

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. FRANK E, BURNS, DEFENDANT AND APPELLANT.*G. R. No. 16648. March 05, 1921*

Ponente: STREET, J.

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This case comes up on appeal from the Court of First Instance of the Province of Samar, where the accused, Frank E. Burns, was, on April 27, 1920, found guilty of the crime of arson and sentenced to twenty years of cadena temporal, with the accessories prescribed by law, and adjudged to pay the costs.

At about 11 o'clock p. m., on the 5th of September, 1918, a fire broke out in the basement of the residence of Pedro de la Cruz in the municipality of Pambujan, Province of Samar. As the flames spread, the heat generated by the fire awakened the owner, who was sleeping in the upper apartment with his wife, five children, aged from 1 to 12, and several servants. Running hastily to the window, he saw that the flames were coming from the basement where his automobile was kept and that the usual means of exit in that direction by the stairs had been cut off. For this reason the members of the household had no other way of escape than through the window; and in the excitement of the moment the father hurriedly tossed his smaller children out. All the inmates escaped except one servant, named Cipriano Jazmin, of 14 years, who was burned to death.

The house in question was situated near the center of the poblacion, and the fire was soon communicated to other adjacent houses with the result that not only the home of Pedro de la Cruz was consumed but also those of his neighbors, Sy Quico, Pedro Tan, Isidro G. Morales, Dionisio Mijos, Manuel Merino, Felipe Luca, Pablo Madeja, Romana Morales, Sergio Socorro, and Paulo Morillo. The damage thus inflicted upon Pedro de la Cruz was estimated by him at not less than P40,000, and the total loss resulting to all whose houses were burned amounted to P111,000.

Of this calamity the appellant, Frank E. Burns, stands convicted as the responsible author, being supposedly moved by resentment towards Pedro de la Cruz as a competitor in the operation of his automobile for hire.

It appears that the appellant is an American resident of Catarman, Samar, where he maintains a shop, or garage, with a number of automobiles for hire; and from that municipality as a base he was, at the time of the occurrence which gave rise to this prosecution, engaged in operating one or more automobiles for the conveyance of passengers over different routes in the Province of Samar. In the mid-afternoon of September 5, 1918, the appellant left Catarman in an automobile upon a trip to Laoang, where he had an engagement to meet Major Newman, of the Philippine Constabulary, for the purpose of conveying the major on the morning of September 6, to Catarman. Upon this trip the appellant was accompanied by an employee, named Casimiro Brea, and one other person.

The road from Catarman to Laoang goes through the municipality of Pambujan, and the appellant found it convenient to spend the night of September 5th at this place, intending to resume his journey towards Laoang in the early hours of the next morning. The appellant had once lived in Pambujan, and he was accustomed to stop

overnight at this place when it suited his convenience, having arranged upon such occasions to keep his automobile at the house of Andres Jazmin. Accordingly, upon the date mentioned, after having discharged the passenger and luggage, the appellant proceeded to the house of Andres Jazmin and there left his automobile as usual.

According to the testimony of Casimiro Brevia, the party arrived in Pambujan at 9 p. m., more or less. According to the statement of Burns, which is more precise and probably more correct, the hour of arrival was about 7 p. m. The exact time is not of vital importance in the case, and the inaccuracy of Casimiro Brevia on this point does not, in our opinion, impair in the slightest degree his credibility in respect to other more important facts. Filipinos of the laboring class, being unaccustomed to watches and having little regard for dates and hours, are notoriously untruthworthy in their estimate of time, even when they speak with the most evident intention of declaring the truth.

