

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. FAUSTINO CORTES Y MACASAIT, DEFENDANT AND APPELLANT.

G.R. No. L-12564. September 06, 1917

Ponente: ARELLANO, C.J.

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ARELLANO, C.J.:

This case has come to us on appeal from a judgment of the Court of First Instance of the city of Manila whereby Faustino Cortes was convicted of the crime of homicide and sentenced to the penalty of 14 years 8 months and one day of reclusion temporal with its accessory penalties, to indemnify the heirs of Pablo Montevirgen in the sum of P1,000 and to pay the costs.

The facts are as follows: Faustino Cortes who had been living in concubinage with Marciana Bozmente separated from her three days before the crime, left the house they had been occupying and went to live in another one nearby. In front of said second house, on the night of August 21, 1916, the woman Bozmente and her son Pablo Montevirgen appeared and roundly insulted the defendant, after which Montevirgen challenged him to come down into the street. Cortes came down and there a struggle of diverse success took place between him and Montevirgen until Cortes, having overpowered his antagonist, was seen to get up his right hand covered with blood and his left grasping a fan knife. Montevirgen also got up, dragged himself along very painfully until finally he collapsed, fell down and shortly afterwards died unconscious. Deceased had a deep wound in the base of the neck from which blood flowed in abundance. "The cause of death," says the medical certificate, "was a hemorrhage produced by a wound in the right carotid artery and in the inner jugular vein. The body bore seven other wounds also."

Faustino Cortes was charged with the commission of the crime of homicide and after hearing the witnesses, most of them eyewitnesses, the court was convinced of his guilt wherefore it sentenced him for said crime, committed with neither extenuating nor aggravating circumstances, to the penalty aforesated.

The defendant appealed and, in this second instance, alleged that the trial court erred in not taking account, for the purpose of reducing the penalty, of the extenuating circumstance of immediate provocation.

The appellant is right in this contention; but the provocation should not be estimated according to the statement of facts made by appellant, to wit, that Marciana Bozmente went up into his house and while he was asleep, struck him in the face with her sabot or wooden shoe, and, when he awoke, caught hold of his shirt bosom and tried to drag Him outside, saying "Come here! It's your hour now." That testimony not only is not corroborated but also conflicts with other testimony declaring that the Bozmente woman did not move from the street from whence she insulted the defendant—it does not appear that she entered the house.

The proof of immediate provocation is found in the testimony of the witness for the prosecution Joaquin Bas, an eyewitness from its beginning, truthful and impartial, as shown by other testimony. He told of the insults uttered by the mother and son in front of the defendant's room; he saw upon the deceased's challenge, the defendant come down from his house; and he witnessed the struggle in all its vicissitudes. Without those insults and threats the

defendant would not have come down and the struggle would not have taken place.

Moreover the appellant alleges that the trial judge erred also in not giving due weight to the extenuating circumstance of unlawful aggression.

In respect to this point the lower court did not err. It is already a well-settled rule, firmly established in many decisions interpretative of article 8 of the Penal Code, that, after the accused accepts a challenge, thereby placing himself in an unlawful status and one of force, the prior aggression of his opponent, which, as it was not unexpected, could not catch him off his guard, excludes the condition of lawful defense, for the challenge by itself excludes the classification of self-defense that, totally or partially, exempts from liability (decision by the supreme court of Spain, of March 8, 1897); or, as set forth in another decision by the same court (that of February 6, 1899), the right of lawful self-defense cannot validly be set up in behalf of a person who voluntarily exposes his person to the consequences of a hand to hand struggle with his adversary in which, for the reason that each of the combatants has no other intention than to injure the other, the first act of force, come from whichever of the two it may, cannot be held but to be an accident of the fight itself and in nowise whatever as an unwarranted and unexpected aggression which alone can legalize self-defense.

Taking into consideration the extenuating circumstance defined in paragraph 4 of article 9 of the Penal Code, the penalty should be imposed in the minimum degree.

With the understanding, therefore, that the penalty imposed of reclusion temporal shall be 12 years and one day of imprisonment, the judgment appealed from is in all other respects affirmed and the costs of this instance shall be against the appellant. So ordered.

Johnson, Carson, Araullo, Street, and Malcolm, JJ., concur.

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