

THE UNITED STATES, PLAINTIFF ANA APPELLEE, VS. CASIANO BANZUELA AND ANSELMO BANZUELA, DEFENDANTS AND APPELLANTS.

G. R. No. 10172. October 01, 1915

Ponente: ARAULLO, J.

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ARAULLO, J.:

These proceedings were commenced by a complaint filed by the provincial fiscal in the Court of First Instance of Laguna on February 14, 1914, which was drawn up in the following terms:

"The undersigned charges Casiaho Banzuela and Anselmo Banzuela with the crime of homicide committed as follows:

"About the 24th of November, 1913, in the municipality of San Pablo, Province of Laguna, the said accused persons, neither of them being either the father, mother, legitimate or illegitimate child, ascendant, or spouse of Carlos Violan, did, intentionally, maliciously and criminally, kill the latter with a dagger, pocket knife and monkey wrench—an act committed in violation of law."

At the commencement of the hearing of the case, on March 2 of the same year, 1914, counsel for the defendants stated to the court that a preliminary investigation of the matter had been held in the pueblo of San Pablo and that in view of the evidence adduced therein the justice of the peace declared the defendant Anselmo Banzuela to be innocent, or rather that he was probably not guilty of the crime charged; that the said charge freed Anselmo Banzuela from a charge in the Court of First Instance, unless & preliminary investigation be again held with respect to him, and for these reasons the said attorney moved that the name of Anselmo Banzuela be stricken from the complaint.

The fiscal, in turn, stated that the defendants had in fact been accused in the justice of the peace court, the information being supported by affidavits which the court had deemed sufficient to order the defendants' arrest; that in the preliminary investigation, which he attended, he did not believe it advisable for the prosecution to exhibit all its evidence, wherefore he presented only one witness, and the justice of the peace stated it to be his opinion that Anselmo Banzuela was innocent; but that such expression of opinion could not warrant the exclusion of defendant from the proceedings nor free him from the complaint, inasmuch as a preliminary investigation had already been held. He added, furthermore, that he objected to a new investigation being made with respect to this defendant. After again hearing counsel for the defendant, who insisted that, in conformity with the provisions of section 2 of Act No. 194, the accused Anselmo Banzuela was entitled to a preliminary investigation, the court denied the said attorney's motion to exclude. Immediately thereafter the latter excepted to this ruling and moved the court to hold a preliminary investigation, previous to determining whether there was probable cause for the prosecution of his client. This petition was denied by the court, on the ground that it had just declared that such investigation had already been held. An exception to this ruling was also taken by counsel for the said accused.

Thereupon the said attorney announced that the two accused waived arraignment and pleaded not guilty. After

due trial the Court of First Instance, on March 7, 1914, rendered judgment in which it held that the said Casiano Banzuela and Anselmo Banzuela were guilty of the crime of homicide as charged in the complaint, with no extenuating or aggravating circumstances, and sentenced each of them to 14 years, 8 months and 1 day of reclusion temporal, with the corresponding accessory penalties, to indemnify jointly and severally the family of the deceased in the sum of P1,000, and to pay each one-half of the costs. From this judgment the defendants appealed, and their counsel has alleged in this instance that the lower court erred:

"1. In continuing these proceedings against Anselmo Banzuela, inasmuch as in the preliminary investigation they were dismissed with respect to him.

"2. In denying his petition that a preliminary investigation first be held before compelling him to answer the complaint.

"3. In subjecting him to a trial in criminal proceedings without previous judicial declaration of probable cause.

"4. In sentencing him without due process of law.

"5. In finding the appellant Casiano Banzuela guilty and not allowing in his favor the exempting circumstance of lawful defense.

"6. In sentencing the appellant Anselmo Banzuela, notwithstanding that the evidence shows his entire innocence.

"7. In not allowing the defendants the benefit of reasonable doubt."

The general provision contained in section 13 of General Orders No. 58 is explicit. It provides that when a complaint is laid before a magistrate, he must examine, on oath, the informant or prosecutor and the witnesses, and if he be satisfied that the crime complained of has been committed, and that there is reasonable ground to believe that the party charged has committed it, he must issue an order for his arrest and admit him to bail if the offense is bailable.

Very explicit also are the general provisions contained in section 14 of the same General Orders, pursuant to which, if the magistrate believes from the evidence submitted, either that the crime complained of was not committed, or that, if committed, the person charged did not commit it, he must set the person at liberty; but such release shall not prevent the filing of a new complaint or information and the arrest of the accused thereon at any time before the prosecution of the offense shall be barred by the statute.

