

THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS. VIVENCIO CELESPARA, DEFANDANT AND APPELLANT.

G.R. No. L-1908. December 17, 1948

Ponente: PERFECTO, J.

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PERFECTO, J.:

The witnesses testified in substance as follows:

- Sotero Cantong, 20, married, farmer, Mondragon, Samar.—Catalina Cantong, his elder sister, was shot by Vivencio Celespara. At about 8 o'clock in the evening of October 2, 1942, he was taking supper in their house in barrio Agrupacion with his sisters Catalina and one other. "We had Just started to take our supper and we heard a noise behind the house. It was a noise produced by simply separating the nipa shingles of the waiting of the house. Immediately after we heard gunshot. After the explosion, I looked from the kitchen where I was and I saw Vivencio Celespara holding a bardug, a homemade shotgun. My elder sister died. She was shot ;on the left nipple." (4-5). She immediately died. The witness was not in good terras with the accused, because the latter was after his wife. (6). Later on his wife became the paramour of the accused. "In fact my wife is already in his possession and they have already a child. They live together as husband and wife (since October, 1943)." (7). Prom that month his wife separated from him. When the shooting took place it was a moonlit night. Guillerma de los Reyes is the name of the witness' wife. Her child with the accused is a girl, one year old. (8). When the shooting took place Guillerma de los Reyes was not taking supper with the witness because "she has recently delivered a child." The house was only three brazas long. It was only a room which the witness constructed in view of the delivery of his wife. (9) The name of his other sister is Aurea. (10). The witness is legally married to Guillerma de los Reyes. He did no\$ file any complaint for adultery against his wife and the accused "because they have not yet child." His wife left their house in October, 1943. (16).

- Victorino Caranog, 55, married, farmer, barrio Bagasbas, Mondragon.—At about 4 o'clock in the afternoon of October 2, 1942, Alberto Donor passed by their house and went directly to Bagasbas. (17). His other companions were Vivencio Celespara and Silvestre Rondina. Upon reaching Bagasbas, Alberto Donor told the others to find out if there were still Japanese in the place. "We were about 25 persons but the rest we do not know." Donor was a corporal of the home volunteer guards. I simply went with them because they passed by my house. (18). We have not found any Japanese in that place. So I tried to look for my relatives there and while looking around for my relatives, I happened to pass by a place where Vivencio Celespara was separating nipa shingles through which he was peeping. It was the house of Sotero Cantong. The barrel of Celespara1s gun was placed thru that hole from the kitchen. Upon seeing him that he placed the barrel of his gun thru the hole of the kitchen of that house, I told him not to do it because the people inhabiting that house were civilians but he answered telling me, 'never mind.'"1 The gun held by the accused was a bardug. The accused said that he was a member of the home volunteer guards.

"I even pulled away the gun and he having not heard my advice, I proceeded on my way. (19). Upon arriving at around 4 brazas from the place where Vivencio Celespara was, I heard a gunshot. I ran away to the brook of Cananbanan." The detonation came from the gun of Vivencio Celespara. "We all assembled near the brook because their corporal was also there." (20). Upon arriving at the place, Celespara was asked by Donor as to who fired. "Vivencio Celespara answered that he was the one who fired at Sotero Cantong." (21). All the 25 members of the group were provided with guns. Donor gave the witness a gun with only one bullet. (22). The witness was informed that the Japanese patrol used to stay almost every night in Bagasbas. (23).

