

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
MARCELINO TUMAOb, DEFENDANT AND APPELLANT.***G.R. No. L-2300. May 27, 1949*

Ponente: TUASON, J.

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Marcelino Tumaob was found guilty of murder by the Court of First Instance of Samar and sentenced to reclusion perpetua, to indemnify the heirs of the deceased in the sum of P2,000, and to pay the costs. This is an appeal from that judgment.

The uncontroverted facts are these: The defendant was a civilian security guard in the employ of the Surplus Property Commission on the Island of Tubabao, municipality of Guiuan, Samar. On December 1, 1947, he was posted as a sentry in a sentry box or shade outside a compound or so-called warehouse where surplus property was being kept and which was a roofless affair enclosed by chickenwire on four sides with open gates at both ends and at one side. Eduardo Basas, 17 years, ventured into that enclosure on the above mentioned date, at 10 o'clock a.m., and was shot and killed. Basas wound was thus described by an examining surgeon: "Gun shot wound in the right buttock about 2 inches lateral from the tip of the coccyx right side. The slug traversed upwards obliquely perforating the small intestine at five points and penetrated (passed through both walls) the internal iliac vein, right side, just below the bifurcation of the abdominal vein. The bullet made its exit at the left side of the abdomen about 2 inches above the umbilical stump and 2 inches lateral to it."

The accused, shortly after Basas was shot, reported the killing to his superior officers and was placed under arrest. What he told his superiors is not known. The direct evidence against him consists of what purports to be his statement to the chief of police in which he is said to have admitted to be the killer, and an ante-mortem declaration of the now deceased stating that he had been shot by one whom he did not know while he was gathering firewood.

At the trial the defendant denied having made any statement to the chief of police. He gave substantially the following version of the occurrence:

On December 1, 1947, at about 10:00 a.m., he was on sentry duty in a sentry box or shade a short distance from the SPC compound. Inside this compound he spotted a man from his post. He fired twice into the air to stop the intruder. Then he walked into the compound passing through the front gate. Inside, not far from that entrance, he was fired upon by someone whom then he could not see. When they had stopped shooting he fired in the direction of where the gunmen were supposed to be. From his position, after he let off two shots, he saw two men dash away through the rear or opposite gate. He came out of the front gate and turned around one side of the compound in pursuit of the fleeing thieves. He did not open fire outside the compound because the men quickly disappeared in the jungle. After that he returned to the compound and there saw Basas sprawled on the ground facing the side door and dying. Then he reported the matter at the Investigation Section of the Surplus Property Commission.

The accused stated that in the compound there were piles of boxes containing refrigerators and other heavy

appliances. When, he said, he was shot at, the attackers were behind some of those boxes, that being the reason why he could not see them until they started to flee.

This testimony can not be given credence. It is entirely inconsistent with defendant's statement to the chief of police made soon after the killing and before he had time to reflect on the best manner to get himself out of his predicament. To the chief of police he categorically admitted that he had shot Basas as the latter was gathering firewood. The position of Basas wound tends to corroborate this statement and the ante-mortem declaration of the deceased, that the latter was in a stooping position picking firewood when he was hit.

We have no reason to distrust the veracity of the chief of police. He sustained no relation to the decedent and had no motive to desire the defendant's punishment on fabricated evidence for a crime for which he was not criminally responsible. The chief of police's testimony pitted against that of the defendant appears to be the more coherent, more sensible and more trustworthy of the two.

The accused has given evidence of unreliability for truth. He denied that any one ever questioned or tried to question him in connection with the killing at bar. The fact is that Arcadio Salvo, an employee of the Surplus Property Commission in Guiuan whose veracity is unquestioned, swore that on December 1, he was acting as "desk man" at the Investigation Section of the Surplus Property Commission; that the accused presented himself and reported the incident; that he tried to get from the defendant the details of the shooting but that the defendant refused to answer. Incidentally, this refusal was out of keeping with the idea that there had been an exchange of fire and that the deceased had been hit accidentally in the process either from the defendant's gun or from the looters.

That the defendant, when he reported the killing, stated or at least gave to understand that he was the killer, is to be inferred from the fact that according to his own testimony he was ordered lodged immediately in the guard-house "for his protection."

Amidst many uncertainties in the case one thing is certain; it is that the accused before his trial never said to anyone that he had seen in the depot persons other than the deceased. The incident narrated by the accused on the witness stand, that he was attacked, was too important not to be mentioned, let alone stressed, by him before his interrogators, if such incident had occurred.

There is another detail that belies the defendant's theory that two would-be looters fired several times against him from behind the boxes and that he returned the fire. The accused admitted that he did not find any empty shells in the compound or any sign of any of the boxes having been hit by bullets.