With respect to the procedure which must be followed when the crimes charged are alleged to have been committed in the provinces of the Philippine Islands, with the exception of the city of Manila, that is, within the limits of the respective municipalities of such provinces, the provisions of section 1 of Act No. 194 of the Philippine Commission are also very clear and precise. They prescribe that every justice of the peace in the Philippine Islands is vested with authority to make a preliminary investigation of any crime alleged to have been committed within his municipality, jurisdiction to hear and determine which was vested in the judges or Courts of First Instance; and, further; that it shall be the duty of every justice of the peace, when written complaint under oath has been made to him that a crime has been committed within his municipality and there is reason to believe that any person has committed the same which complaint the justice believes to be well founded, to issue an order for the arrest of the accused and have him brought before the justice of the peace for such preliminary examination.

In connection with the provisions of the said section 1 of Act No. 194, those of section 2 of the same Act are also clear and precise, according to which, when the accused is brought before the justice of the peace, it shall be his

duty to inform the accused person of the charge, to give him an opportunity to examine the complaint and the affidavits, if any, of all the witnesses in support thereof, to make a preliminary investigation of the charge, in the manner and form provided in this section, and, upon the conclusion of the preliminary investigation, if the justice of the peace is of the opinion that there is reasonable cause to believe that an offense has been committed and that the accused is guilty thereof, he shall so declare and shall adjudge that the accused be remanded to jail for safekeeping to await the action of the judge or the Court of First Instance, unless he give bail for his appearance; but, if the justice of the peace be of the opinion that no crime has been committed, or that there is no reasonable ground to believe the accused guilty thereof, the justice of the peace shall order the discharge of the accused.

This same section further provides however, that such discharge shall not operate as a final acquittal of the accused, but he may be again arrested and prosecuted for the same offense.

The legal provisions above cited recognize and affirm the right of every person charged with the commission of a crime to a preliminary investigation, or to have preliminary proceedings conducted such as shall tend to show whether the crime charged was committed and whether there is reasonable ground to believe that the accused committed it, before he be imprisoned and subjected to trial. Such preliminary investigation, which in general terms is prescribed in the said General Orders No. 58, or the law of criminal procedure now in force, may, pursuant to section 39 of Act No. 183, as amended by section 2 of Act No. 612, be made by the prosecuting attorney of the city of Manila, in cases triable in the courts of the other provinces of the Archipelago, when the crime was committed within their respective jurisdiction, and shall be conducted subject to the provisions of the said Act No. 194, as amended by Acts Nos. 1450 and 1627. Section 37 of this last Act amended section 1 of Act No. 194 in the sense that the Court of First Instance of the province, or the justice of the peace of the provincial capital or of the municipality in which the provincial jail is located, when directed by an order from the judge of first instance, shall have jurisdiction to conduct such investigations at the expense of the municipality wherein the crime or offense was committed, though alleged to have been committed anywhere within the province.

The diligent foresight of the legislator in granting jurisdiction for the conduction of preliminary investigations or proceedings, not only to the justice of the peace courts, within whose jurisdiction the crime complained of was committed, but also to any justice of the peace of the province, to the justice of the peace of the provincial capital and to the Court of First Instance itself, shows the purpose of the law to be that no person charged with the commission of any crime shall be deprived of that right.

The preliminary investigation which must be conducted by the justice of the peace, is, pursuant to the provisions of Act No. 194, the necessary and indispensable commencement of the proceedings against the accused, for its purpose is to determine whether there is reasonable cause to believe that the crime complained of has been committed; whether the accused is guilty thereof and whether there is reasonable ground for believing that he committed it, before depriving him of his liberty and subjecting him to trial. If such determination be in the affirmative and in conformity with the provisions of section 2 of the same Act, the justice of the peace orders the imprisonment of the accused or his release on bail and places him at the disposition of the Court of First Instance for such action as the latter may deem proper, then beyond all doubt the proceedings must be continued against the accused, after the filing of the requisite complaint by the provincial fiscal. But where such determination be in the negative, or what amounts to the same thing, when the justice of the peace, as this same section 2 prescribes, is of the opinion that no crime has been committed, or that there is no reasonable ground to believe the accused guilty thereof, the justice of the peace, by imperative mandate of the law, must order the discharge of the accused, and this having been done and the accused, consequently, not having been placed at the disposition of the Court of First Instance for such action as might be proper in the premises, as in the above case, it is unquestionable that the proceedings initiated by the justice of the peace court, or to put it better, the commencement of the proceedings

against the accused had in the justice of the peace court, was terminated and can not serve as a basis for the prosecution or trial of the accused in the Court of First Instance.

