4 Phil. 561

[G.R. No. 2229. July 01, 1905]

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. ROBERT MCMANN, DEFENDANT AND APPELLANT.

D E C I S I O N

WILLARD, J.:

The defendant, McMann, and one McKay were packers at Camp Vicars in Mindanao, employed by the Quarter-master's Department of the Army. On the day in question the defendant had charge of some mules about one and one half miles from the camp. McKay was not on guard at the time, but, for some reason which does not appear, was near the place where the defendant was stationed with the mules. McKay went to the house of a Moro, Amay Pindolonan, for the purpose of getting matches with which to light his cigar. With his revolver in his hand he attempted to enter the house, but the owner would not allow him to do so. A few moments later the defendant arrived at the same house. He attempted to enter, but was unable to do so on account of the opposition of the owner. He also carried his revolver in his hand with the hammer raised ready to be discharged. A Moro named Master, who was there at the time, was carving the head of a bolo with one hand, holding the blade in the other. The defendant snatched the bolo from him, cutting his fingers. This Moro left for the camp to report the matter to the authorities. Soon after this McKay and the Moro Pindolonan, being seated side by side at a distance of from 3 to 6 feet from the defendant, who was either standing or sitting on the stairway which led into the house, the latter raised his pistol and fired at McKay. The bullet struck him in the back of the head and killed him instantly. The Moro at once jumped up, looked around to see where the shot came from, and started to run, whereupon the defendant shot him. The exact nature of his

injuries does not appear, but it appears that at the time of the trial, about a month after the event, he was still in the hospital. At some time, probably after the killing of McKay, although the defendant says it was before, the latter killed a dog which was on the premises. The defendant and McKay were both drunk at this time.

That the defendant fired the shot which killed McKay is practically admitted by him in his testimony and the fact is also proved by three or four eyewitnesses. It is claimed by his counsel in this court that the shooting was accidental arid that he had no intention of killing McKay. In the face of tne positive testimony of the witnesses there is no ground for saying that the shooting was accidental. Two of the Moros testified that they saw him discharge his revolver at McKay. In view of the fact that McKay and the Moro were sitting side by side, it may perhaps have been difficult for the witnesses to have known at which one of the two the defendant aimed, but their testimony makes it plain that in no event was the discharge of the revolver accidental.

As to the second claim of the defendant that he had no intention of killing McKay, the only evidence in support of it is the proof that the defendant and McKay were good friends prior to the occurrence and that no reason is shown why he should have committed such an act. It may be difficult to state what the exact cause was. It appears from the testimony that while they were in the position above stated the defendant was talking to McKay, but McKay said nothing in reply. The cause for the commission of the crime might be found perhaps in this conversation, if we knew what it was. Or perhaps the defendant killed McKay because he, the defendant, was drunk. But whatever the cause may have been it is not absolutely necessary for us to find a motive therefor. The question of motive is of course very important in cases where there is doubt as to whether the defendant is or is not the person who committed the act, but in this case, where it is proved beyond all doubt that the defendant was the one who caused the death of McKay, it is not so important to know the exact reason for the deed.

The defendant also claims that the court below erred in holding that the crime was committed with *alevosia*.

The judge below based his holding upon the fact that McKay was shot from behind. The authorities cited by the de- fendant from the supreme court of Spain may be divided into two classes. One class includes cases in which the evidence did not show by eyewitnesses the exact way in which the crime was committed. The court held that under these circumstances *alevosia* could not be presumed from the condition in which the body was found or from proof that the shot must have come from behind. These cases have no application to the case at bar, for here the proof shows exactly how the offense was committed. The second class of cases includes those in which, after a struggle has commenced between the parties on one side and on the other, and after each side is notified of the intention of the other side to do them injury, a member of one party is killed by a member from the other by a blow from behind. These cases have no application to the case at bar, for here before any struggle between McKay and McMann had commenced, or before there was any indication, so far as the evidence goes, of any trouble between them, and without any warning, the defendant shot McKay in the back of the head.

We do not understand that the defendant claims that he intended to shoot the Moro when he killed McKay, but even if this claim were made and supported, we do not see how it could change the result in view of the fact that McKay was shot from behind without any warning and with no intimation that an attack was to be made upon him or the Moro.. What the rule would be had McKay been facing McMann when the latter fired at the back of the Moro, we do not, therefore, have to decide.

The court below held that the defendant was drunk at the time the act was committed, but held also that drunkenness was habitual with him and therefore his condition could not be taken into consideration for the purpose of lessening the sentence. The defendant in this court claims that the court erred in holding that drunkenness was habitual with the defendant. The testimony upon that point furnished by one of the witnesses for the defendant is as follows:

"Q. Did you say that you saw the accused and McKay drinking together on the night before the day of the occurrence?

A. Yes, sir.
"Q. Is it not true that the said night was the first time you saw the accused drinking?
A. No, sir. It is not true. I have seen him drink before.
"Q. But you never saw him drunk before?
A. Yes, sir.
"Q. How many times had you seen the accused drunk before?
A. That is a difficult question to answer; I have seen him drunk many times. The first time I knew the accused I saw him drunk twelve or more times.
"Q. Then you mean to say that drunkenness was habitual with the accused?
A. When I have seen him drinking, usually he retired drunk to the quarters.
"Q. How many times have you seen the accused drinking during the time you have known him?
A. I could not say; too many times to recollect.
"Q. Are you sure of this?
A. Yes, sir."

We think this testimony justifies the court below in its holding in view of what is said in some of the decisions cited by the defendant in his brief. In the case of Commonwealth *vs.* Whitney (5 Gray, 85) the court said:

> "The exact degree of intemperance which constitutes a drunkard it may not be easy to define, but speaking in general terms, and with the accuracy of which the matter is susceptible, he is a drunkard whose habit is to get drunk, 'whose ebriety has become habitual.' To convict a man of the offense of being a. common drunkard it is, at the least, necessary to show that he is an habitual drunkard. Indeed the terms 'drunkard' and 'habitual drunkard' mean the same thing."

In the case of Ludwick *vs.* Commonwealth (18 Penn. St., 172) the court said:

> "A man may be an habitual drunkard, and yet be sober for days and weeks together. The only rule is, Has he a fixed habit of drunkenness? Was he habituated to intemperance whenever the opportunity offered?"

The judgment of the court below is affirmed with the costs of this instance against the defendant.

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

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