyewitness gives no details about the manner in which the aggression to the deceased was made. The appreciation of the court below seems to be based solely on the statement of the physician who examined the wounds of the deceased, in so far as the latter's opinion was that the said deceased was wounded *in the back*. However, the diagnosis of the wounds made by the same physician does not seem to authorize this conclusion. According to said physician the deceased was stabbed only once and received two wounds, one of ingress and the other of egress. Upon describing these wounds he says that that of ingress is located between the third and fourth *front* ribs on the middle part of the right side of the body, and that of egress between the seventh and eighth back ribs on the middle part of the same side of the body, the weapon having almost pierced the whole lobule of the right lung from top to bottom and from *front to back*. Besides this, upon describing in the record the cut produced by the entrance of the weapon into the deceased's shirt, he pointed out as such a rent in the collar *toward the breast*. In view of this, we can not conclude, at least in a clear and precise manner, excluding all doubt, that the deceased was attacked from the back, which is made constitutive of the circumstance of treachery (*alevosia*) in the judgment appealed from.

Nocturnity is not necessarily an aggravating circumstance, and the same should be taken into consideration by the courts according to the nature and circumstances of the crime. In the present case it is not evident that the accused had purposely sought the night to perpetrate the crime. This circumstance could have very well been merely accidental in the intention of the said defendant, as there is no proof to the contrary, and for this reason it should not be taken into consideration to the prejudice of the defendant.

There being no circumstance modifying the penalty to be appreciated,

the penalty to be imposed on the defendant should be that provided for in article 403 of the Penal Code, in its medium degree, to wit, *cadena perpetua*.

Therefore we affirm the judgment of the court below, it being understood that the penalty imposed upon the defendant is that of *cadena perpetua*, with the costs of this instance to be charged against the defendant. So ordered.

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

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