

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. LUCAS VIRREY, DEFENDANT AND APPELLANT.*G.R. No. 12901. February 12, 1918*

Ponente: STREET, J.

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This is an appeal brought by the accused, Lucas Virrey, to reverse a judgment of the Court of First Instance of Batangas by which he was convicted of the crime of homicide committed upon the person of Gelasio Violan. By this judgment he was sentenced to fourteen years eight months and one day of reclusion temporal, with the accessories provided by law, was required to indemnify the heirs of the deceased in the sum of P1,000, and to pay the costs.

The facts appearing in the proof are substantially as follows: Upon January 15, 1910, during the fiesta of the municipality of San Pablo, Emilio Briones and Carlos Violan, residents of San Pablo, had a quarrel. Emilio went at once to his house and awaked his brother Crispino Briones, and they both returned to the place where Emilio had left Carlos Violan. Upon arriving there, Carlos was gone, but they found his brother Gelacio. Crispino attacked Gelasio with a bolo, but the latter defended himself with a wire whip and in so doing hit Crispino in one of his eyes and put it out. From this occasion Crispino seems to have been animated by a spirit of revenge; and according to the theory of the prosecution he at once began, with the assistance and encouragement of his brother and friends, to plan an attack upon Gelasio Violan with the purpose of killing him. The testimony of Antonio Ticson strongly supports this View of the case. This witness testified that, shortly after the trouble above-mentioned, he went one night to indulge in gaming at the house of Crispino Briones at the invitation of the latter. He there met Emilio and three others who were from Lipa. One of these was the accused Lucas Virrey. After the gaming was finished, and as the witness was preparing to go home, Crispino asked him if he would like to play some more; and it was suggested that the party should go to another house, which they proceeded to do. When they were in the street in front of the house which they proposed to enter, Crispino said, "If we find Gelasio in this game, we will wait until he comes out/" and Lucas Virrey replied: "Compadre, although we should see Gelasio in the game, we should not attempt to carry out our purpose here; for if we slay him, without doubt suspicion will fall upon you, because he put out your eye, and that is sufficient reason to direct suspicion against you."

When the fiesta at San Pablo was concluded Crispino and his friends departed for Lipa. Later, on January 20, 1910, Gelasio Violan, accompanied by a sister, his brother-in-law Vicente Luistro, and one Luis Castillo, likewise left San Pablo and went to Lipa to attend the fiesta which was being held in that municipality. While there, they were guests in the home of Crispino Laygo. Upon January 22, after breakfast, Gelasio Violan and Luis Castillo asked Crispulo Laygo to accompany them to the cockpit, but the latter replied that he would come later after completing his work. About midday Crispulo left his house and went to the cockpit. Upon arriving he saw Crispino Briones, Lucas Virrey, and two others at an eating house near the cockpit. Upon entering the cockpit he found Luis Castillo and Gelasio Violan. The latter then said to him, "There is my enemy," referring to Crispino,

"He appears to be in company with Lucas; Is that not Lucas?" Crispulo Laygo answered; "Yes; be ready, for you need have no fear if you are prepared." Gelasio Violan then told Luis Castillo to watch for him behind his back as there was his enemy Crispino accompanied by Lucas and the other two.

In the afternoon of the same day Gelasio Violan and Luis Castillo left the house of Crispulo Laygo to take a stroll and after having passed near the church, Gelasio stated that he was tired and asked his companion to return with him to the house. As the two were walking along side by side, they came to a crossing in the street near the house where they were lodging. At this moment Lucas Virrey passed near them and with a dagger or knife made a thrust into the side of Gelasio Violan. The latter, upon receiving the thrust, said to his companion, "Avenge me, for I am badly hurt." Luis then started in pursuit of the assassin; but as he was upon the point of coming up with him the latter warned him not to approach as he would kill him. Thereupon Luis Castillo returned to where Gelasio Violan was standing with his hands covering the wound. Luis Castillo then assisted Gelasio to the house.

The wound was located in the left epigastric region, almost in the abdomen. It passed through the peritoneum and cut the transverse colon and one of the intestines. An internal hemorrhage resulted, and the victim died the next morning.

Upon the night of the day upon which the crime was committed, the justice of the peace of Lipa appeared in the house of Crispulo Laygo, and after assuring himself that the injured man recognized him as a justice, administered an oath and asked him who had wounded him. Gelasio replied that it was Lucas Virrey, in company with Crispino Briones, Dionisio Lumbea, and Lucio Vidal. The justice of the peace proceeded with his questions but the voice of the declarant became gradually imperceptible and dry, until at last he asked the justice to suspend the interrogatories, which was done. The next morning the justice returned, but Gelasio was then unable to make a declaration and presently died.

Meantime Lucas Virrey had fled and could not be apprehended. More than six years later the attention of the Constabulary authorities was drawn to a man in Tabaco, Albay, passing under the name of Canuto Virrey. Upon investigation this personage turned to be none other than Lucas Virrey, against whom the charge of murder was pending in Batangas. He was accordingly arrested and brought to trial.