The fact, then, that a preliminary investigation was made before the justice of the peace of San Pablo with respect to Anselmo Banzuela in the matter of the crime of which he was charged in these proceedings—an investigation which, as the provincial fiscal stated at the opening of the trial, resulted in the finding that the said accused was innocent and, consequently, in his being ordered released,—could not serve as a bar, as the provincial fiscal and lower court understood, to another preliminary investigation with respect to the same accused by virtue of the complaint filed against him by the said fiscal. There was no need to base or ground the same, because it could have no such basis or grounds, on the previous preliminary investigation conducted in the said justice of the peace court with respect to the same accused, Anselmo Banzuela, which investigation, as aforesaid, terminated with the declaration that there was no reasonable ground for believing that he was guilty of the crime of which he had been charged. It differed from the information filed against the other accused, Casiano Banzuela, who had been placed at the disposition of the Court of First Instance by the justice of the peace court, and whose arrest had already been ordered by the latter precisely for the purpose definitely intended by the law, that is, the filing of the required complaint against him by the provincial fiscal.

If the preliminary investigation conducted with regard to Anselmo Banzuela could be or could have been lawfully utilized by the provincial fiscal for the purpose of filing the complaint against the said accused and of prosecuting the action against him wherein he was sentenced, in the same manner that the said fiscal utilized the preliminary investigation had with respect to the other accused, Casiano Banzuela, who also was tried and sentenced by virtue of the aforementioned complaint, to the provisions of which we have just referred, the precept of said section 2 of Act No. 194 would be entirely useless, for there would be no difference whatever between the action of the justice of the peace in ordering the arrest of an accused person and placing him at the disposition of the Court of First Instance, because in his opinion reasonable grounds existed for believing that the accused was guilty of the crime charged in the information, and in the justice ordering the release of an accused person and not placing him at the disposition of the Court of First Instance, because of his opinion that there were no grounds for believing that the said accused was guilty of the crime charged against him. In brief, the declarations and determinations which, in such a contrary sense, the justice of the peace as a result of the preliminary investigation would have made and adopted in accordance with the provisions of the law, would produce the same effect for the provincial fiscal, for the Court of First Instance and upon the rights of the person charged with a crime. That would be a downright absurdity.

Precisely that which shows that the Court of First Instance cannot avail itself of the preliminary investigation held by the justice of the peace, in accordance with the provisions of Act No. 194, for the purpose of ordering the arrest of the accused and subjecting him to a criminal action in which a judgment of conviction may be pronounced upon him, when, as a result of the said preliminary investigation, the justice of the peace who made it had ordered the release of the accused because of said court's opinion that no reasonable grounds existed to believe the accused guilty or that he committed the crime, is that both General Orders No. 58, in its section 14, and Act No. 194, in its section 2, explicitly provide that in such an event the release ordered by the magistrate or justice of the peace who made the investigation shall not be understood to operate as a final acquittal of the accused, shall not prevent the filing of a new information or complaint and the arrest of the accused thereon at any time before the prosecution of the offense is barred by the statute.

It is in this sense that it may be understood, as stated by the Court of First Instance in deciding the motion in question presented by counsel for Anselmo Banzuela, that the opinion of the justice of the peace with regard to the result of the preliminary investigation is not *res judicata*; but this does not mean that the Court of First

Instance, as understood and stated by the trial court in ruling on the said motion, is authorized to review the preliminary investigation made by the justice of the peace court and may, if he finds that the latter erred in finding that there were no reasonable grounds to justify the prosecution of the accused, utilize the preliminary investigation for the purpose of ordering the temporary imprisonment of the accused and subjecting him to trial, notwithstanding that the justice of the peace who made the investigation ordered his release. Preliminary proceedings are not brought up before the Court of First Instance either in consultation or on appeal, but their result serves the fiscal as a basis on which to file the complaint, the accused, meanwhile, whom the justice of the peace has found guilty and for this reason has been temporarily imprisoned awaiting trial or has been released on bail, being at the disposition of the Court of First Instance.