- Silvestre Rondina, 38, married, farmer, barrio Dapdap, Mondragon.—On October 2, 1942, he followed the accused in barrio Dapdap. "We were made to accompany Alberto Donor to find out if there were Japanese in that place." The witness was a volunteer guard and Donor "was our corporal." (27). They were then 25 volunteer soldiers. They were all armed with bardue. (28). Finding out that there were no Japanese, Donor told some of the soldiers to look for their companions so that they could go home. "While I was looking for our companions when I passed by the house of Sotero Cantong, there I saw two persons, Victorino Caranog and Vivencio Celespara. Vivencio Celespara was separating the nipa shingles of the house of Sotero Cantong. I told them in this way, 'Let us go because Alberto Donor is in already.' They were conversing. Inasmuch as these two people did not heed my invitation as per order made by Alberto Donor, so he left the place. I scarcely walked 4 brazas when I heard a gunshot." (29). The shot was fired by Vivencio Celespara. He placed the barrel of his gun through the wall of the house of Sotero Cantong. Sotero Cantong is married. (30). The wife of Sotero Cantong is now living with Vivencio Celespara. The witness knows that since he is living in the same barrio. They have been as husband and wife for more than two years and have one child. (31). The accused fired two shots. (33). The second shot was fired at about 20 meters from the house of Sotero Cantong. (34). All the members of the group were given one bullet each, while Vivencio Celespara was given four bullets. (35).

- Justina Albaes, of legal age, married, housewife, barrio Agrupacion, Mondragon.—She is the mother of Vivencio Celespara. She does not remember where he was in 1942. He was a member of the guerrilla organization. (38). She learned about the fact that Catalina Jantang was killed the following day of October 2, 1942 "after the encounter between the members of the guerrilla group and the Japanese soldiers. She was a pro-Japanese because many times the Japanese soldiers went to her place, the Japanese soldiers went to her house and drank tuba." (39). The people in Agrupacion were informed by the members of the guerrilla to evacuate. Catalina Cantong did not evacuate. Guillerma de los Reyes became a common-law wife of Vivencio Celespara in 1943. (40). Guillerma de los is the legitimate wife of Sotero Cantong. She the paramour of the accused in October, 1943, "in the evacuation place." (41). Once the witness saw Japanese people at the house of Catalina Cantong. They were laughing. (43). Sotero Cantong was a policeman under the Japanese regime. (44)

- Vivencio Celespara, 20, single, farmer.—Previous to 1942 "I was a member of the guerrilla organization to fight against the enemy." His commander was Sergeant Donor. The group was composed of 25 members, armed with rifles. (45). "Two runners informed our leader Sergeant Donor that they saw Japanese soldiers in the house of Sotero Cantong and there were five Japanese drinking tuba. (47). At about 4 o'clock in the afternoon, we were ordered by Sergeant Donor to get ready because we are going to attack barrio Agrupacion where the Japanese were. Once the order was given we were lined up in our camp and there a distribution of arms and ammunitions was made. Each one of us were given a rifle and one bullet with further instruction that whoever among us would not be decided to fight, he will be the one to kill us. And he further said that whoever among us would be able to

kill a Japanese would be given a prize. So we left for Agrupacion. Upon our arrival at Agrupacion we were at the outskirts of the barrio and he instructed us not to get near to the barrio because it may be that the Japanese are there. After that we were distributed. Some were detailed in the house of Murillo, and others in the house of Sotero Cantong." (48). There were only three houses occupied at the time in Agrupacion. "While we were in the house of Sotero Cantong we were then distributed. Some were at the door, others at the window. I was then detailed at the door. Then later on we heard two gunshots and we heard a commotion in that house. we were encircling the house of Sotero Cantong we were of course at a distance of 20 brazas. We noticed that it was somebody opening the Window in the attitude of jumping through the window. So, upon seeing it, I immediately fired. Then I heard two shots in another portion of the barrio." (49). The one who fired towards the window was Silvestre Rondina, one of the witnesses for the prosecution. As to the persons in the house, "we thought they were Japanese. We ran away because we had no more bullets." Each soldier was given only one bullet. The witness had only one. He reported the incident to their chief. (50). "When we arrived near the mountain we were questioned by Donor as to how many have fired. Four of us reported to have fired. The rest of us told Donor that they did not fire because they were afraid." Those who fired were the accused, Silvestre Rondina, Victorino Caranog and another. They reported to Donor that they fired at the Japanese. "The following day, in the morning, we found out that we killed one but not a Japanese." A Filipino was killed. (51). Guillerma de los Reyes, wife of Sotero Cantong, went in 1943 to their place, and so they lived as husband and wife. In 1942 the accused was who not courting yet Guillerma de los Reyes/was already married. They got acquainted in 1943. He used to see her often. On October 2, 1942, they were in all 25 guerrilleros. (53). It was a dark night on October 2, 1945. But the accused could see the people. He did not see any Japanese sentry guarding the house of Sotero Cantong. fthere was no truck. (54). Those who fired in the house of barrio lieutenant Murillo were Victorino Caranog and "another man from the interior." Nobody was killed. There was a casualty only in the house of Catalina Cantong. (55). The accused does not know who fired the fatal shot, whether he or Silvestre Rondina. (56).