Justification for the killing is not claimed. The defendant himself said that Basas was merely picking firewood unarmed, and that the time was ten o'clock in the morning. As far as the evidence would show, the surplus property in the depot consisted of bulky and heavy boxes which one boy could not and would not have dared carry away in the daytime with a guard or sentry around.

However, we do not agree with the trial court that the crime committed was murder. The qualifying circumstance of treachery can not logically be appreciated because the accused did not make any preparation to kill the deceased in such a manner as to insure the commission of the crime or to make it impossible or hard for the person attacked to defend himself or retaliate. This circumstance can only be applied, according to the tenor of article 13 sub-section 16 of the Revised Penal Code, when the culprit employs means, methods or forms of execution which tend directly and specially to insure the commission of the crime and at the same time to eliminate or diminish the risk to his own person from a defense which the other party might offer. In *United States vs. Namit*, 38 Phil., 926, it was held that the circumstance that an attack was sudden and unexpected to the person

assaulted did not constitute the element of *alevosía* necessary to raise a homicide to murder, where it did not appear that the aggressor had consciously adopted a mode of attack intended to facilitate the perpetration of the homicide without risk to himself. In the present case, the circumstances negative the hypothesis that the defendant reflected on the means, method and form of killing the offended party. There was absolutely nothing personal between the accused and Basas. He was, so he thought, erroneously, protecting the property which he was detailed to watch by killing the stranger. His purpose was to kill, the decision was sudden, and the position of the stranger was accidental and did not matter. In fact, in the nature of things, to give the other man an opportunity to defend himself or to return the attack would have been a contradiction.

In an analogous case decided by the Supreme Court of Spain on April 3, 1888, and reported in Vol. II, Viada, 5th ed., pp. 171, 172, with Senor Viada's comment, the Court held that it was error to hold the killing as murder qualified by treachery:

"El que estando guardando una finca de la propiedad de su padre, al ver de noche subido a una higuera a un hombre que estaba cogiendo brevas, le apunta con la escopeta y le dispara un tiro, infiriéndole una lesión que le produce la muerte, deberá ser calificado de autor del delito de asesinato, o simplemente de homicidio? La Audiencia de lo criminal de Cartagena, aplicando la disposición del art. 10, núm. 2.º por la letra que mata, estimo lo primero; mas el Tribunal Supremo; interpretándola por el espíritu que vivifica, declaro que no existía *alevosía* en el hecho expuesto. Véanse los notables fundamentos de su sentential 'Considerando que es condición esencial de la *alevosía* que califica de asesinato la muerte violenta de alguna persona que los hechos que la determinar, ya preparados o ya ejecutados sin anterior preparación, sean libre expresión y resultado de pensamiento y propósito del culpable de aprovechar para el éxito de su acción las ventajas que le ofrezca la situación en que en el momento del delito se halle, siquiera accidentalmente, respecto del ofendido, y que se encaminen con especial dirección a evitar al primero el riesgo personal en que racionalmente pueda tener que le pondrían los actos de defensa con que el ultimo tratara de rechazar la agresión: Considerando que los términos en que se describe la *alevosía* en el núm. 2.º del art. 10 del Código Penal implican este concepto, puesto que requieren que los medios, modos y formas de excusión en que consiste y por donde se revela tiendan directa y especialmente, es decir, como resultado consciente de determinación de la voluntad, a la seguridad del exito intentado y a eludir a la vez probables o siquiera temidas consecuencias de retorsión, por lo que no es aplicable al caso procesal, a causa de que el procesado, al disparar un arma contra la persona para el entonces desconocida que vio en el árbol sustrayendo frutos que el guardaba, obro no tanto con el deseo y la intención de darle segara muerte sin riesgo propio, como por el de castigar, sin cuidarse del resultado natural de su acto, la acción ilícita que en perjuicio de su padre se realizaba a su propia vista por quien, cualquiera que fuese, debía temer alguna consecuencia por ejecutar sigilosamente un hecho punible, etc.'."

We hold that the crime committed by the accused is simple homicide with the mitigating circumstance of voluntary surrender and without any aggravating circumstance.

Wherefore, the judgment of the lower court will be modified so as to sentence the accused to an indeterminate penalty of from 6 years and 1 day of prison mayor to 12 years and 1 day of reclusion temporal, with the accessories of law, to pay the heirs of the deceased the sum of P6,000 as indemnity and to pay the costs. It is so ordered.

Ozaeta, Paras, Feria, Pablo, Perfecto, Bengzon, Montemayor, and Reyes, JJ., concur.

TUASON, J.:

I certify that the Chief Justice concurs in this decision.

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