For this same reason the fiscal cannot file a complaint against an accused person on the strength of the preliminary investigation, or by submitting the latter to the consideration of the Court of First Instance, when the justice of the peace court has found the accused not guilty of the crime complained of, has consequently ordered his release and has not placed him at the disposition of the said Court of First Instance. The trial court, therefore, erred in holding that, inasmuch as the transcript of the testimony given by Jeremias Villanueva in the preliminary investigation conducted by the justice of the peace of San Pablo with respect to Anselmo Banzuela showed there were reasonable grounds to warrant this defendant's prosecution, the said trial court could consider the preliminary investigation requested with such insistency by Anselmo Banzuela's attorney to be unnecessary because that investigation had already been held before the justice of the peace of San Pablo.

It being unquestionable that the said investigation had was absolutely worthless as a basis for the complaint filed by the provincial fiscal against Anselmo Banzuela, and the law having explicitly recognized and established the right of any person, accused of a crime, not to be deprived of his liberty or subjected to trial until after a preliminary investigation has been made from which it is shown that there are reasonable grounds to believe him guilty of the crime charged against him, it is beyond all question that the defendant Anselmo Banzuela was deprived of his liberty, tried and sentenced in this cause by virtue of a complaint filed against him by the provincial fiscal of Laguna on February 14, 1914, without due process of law, that is, without the holding of the proper preliminary investigation with respect to him as requested by his attorney at the commencement of the hearing in this cause. Consequently, the Court of First Instance of Laguna incurred the first four assignments of error specified by the defense in its brief,— errors which nullify the judgment rendered against the said defendant and all the proceedings had with respect to him in the said trial. The order to release the accused, Anselmo Banzuela, given by the justice of the peace court of San Pablo in that preliminary investigation, must not, however, be understood to operate as a final acquittal, nor does that order prevent the filing of a new complaint against him, for the crime has not yet prescribed; and after the complaint has been filed by the provincial fiscal of Laguna the proper preliminary investigation must be held and the Court of First Instance must take such action as the law requires upon the termination of the proceedings.

With respect to the defendant Casiano Banzuela, the defense contends in its brief that he should be exempted from all criminal liability for the death of Carlos Violan because this defendant acted in lawful self-defense, the three requisites for such exemption which are required in article 8, No. 4, of the Penal Code having concurred.

In support of his theory, the defense admits that there was a struggle between the defendant Casiano Banzuela and Carlos Violan and that the latter died as a result of the wounds inflicted upon him during that struggle. In relating what occurred between these two men the defense, in fact, says in its brief:

"The struggle reached such a pitch that the assailant and the assaulted party approached very near each other, and it was then that Casiano Banzuela was able to use his weapon and stab the deceased a number of times in the breast, in the stomach and, finally, once in the neck, thus piercing the spinal cord, and upon striking this

blow not only Carlos Violan, but also Casiano Banzuela fell down. Carlos Violan fell never to rise again, for he felt that he was dying from the wounds he had received."

It was proved at trial that the struggle to which the defense refers and which took place between defendant Casiano Banzuela and Carlos Violan, occurred a little after 4 o'clock of the afternoon of the 24th of November, 1913, on one side of the main street of the barrio of Balanga, pueblo of San Pablo, Province of Laguna; that Carlos Violan died a few moments after he had fallen, as a result of the wounds he received in that struggle, his inert body remaining stretched out at full length near the gate of a fence until after dark when the lieutenant of the barrio and other agents of the authorities appeared at the place, picked up the corpse and carried it to the pueblo; that in the meantime the defendant, Casiano Banzuela, who had started to flee as soon as Carlos Violan fell mortally wounded, disappeared from the sight of the many persons who had witnessed the struggle, and kept in hiding that night in a deserted part of one of the neighboring barrios and afterwards in a shack belonging to a relative of his, and that the police who went to find and arrest him did not discover him during the time that elapsed from the afternoon of the 24th of November, when the crime was committed, to the 23d of the following month of December, when the defendant gave himself up to the municipal president of the pueblo of Alaminos of the aforesaid province.