Sotero Cantong, as rebuttal witness, said that it is not true that he was a policeman under the Japanese regime. It is not true that he ever invited Yivencio Celespara to become a Japanese policeman as stated by the mother of the accused. (57). It is not true that in his house the Japanese were seen often entertained with tuba. "No Japanese came to my house. They simply went to the house of the barrio lieutenant Celestino Murillo." On October 2, 1942, the night of the killing, there were no Japanese in barrio Agrupacion. Catalina Cantong had never entertained in their house any Japanese. (58),

There is no question that Catalina Cantong was killed by appellant. The killing took place in the manner narrated by the witnesses for the prosecution. The uncorroborated testimony of appellant that he and his companions were assigned to surround the house of Sotero Cantong in the belief that there were Japanese therein and that he and three other companions fired from a distance when they saw that somebody was moving in the house in an attempt to jump and that in the next morning they found out that a Fllipina was killed, cannot be taken seriously. Although the testimony of Sotero Cantong may be attributed to his grudge, because his wife was taken by the accused, there is no reason why the two other witnesses for the prosecution, Victorino Caranog and Silvestre Rondina, should falsely testify against appellant, their comrade-in-arms during the Japanese occupation.

Appellant is guilty of the crime of murder, qualified by treachery. The prosecution recommends that the death penalty be imposed upon appellant, alleging that the offense was committed with the aggravating circumstances of nocturnity and dwelling. There is no evidence that the accused has intentionally sought the cover of darkness of the night to prevent his being recognized, to avoid interference, or to obtain some other advantage. There is no evidence that the house wherein she was killed was the dwelling of the deceased. According to Sotero Cantong, he built it on the occasion of his wife's delivery. The mere fact that the deceased was at the time of the shooting taking supper in the house did not make her a dweller therein. No aggravating circumstance can be considered in

this case.

The age of the accused had posed a legal problem. At the time he testified on March 22, 1947, he was 20 years old. The crime was committed on October 2, 1942. Therefore he was then between 15 and 16 years old. That fact would entitle him to the benefits of Article 80 of the Revised Penal Code. But this article presupposes that the accused is yet a minor. Because he is already of age, appellant can no longer be committed to the custody of the proper institution as provided in Article 80 of the Revised Penal Code. It has been suggested that in the absence of a report from such an institution, the purposes of the law may be attained by the information as to the minor's conduct that can be given by prison officials or other competent persons who had been in a position to observe the minor and, upon such suppletory information, the court may order the final release of the accused or impose upon him the corresponding penalty.

Appellant's specific case, however, would not require us to decide how the legislative hiatus in Article 80 of the Revised Penal Code can be filled. The deficiency can be left to Congress for appropriate correction. Both witnesses for the prosecution and for the defense, without excluding appellant, agree that the latter has been living in adultery with Guillerma de los Reyes, wife of Sotero Cantong, since 1943, and such conduct precludes appellant from enjoying the right to be released provided by Article 80 of the Revised Penal Code. The fact that he was a minor at the time he committed the offense can, however, be considered as a mitigating circumstance.

Accordingly, the appealed decision is modified and appellant is sentenced to an indeterminate penalty ranging from 10 years and 1 day, prison mayor, to 17 years, 4 months and 1 day, reclusion temporal, to be served in the manner provided for by Article 70 of the Revised Penal Code, and as recommended by the prosecution and in accordance with the ruling enunciated in *people vs. Amansec*, L-927, to pay the heirs of the deceased the sum of P6,000.00 and the costs.

Moran, C.J., Pablo, Bengzon, Briones, Montemayor, JJ., concur.

Paras Feria and Tuason, JJ., concur in the result.

Judgment affirmed.

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