

[G.R. No. 1929. May 01, 1905]

THE UNITED STATES, COMPLAINANT AND APPELLEE, VS. JUAN FRESNIDO ET AL., DEFENDANTS AND APPELLANTS.

D E C I S I O N

MAPA, J.:

The defendants are charged with the crime of murder, committed, according to the complaint, as follows: "In the Province of Sorsogon, in an uninhabited place near the municipality of Santa Magdalena, on the morning of one of the days of the month of August, 1902, that is to say, about the 18th of said month, the defendants formed and banded together with others, armed with bolos and firearms did, in ambush and with known premeditation, kill three soldiers of the Constabulary called Santiago Dellosa, Ramon Gerona, and Juan Espinola, inflicting on them wounds with a bolo from which they then and there died." The court found the defendants guilty of the crime of which they are charged and sentenced them to death, for which reason this case has been brought to this "court *en consulta*. The defendants Pedro Gaymo, Cayetano Gaupo, and Vicente Julio having died during the pendency of this review, we declare the case as to them dismissed, in accordance with the law.

The killing of the three Constabulary soldiers as denounced in the complaint has been sufficiently proven at the trial, but it was not established that the act was committed with treachery (*alevosia*) or with premeditation. The defendants belonged to a band of insurrectionists commanded by one Esposias, and on the evening of the day in question, they were returning from a visit in Talaongan, where it seems they had their camp. After they left the town of Santa

Magdalena, at about midway, they met a division of ten Constabulary men, of which the three formed part. The meeting was casual; it was not intentionally sought, nor was it premeditated on the part of the defendants. Two witnesses for the prosecution assert this, and they are the only ones who testified on that point. To one of them the following question was put, "Did you wait in that place for the Constabulary or did you meet them casually?" To which he answered, "We did not wait for them; we just met the Constabulary *by accident* in Matacla."

When he was questioned again whether they knew the Constabulary had gone to Talaongan and had to pass by the place where the engagement took place he answered, "We did not know that the Constabulary would pass that place, we only by chance met them as we came from Magdalena." Nor was there any treachery. Treachery was said to exist in the fact of the ambush which it was supposed the defendants prepared together with the other members of their band so as to fall on the Constabulary unawares without risk. The supposition of ambush is incompatible with the fact of the meeting having been casual. This meeting was followed immediately by a fight in which the three deceased were killed. But, disregarding this fact, the statement made by one of the soldiers of the Constabulary who took part in the encounter shows conclusively that such treachery never existed. According to this witness the Constabulary opened fire on the band of the defendant *five minutes* before any of the members of the said band succeeded in advancing and wounding with their bolos any of the Constabulary soldiers. This proves that the killing of the latter was not the result of a surprise, as that would have rendered them unable to defend themselves, but, on the contrary, it was the result of an open fight which was of sufficient duration for each side to utilize, as they did, the means of attack and defense with which each was respectively provided. And so it was that three individuals belonging to the band of the defendants were also wounded.

The act committed under such circumstances constitutes the crime of homicide provided for and punished in article 404 of the Penal Code and not that of murder, for the reason that in the execution thereof none of the circumstances which qualify or characterize the latter crime

were present. The aggravating circumstances of nocturnity and uninhabited place, taken into consideration in the judgment appealed from, can not be considered for the reason that neither the time nor the place of the occurrence was chosen by the defendants intentionally. The aggravating circumstance of a "gang" (*cuadrilla*) should be taken into consideration, because it is proven that the band which caused the death of the three Constabulary soldiers was composed of seventeen individuals armed with firearms and bolos.

The participation of the defendant Juan Fresnido in the acts prosecuted has been sufficiently proven at the trial. He himself stated to several persons that he delivered several blows with his bolo during the fight upon one of the Constabulary soldiers. This statement has been testified to by five witnesses. Furthermore, it was also stated by said Juan Fresnido before the provincial fiscal and also before the justice of the peace, as he admits in the declaration which he made as a witness at the trial. The exculpation which he alleges, that he made such statement before the justice of the peace and the fiscal on account of maltreatment on the part of the Constabulary soldiers, does not appear substantiated in any manner in the record of the case. Furthermore, there would still remain the testimony of the five persons who heard him relate that fact on several occasions, against which testimony the defendant has established absolutely nothing.

As regards Severino Fresnido, an eyewitness for the prosecution states clearly and unequivocally that said defendant fled from the place of the occurrence at the instant of the beginning of the fight. This being so, it is clear that he could not have had any participation in the killing of the Constabulary soldiers which resulted from the fight. The testimony of said witness has not been disproved by any other data in the record, and for this reason we accept it as true, and also for the reason that he is a witness for the prosecution. Notwithstanding this circumstance, some liability might yet attach to the defendant in question, if the encounter with the Constabulary soldiers had been the result of a plan previously agreed upon between him and his companions, but the engagement having been purely accidental and he having taken no active part in the fight, we can not

find him responsible for the consequences of the same, and therefore his acquittal must follow.

Reversing the judgment brought here *en consulta*, we find Juan Fresnido guilty of the crime of homicide executed with the aggravating circumstance of a "gang" (*cuadrilla*) and we impose on him the penalty of twenty years' *reclusion temporal* with one-fifth of the costs in this instance, and we acquit Severino Fresnido, declaring the costs in both, instances corresponding to him *de oficio*. So ordered.

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