On the morning of the day following the commission of the crime the corpse of Carlos Violan was examined by Doctors Jose M. Delgado and Justiniano Jaojoeo, and was found to present eight wounds, all of them produced by a stabbing instrument, except one, which was inflicted by a stabbing and cutting instrument. The first wound was on a line between the two sternal and mammary lines, on a level with the fourth left intercostal space, and reached and made a deep incision in the heart; the second, in the fifth intercostal space of the right side, half a centimeter above the right nipple, injuring the lung on the same side; the third, in left side of the umbilical region, affecting the peritoneum and the intestines; the fourth, in the abdominal cavity, on a level with the eleventh rib, also injuring the peritoneum and the intestines; the fifth, in the lower part of the left mastoid region, injuring the spinal cord; the sixth, in the left lateral part of the region of the left hypochondrium, and which affected only the muscular sheath; the seventh, in the posterior part of the middle axillar line, on a level with the eighth rib of the left side; and the eighth, in the outer side of the first joint of the thumb of the right hand. The first five of these wounds were necessarily mortal; the sixth was slight, and the last two were of minor importance.

The physician and president of the municipal board of health Doctor Jaojoco, having also examined the defendant Casiano Banzuela, on January 20 of the following year, 1914, (for, as aforesaid, this defendant had disappeared and his whereabouts were not discovered until the 23d of December of the previous year 1913), it was found that he had eight healed wounds apparently caused by a cutting instrument. The first wound was in the upper right side of the occipito-parietal region; the second, in the lower portion of the left antero-lateral part of the neck; the third, in the lower part of the outer side of the right arm; the fourth, in lower third of the back of the right forearm; the fifth, in the lower part of the back of the same forearm; the sixth, appearing to be a continuation of the fourth and fifth wounds, in the back of the right hand; the seventh on the lower and inner part of the back of the left hand; and the eighth, in the right upper side of the epigastric region, and, as a continuation of this wound, a scar two and a half centimeters long of a wound that only injured the skin. As stated by the said physician in his certificate, Exhibit 1 of the defense, these wounds were apparently caused by a cutting instrument, the second, fourth, fifth, sixth and eighth of them being superficial.

It was also proved at the trial that before 4 o'clock in the said afternoon of the 24th of November, 1913, Casiano Banzuela and Carlos Violan were gambling at monte in the barrio of Balanga; that because Banzuela would not trust Violan for a bet of half a peso which the latter had made on a card, a quarrel arose between them during which Violan struck Banzuela a blow on the neck with his bolo, the same weapon which produced the cicatrized

superficial wound found by Doctor Jaojoco when he examined this defendant on January 20, 1914, and one of those mentioned in the certificate, Exhibit 1. It is likewise proved that that dispute was settled and the two disputants were separated by the efforts of Francisco Munda, a resident of the said barrio of Balanga, who, on seeing that they were wrangling and that Casiano Banzuela was wounded in the neck, said to them, after learning the cause of the dispute, that it was not worth while for them to continue to act that way; that he took hold of Carlos Violan and led him toward the street to a point about 250 meters away from the scene of the quarrel; that meanwhile the defendant Casiano had withdrawn; that witness did not continue to accompany Violan, because his (Munda's) wife did not allow him and obliged witness to return home with her; that, therefore, witness left Casiano at the side of the street, advising him to take a carromata or the train and withdraw.

The defendant Casiano Banzuela took the stand in his own behalf, and in relating what occurred after Francisco Munda had separated him from Carlos Violan, said that he, Casiano, continued on his way in the direction of Tiaong for the purpose of boarding the train there; that just as he had started he heard a voice say: "Wait, Casiano;" that he then turned his head and saw that it was Carlos Violan who was calling him; that he thereupon quickened his steps and almost ran, but that Violan pursued and overtook him and struck him a blow on the head which made him stagger, and afterwards, another cut on his right arm; that defendant then drew out his pocket knife and Violan thrust at him with the bolo he, Violan, was carrying; that defendant fell sideways against the fence to avoid the blow, and, while in this position, Violan struck him another blow which he parried with his left hand, for it was aimed at his neck; that Violan struck him another blow and he defended himself with his right hand in which he held the pocket knife, and believed that it was with this weapon that he wounded his assailant; that Violan continued to strike him while he defended himself and fell back; that, as he saw that his life was in danger because his assailant wished to kill him, he grappled with Violan, caught him by the neck and struck him on the breast and the stomach, wounding him when they were near the fence; that the struggle ended by their falling down together; and that when they fell defendant saw that his pocket knife was sticking in Carlos' neck and he drew it out.

