

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. PROTASIO EDUAVE, DEFENDANT AND APPELLANT.

G.R. No. 12155. February 02, 1917

Ponente: MORELAND, J.

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MORELAND, J.:

We believe that the accused is guilty of frustrated murder.

We are satisfied that there was an intent to kill in this case. A deadly weapon was used. The blow was directed toward a vital part of the body. The aggressor stated his purpose to kill, thought he had killed, and threw the body into the bushes. When he gave himself up he declared that he had killed the complainant.

There was alevosia to qualify the crime as murder if death had resulted. The accused rushed upon the girl suddenly and struck her from behind, in part at least, with a sharp bolo, producing a frightful gash in the lumbar region and slightly to the side eight and one-half inches long and two inches deep, severing all of the muscles and tissues of that part.

The motive of the crime was that the accused was incensed at the girl for the reason that she had theretofore charged him criminally before the local officials with having raped her and with being the cause of her pregnancy. He was her mother's querido and was living with her as such at the time the crime here charged was committed.

That the accused is guilty of some crime is not denied. The only question is the precise crime of which he should be convicted. It is contended, in the first place, that, if death had resulted, the crime would not have been murder but homicide, and in the second place, that it is attempted and not frustrated homicide.

As to the first contention, we are of the opinion that the crime committed would have been murder if the girl had been killed. It is qualified by the circumstance of alevosia, the accused making a sudden attack upon his victim from the rear, or partly from the rear, and dealing her a terrible blow in the back and side with his bolo. Such an attack necessitates the finding that it was made treacherously' and that being so the crime would have been qualified as murder if death had resulted.

As to the second contention, we are of the opinion that the crime was frustrated and not attempted murder. Article 3 of the Penal Code defines a frustrated felony as follows:

"A felony is frustrated when the offender performs all the acts of execution which should produce the felony as a consequence, but which, nevertheless, do not produce it by reason of causes independent of the will of the perpetrator."

An attempted felony is defined thus:

"There is an attempt when the offender commences the commission of the felony directly by overt acts, and does not perform all the acts of execution which constitute the felony by reason of some cause or accident other than his own voluntarily desistance."

The crime cannot be attempted murder. This is clear from the fact that the defendant performed all of the acts which should have resulted in the consummated crime and voluntarily desisted from further acts. A crime cannot be held to be attempted unless the offender, after beginning the commission of the crime by overt acts, is prevented, against his will, by some outside cause from performing all of the acts which should produce the crime. In other words, to be an attempted crime the purpose of the offender must be thwarted by a foreign force or agency which intervenes and compels him to stop prior to the moment when he has performed all of the acts which should produce the crime as a consequence, which acts it is his intention to perform. If he has performed all of the acts which should result in the consummation of the crime and voluntarily desists from proceeding further, it can not be an attempt. The essential element which distinguishes attempted from frustrated felony is that, in the latter, there is no intervention of a foreign or extraneous cause or agency between the beginning of the commission of the crime and the moment when all of the acts have been performed which should result in the consummated crime; while in the former there is such intervention and the offender does not arrive at the point of performing all of the acts which should produce the crime. He is stopped short of that point by some cause apart from his voluntary desistance.

To put it in another way, in case of an attempt the offender never passes the subjective phase of the offense. He is interrupted and compelled to desist by the intervention of outside causes before the subjective phase is passed.

On the other hand, in case of frustrated crimes the subjective phase is completely passed. Subjectively the crime is complete. Nothing interrupted the offender while he was passing through the subjective phase. The crime, however, is not consummated by reason of the intervention of causes independent of the will of the offender. He did all that was necessary to commit the crime. If the crime did not result as a consequence it was due to something beyond his control.

The subjective phase is that portion of the acts constituting the crime included between the act which begins the commission of the crime and the last act performed by the offender which, with the prior acts, should result in the consummated crime. From that time forward the phase is objective. It may also be said to be that period occupied by the acts of the offender over which he has control—that period between the point where he begins and the point where he voluntarily desists. If between these two points the offender is stopped by reason of any cause outside of his own voluntary desistance, the subjective phase has not been passed and it is an attempt. If he is not so stopped but continues until he performs the last act, it is frustrated.

That the case before us is frustrated is clear.

The penalty should have been thirteen years of *cadena temporal* there being neither aggravating nor mitigating circumstance. As so modified, the judgment is affirmed with costs. So ordered.

Torres and Araullo, JJ., concur.

Carson and Trent, JJ., concur in the result.

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