We consider the guilt of the defendant to be completely established. His complicity in a plan to attack the deceased and possibly take his life is indicated in the testimony of Antonio Ticson, and it is obvious that he was animated with the purpose of avenging the injury that had been inflicted by the deceased upon Crispino Briones. The action of these and their two companions at the cockpit in Lipa upon January 22, 1910, was suspicious; and we think that Gelasio Violan was not mistaken when he guessed that they entertained designs upon his life.

The witness Luis Castillo, who was at the side of the deceased when the mortal blow was struck, could not say with certainty, that at the time the act was committed he recognized Lucas Virrey as the perpetrator of the crime; but he swore that he was a man of low stature and little body, like the accused and his impression was that Lucas Virrey was the man.

Gelasio Violan also made before his death more than one statement naming the accused as the person who had wounded him. But it is not shown that at the time all of these statements were made the declarant was speaking under a sense of impending death. However, at the time he made his statement to the justice of the peace, his condition was already precarious, his respiration being low and labored. Furthermore, the taking of the statement had to be suspended upon account of the failure of his strength. A reasonable inference is that he was at that time in a dying condition and recognized the fact. If so, his statement was admissible; and certainly in view of the fact that no objection was made at the time to the introduction of this statement, we could not hold that the trial court was in error in considering it. With regard to this statement it appears that Gelasio believed he had been attacked

by Lucas, in company with three others; while Luis Castillo saw only one. We do not think that this discrepancy is of vital importance, the more immediate question being as to the identity of the actual assailant. We wish to add, furthermore, that we think the guilt of Lucas Virrey is sufficiently established by evidence apart from the ante mortem statements made by Gelasio Violan.

The immediate flight of the accused and his lengthy sojourn in another province under an assumed name are circumstances to be weighed, in connection with the other proof, as tending to show that he was the person who committed the deed. It is true that flight raises no legal presumption of guilt; but it has always been considered admissible in evidence. (U. S. vs. Alegado, 25 Phil. Rep., 510.) If not explained upon grounds consistent with the fugitive's innocence, the act of fleeing shows a consciousness of guilt and operates as an admission implied from the party's own conduct. The wicked flee when no man pursueth, but the righteous are bold as a lion.

We deem it desirable, before dismissing this case, to say a few words about the conditions under which an ante mortem statement made by an injured person may be received in evidence in the prosecution for homicide committed upon the body of the declarant; for we are led to believe from this and other cases of a similar nature which have come before us, that this subject is not as well understood as it should be by the peace officers and the prosecuting officials at large. Such statements are commonly called "dying declarations;" and their admission in evidence rests upon a well recognized exception to two different rules of law, both of which are of binding force within the limits of their proper application. The first is the rule of evidence which prohibits the introduction of hearsay. The second is the rule which secures to an accused person the right to be confronted by the witnesses who give testimony against him. Concerning the first of these rules no comment need here be made, as the admission of the dying declaration has long been recognized as a proper exception to the hearsay rule. But it is proper to say a few words about the right of the accused to be confronted by the witnesses for the prosecution; and in fact the comment to be made in this connection is pertinent to the rule which excludes hearsay, both being based more or less upon the same conceptions.

It is a cardinal principle of common law procedure in criminal cases that the accused shall have a right to confront and cross-examine the witnesses for the prosecution. This principle will be found stated in the "bill of rights," which forms the first and more general part of the Constitutions of the several States. The Act of Congress of August 29, 1916, relating to the Government of the Philippine Islands, as did the original Philippine Bill, states the rule in this form: "That the accused shall enjoy the right * * * to meet the witnesses face to face." (Act of August 29, 1916, sec. 3.) This principle, in its accepted application, supports the rule of procedure which excludes hearsay evidence; and if literally applied, it would make impossible the introduction of dying declarations in evidence. But the admission of such declarations, subject to certain conditions, is established as proper, the reason assigned being that the practice of admitting them had become fully established in the common law courts before our constitutions were created; and it is held that when the authors of the constitutions framed these instruments they had no intention of disturbing legitimate practices already fully established in common law usage. (Mattox vs. U. S., 146 U. S., 140, 151; 36 L. ed., 917.)

While no question can therefore be made as to the propriety of admitting these declarations, it is nevertheless to be noted that their admission is an exception to general rules and can be sustained on no other ground than that of necessity and to prevent the failure of justice. As can be readily supposed, the courts have not been inclined to extend this exception beyond the well-defined limits set by reason and authority.

The most important of the conditions to be fulfilled before a dying declaration can be admitted has reference to the sanction under which the statement is made; and upon this point it is required that the declarant should have realized and believed at the time the statement was made, that he was in a dying condition and had given up the hope of surviving. (U. S. vs. Gil, 13 Phil. Rep., 530; U. S. vs. Javellana, 14 Phil. Rep., 186; U. S. vs. Montes, 6

Phil. Rep., 443.) It has been supposed that a realization of impending dissolution and the sense of responsibility at the bar of judgment is sufficient, among people of Christian training, to impart a sanction to a dying statement at least equal to that which is supposed to be derived from an oath.