Victorino Montecillo, a witness for the defense, testified that he saw Carlos Violan, who was carrying a bolo, pursue the defendant and strike him a blow on the head. He related what then occurred between these two men and his story was the same as that told by the defendant. He further stated that "when Carlos saw that his blows were not effective, on account of the nearness of Casiano to Carlos, he rushed upon Casiano and seized him by the throat, notwithstanding which Casiano struck him a blow in the direction of his shoulder, and it was then I saw that they both fell." This witness finally added that when he was going away, frightened by what he had seen, he turned his head and saw that Casiano was getting up.

No other witness testified at the trial that, after Francisco Munda had separated Casiano Banzuela and Carlos Violan, the former already having the wound in his neck inflicted by the latter with his bolo, Violan pursued this defendant, and that as a result of pursuing and overtaking him the struggle between them took place which resulted in the death of Carlos Violan.

On the contrary, when Francisco Munda, who was obliged by his wife to retire to his house with her and leave Carlos Violan in the street, was already separated from the defendant and at some distance from him, in front of and about to enter his house, he glanced down the street and saw these two men fighting at a distance of about 120 meters from him. It is therefore strange that he should not then have seen Carlos Violan pursue the defendant.

Leon de Silva, who was also that afternoon in the vicinity of the place where the struggle took place, for he had gone there to gamble, and saw Francisco Munda accompanying Violan, testified that after a little while Munda left the latter; that a moment later the defendant appeared and, on approaching Violan, unsheathed his weapon, as the latter did his, and the two men began to fight, so witness said, when they were about 20 meters distant from

him. It is also strange that at that moment this witness should not have seen Carlos Violan pursue the defendant. On the court's endeavoring to ascertain which of the two combatants struck the first blow, this witness answered the questions which were put to him in the following manner:

"Court: Do you know who struck first?—A. Both of them struck at the same time.

"Q. Who are the two who struck each other at the same time?—A. Carlos and Casiano.

"Q. Whom did Carlos strike?—A. One struck the other and at the same time the other stabbed in return."

Victor Cobel, who that afternoon passed along the same road on his way from his rice field in Tiaong to the barrio of Santa Cruz, and was, as he himself stated, in the crowd of spectators, who numbered more than thirty, and at a distance of 20 meters from the combatants, saw that Carlos Violan and the defendant were fighting, and that the latter had a dagger and the former a bolo. He also saw the defendant snatch away the bolo carried by his opponent, and saw the latter fall with blood on his breast. He then left the place. Neither did this witness, in relating what he saw, make mention of having seen Carlos Violan pursue the defendant.

It cannot be denied that the fact of Carlos Violan having struck the defendant a cut on the neck with his bolo when the altercation arose between them, caused by this defendant's refusal to loan Violan half a peso for a bet in the game, was an unlawful assault; but as the two disputants had already been separated by Francisco Munda, as the one had already gone away from the other, and as a considerable time elapsed between the moment the defendant was wounded by Carlos Violan with his bolo and the time when the two armed men fought in a place other than that where they had the altercation, though in the same barrio, the said unlawful assault can not be held to be sufficient to exempt the defendant from criminal liability, nor can the act performed by the latter in killing Carlos Violan be considered an act of lawful self-defense against that assault, as claimed by his attorney, because, in order that an unlawful assault may be set up as a defense for the purpose of such exemption from liability in accordance with the provisions of article 8, No. 4 of the Penal Code, it is necessary that the assault be immediate, imminent, and that the person who defends himself therefrom find himself attacked or threatened by a danger which may be visited upon him in the very moment when he acts in self-defense. The harm caused by one person to another who offended or caused him injury, some time after he suffered such offense or such injury, does not constitute an act of self-defense, but an act of revenge which can find no justification whatever in the eyes of the law, even though the harm or the offense inflicted upon him be an aggression which is considered by the statute to be unlawful.

Although the defendant stated at the trial, and his testimony was corroborated by a witness, that after he had already been separated by Francisco Munda from Carlos Violan and was going toward Tiaong there to take the train, he was pursued and overtaken by Violan who struck him with his bolo,—a statement used by the defense as a ground for maintaining that for the second time the defendant was unlawfully assaulted by Violan and found it necessary to employ the means he did employ, which under those circumstances were reasonable, to repel the assault by wounding Violan, who was not provoked by the defendant,—no credence can be given to such testimony in view of that produced by the witnesses for the prosecution who were there present and saw what then occurred between Violan and the defendant. The truth of their testimony can not be doubted, for there is not an iota of evidence in the record to induce the belief that these witnesses for the prosecution had any interest whatever in making the criminal act performed by Casiano Banzuela appear to be more serious than it actually was. On the other hand, it is more likely that the defendant Casiano Banzuela would try to obtain revenge for the ill treatment inflicted upon him by Carlos Violan and to return evil for evil when the two men found themselves in the same road, now free from all intervention on the part of Francisco Munda, and that he should pursue and attack Carlos Violan, than that the latter, who must already have been satisfied, because a few moments before, he

