

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. SIXTO BALMES, DEFENDANT AND APPELLANT.*G.R. No. 12979. January 28, 1918*

Ponente: CARSON, J.

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The defendant and appellant was convicted in the court below of atentado, and sentenced to two years, four months, and one day of prision correccional and to pay a fine of 625 pesetas, under the provisions of the first paragraph of article 250 of the Penal Code. The penalty was placed under this paragraph upon a finding that the accused assaulted a policeman with an oar. It appears that the policeman who was endeavoring to arrest suspected violators of an ordinance relating to the municipal fisheries, stepped over into the boat of an uncle of the accused to count the fish in the bottom of the boat, and that the accused stepped into the boat at or about the same time, evidently with the intention of opposing the action of the policeman in coming on board his uncle's boat. Words passed between them, and in the darkness and confusion of the moment the boat was upset, and both parties were compelled to struggle ashore as best they could. Some of the witnesses for the prosecution insist that the accused tried to strike the policeman with his oar, and that the boat was upset in the struggle for possession of the oar. The incident occurred at night, the evidence as to exactly what did occur is conflicting and unsatisfactory. We do not think the evidence supports a finding beyond a reasonable doubt that the accused made any attempt to use the oar as a weapon of defense, though it well may be that in trying to balance themselves in the small boat, both parties tried to get hold of it. We are satisfied, however, that the accused resisted the policeman in the performance of his duty. We think that the offense proved to have been committed is that penalized in the last paragraph of article 250 of the Penal Code.

We do not find that the force used against the policeman was such as is contemplated in subsections 1, 2, 3, or 4 of article 250, under the rule announced in the case of *U. S. vs. Tabiana and Canillas* (p. 515, post) recently decided.

We conclude, therefore, that the penalty imposed by the trial judge should be modified by substituting one year, eight months, and twenty-one days of prision correccional and a fine of 375 pesetas, with subsidiary imprisonment as prescribed by law, for so much thereof as imposes two years, four months, and one day of prision correccional and to pay a fine of 625 pesetas, and that thus modified, the judgment should be affirmed, with the costs of this instance against the appellant. So ordered.

Arellano, C. J., Johnson, Araullo, Street, and Malcolm, JJ., concur.

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