In every case, therefore, where such a statement is offered in evidence, it is important to bring before the court, the evidence tending to establish that the declarant was so circumstanced as to realize with certainty that death was at hand. This may be shown by the words or statements of the declarant himself, or it may be inferred from the nature and extent of the wounds inflicted. It may also be shown by his conduct at the time and the communications, if any, made to him by his medical adviser or others, if acquiesced in by him. The fact that a clergyman has administered to him the last rites of the church also tends to show that he was under the sense of approaching death. (*Mattox vs. U. S.*, 146 U. S., 140, 151; 36 L. ed., 917; *Carver vs. U. S.*, 164 U. S., 694, 696; 41 L. ed., 602.)

When death supervenes speedily after such a declaration is made, the inference that the declarant realized his condition may be obvious; but it should be remembered that it is the belief in impending death and not the rapid succession of death, in point of fact, that renders the testimony admissible. The admissibility of the declaration, as is thus apparent, depends on the state of the declarant's mind at the time of making the declaration; and the mere fact that death does not immediately follow will not render the declaration inadmissible, provided death does ensue as a result of the injuries which are the subject of the declaration.

In *Regina vs. Perkins* (9 C. & P., 395), the deceased received a severe wound from a gun loaded with shot, of which wound he died at 5 o'clock the next morning. On the evening of the day on which he was wounded, he was told by a surgeon that he could not recover; he made no reply, but appeared dejected. It was held by all the judges of England that a declaration made by him at that time was receivable in evidence on the trial of a person for killing him, as being a declaration in articulo mortis.

In *Mattox vs. United States* (146 U. S., 140), the lapse of time between the infliction of the fatal injuries and the death of the victim was of about 18 hours duration. The wounds, inflicted by gunshot, were three in number; and one of them was of great severity. The attending physician, who was called in soon after the shooting, told the injured man that he had no hopes of recovery. The physician then asked him who shot him, and he replied that he did not know. It was held that this statement, favorable to the defendant, was admissible, though the injured man lived twelve hours longer. Said the court:

"The point is to ascertain the state of the mind at the time the declarations were made. The admission of the testimony is justified up on the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood, and enforce as strict adherence to the truth as the obligation of an oath could impose."

Inasmuch as the admissibility of the dying declaration is based on the sole circumstance that it is made under the sense of impending death, it results that the fact that an oath may be administered, or that the declaration may be made to a justice of the peace, is immaterial upon the question of admitting the statement in evidence. Such circumstances may or may not contribute to the probative weight of the declaration, but they in no wise affect its legal competency. In a case of this kind, it is therefore more important for the court to know that the declarant realized he was fatally hurt than it is to know that he made his declaration in the presence of an officer of the law or that it was delivered upon oath.

The offense committed in this case was that of murder, with the qualifying circumstance of alevosia. The factor of alevosia is found in the character of the attack upon the deceased and the surprise with which it was effected. In thrusting his knife into the victim's side as the parties casually passed each other in the street, the assailant

adopted a method or form of execution which tended directly and specially to insure the accomplishment of his purpose without risk to himself arising from any defense which the offended party might make; since it was obvious that after delivering the stroke, he could in any event escape before a blow could be given in return.

The evidence also tends to show that the crime was deliberate and premeditated; but we do not think it would be proper to found on the proof submitted in this case a finding that the crime was characterized by the generic aggravating circumstance of evident premeditation, since the cold and reflexive premeditation and tenacious persistence in the attainment of the criminal design—which are the characteristic elements of this circumstance—have not been proved in an evident and convincing degree.

From what has been said it follows that the defendant should have been found guilty of murder instead of homicide, and that he should have been sentenced to cadena perpetua, instead of reclusion temporal in its medium degree. The sentence of the lower court is therefore modified accordingly; and the defendant is hereby sentenced to cadena perpetua, with accessories as by law provided, to indemnify the heirs of Gelasio Violan in the sum of P1,000, and to pay the costs of both instances. So ordered.

Arellano, C. J., Torres, Johnson, Carson, Araullo, Malcolm, and Avanceña, JJ., concur.

ON MOTION FOR REHEARING.

March 27, 1918.

STREET, J.:

The attorney for the accused asks the court to reconsider its action in qualifying the crime in this case as murder and in elevating the penalty to cadena perpetua. In support of this motion it is urged that the facts proved do not justify the conclusion that the qualifying circumstance of alevosia was present.

In view of this suggestion we think it well to clarify the opinion already filed, in so far as it relates to the circumstance of alevosia, by adding that when the accused attacked his victim at the crossing of the street, in the manner stated in the opinion, it had already become somewhat dark by reason of the approach of nightfall; and as the moon had not yet risen, it was impossible for the deceased clearly to discern a person approaching from another direction or to take cognizance of any acts of a menacing character which might be done by the latter until close upon him. The fact that it was then dark or getting dark, is fully brought out in the testimony of Luis Castillo, the principal witness for the prosecution; and we are convinced that the obscurity of nightfall contributed to make the surprise of the attack more complete. We therefore consider that the treacherous character of the assault is fully established. Motion denied.

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

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