had wounded the defendant, should have again attacked and assaulted him. Moreover, the location and number of the cicatrized wounds found on Casiano Banzuela one month and a half after the occurrence, the greater+ part of them superficial and the rest of very slight importance, show that he could not have been pursued and attacked by Carlos Violan with a bolo, as related by the defendant himself and his witness Montecillo, before this defendant attacked Violan with his dagger,—which, besides a monkey wrench, he carried about with him since the morning of the day of the crime, according to the testimony of Vicente Luistro,—because he would have been rendered incapable of making such a furious assault upon Carlos Violan and causing him so many and such serious wounds as he did, leaving him almost dead on the edge of the road and fleeing, not again to appear for more than a month. This latter detail indicates also that he did not consider himself free from responsibility for the act performed by him, for otherwise he would immediately have surrendered himself to the authorities and under their protection would have had nothing to fear from the relatives of the deceased. It was the persecution of the latter, he claimed, that forced him to keep in hiding during that period of time.

That Carlos Violan was not the first to attack the defendant Casiano Banzuela, but that these two men, on meeting each other on the road as soon as they were free from Francisco Munda's interference, attacked and wounded each other, is shown in a positive and conclusive manner by the testimony of Leon de Silva who virtually corroborated these facts, for he saw Carlos Violan while the latter was still accompanied by Francisco Munda; he also saw that after a while Munda left Violan, and he likewise saw that shortly afterwards the defendant Casiano Banzuela appeared and on approaching Violan he unsheathed his weapon, as Carlos likewise did, according to the language of this witness, and they began to fight. This witness also testified that the weapon the defendant carried was a dagger, while that carried by Carlos Violan was a bolo. Witness stated that he saw all this while he was at a distance of only twenty meters from the combatants.

Consequently, the struggle or the duel to the death between the defendant Casiano Banzuela and Carlos Violan took place without prior unlawful aggression on the part of the deceased. Two men on meeting each other on the road, attacked one another reciprocally, one of them with a bolo and the other with a dagger; "they both cut each other," according to the language used by the witness Francisco Munda, and "they both struck each other at the same time," as stated by Leon de Silva, nor did either of them relax his obstinate determination to cause the greatest possible harm to the other, as shown by the number of wounds they both were found to have received, nor did either try to escape or free himself from the attacks of the other, as either of them could have done, being as they were surrounded by a large number of persons among whom they could have found some protection or help, although these onlookers, terror-stricken at the sight of such a bloody spectacle, did not venture to interpose themselves between the combatants.

As unlawful aggression by the offended party is an essential and primal element of just defense and a requisite prescribed in No. 4 of article 8 of the Penal Code, as the first and most fundamental condition necessary to work exemption from criminal liability in self-defense; and as the killing of Carlos Violan by the defendant Casiano Banzuela was the result of a struggle between them, with no unlawful aggression on the part of the deceased, the trial court did not err in not allowing in behalf of this defendant the said circumstance of exemption from liability, and in finding him guilty of the crime of homicide, provided for and punished by article 404 of the Penal Code, without any circumstance modifying such liability, and, finally, in imposing upon him, as was done in the judgment appealed from, the penalty fixed for the said crime in its medium degree, with the accessory and other penalties therein specified.

For the foregoing reasons, we affirm the judgment appealed from, with respect to the defendant Casiano Banzuela, with one-half of the costs of both instances; provided, however, that the indemnity in the sum of P1,000 to the family of the deceased, to the payment of which the said defendant was sentenced, shall not be satisfied

jointly and severally with the other defendant, Anselmo Banzuela. We set aside the judgment appealed from and declare null and void all the proceedings had at trial, excepting the complaint, with respect to the defendant Anselmo Banzuela, with one-half of the costs de oficio, and after the proper preliminary investigation has been held by virtue of the said complaint, the lower court shall proceed in accordance with law as regards this defendant. So ordered.

Torres, Carson and Trent, JJ., concur.

Johnson, J., dissents.

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