The principal witness for the prosecution is Casimiro Brevia, whose testimony, delivered in the Visayan and interpreted to the court in Spanish, may be briefly summed up as follows: After the automobile driven by Burns had been installed in the place destined for it, Burns asked the witness if he needed money. To this the witness replied that he did, as he wished to buy some cigarettes. Burns then delivered to the witness the sum of P10, consisting of five bank bills of P2 each. Burns then told the witness that he would like to know where the automobile of Pedro de la Cruz might be found, as he was seeking a chance to burn it; and as the witness had no knowledge of its whereabouts, Burns told him to go in search of the car and to return to him (Burns) as soon as the witness should learn where the automobile was to be found. In obedience to these instructions the witness sauntered around for a while through the streets, looking for the automobile in question; and while on this errand he made inquiry of at least one person, whose name he gives, as to where it might be found. Being unsuccessful in his search, the witness returned to Burns, who was awaiting him near the stairs leading into the house of Pedro (?) Jazmin. The witness then informed Burns that he was unable to find the automobile; whereupon Burns told him to find a house where he might pass the night and further instructed him that as soon as the streets should be deserted he should come out, as his assistance was needed in burning the automobile of Pedro de la Cruz. In this conversation Burns told the witness that he wished the witness to serve as a lookout for people passing along the street, and that if he would assist in this way he (Burns) would deliver to the witness the sum of P200 upon returning to Catarman. Burns furthermore told the witness that he need have no fear, as he (Burns) would take care of him. After this conversation the witness proceeded to look for the house of Cirilo Mijos, where he hoped to stay all night, and presently meeting Mauricio Mijos, the latter conducted him to the house of Cirilo Mijos. Permission having been obtained by the witness to pass the night in this house, the witness retired; and when the night had become quiet, with no people abroad, the witness sallied forth in search of Burns to accomplish the work upon which they had agreed. The witness found Burns at a corner near where his automobile had been left, and the latter then conducted the witness to the house of Pedro de la Cruz. Upon arrival at that place Burns told the witness to stand guard in the street, and the latter accordingly took his position at a distance of about 3 brazas from the open door leading into the space where stood the automobile, the object of their search. As Burns entered this door, the witness cautioned him against burning the car, lest the house and its inmates should be consumed. Burns answered: "Let whatever burns burn; and those die who ought to die." When Burns had gotten inside the witness heard a sound which appeared to indicate that some part of the car had been opened. Burns then lighted a match and in a moment the witness saw that the automobile was afire. When the flames had attained considerable proportions, as immediately occurred, the witness fled, directing his course towards the house where Burns' automobile was standing. Having arrived at that place, the witness heard a detonation; and in the excitement of the moment he ran a little further across the street to the market, but presently returned. Upon coming again to the house where Burns' auto had been placed, he found a woman, of whom he inquired, mechanically, where Burns

was. She told him that she did not know. The witness then hurried in the direction of the fire; and upon arriving at a spot a short distance from the house of Pedro de la Cruz, he found Burns himself, and no other person. Upon meeting Burns at this spot, the witness told Burns that his automobile would be burned, to which Burns replied that the witness need not worry. While the two were thus standing in the street two persons arrived, whom the witness supposed to be policemen, and ordered the witness to aid in extinguishing the fire. Burns objected to this and told the men that the witness was his companion. Nevertheless, the men compelled the witness to accompany them and help in the work of extinguishing the fire.

Primitivo Balanquit, another important witness for the prosecution, testified that upon the date of the fire he was municipal president of Pambujan and that at about 11 o'clock on that night he left his house to make a tour of inspection, before retiring, as was his custom. Arriving at the street upon which the house of Pedro de la Cruz was located, he saw flames issuing from the basement. He was unable to pass through the street immediately in front of the fire, and being desirous of reaching the cross street beyond, he passed into the lot behind the house of Pedro de la Cruz and emerged into Calle San Juan. He there found Burns and Casimiro Brea and no other person. He immediately called to these two individuals and told them to come and help put out the fire. As there was no immediate response, the witness caught Casimiro Brea as if to pull him along, whereupon Burns took the witness by the shoulders and exclaimed, "Friend, friend, don't take Casimiro, for I am going to have him get out my auto."

The witness replied to the effect that there was no need to remove that auto as it was on another street to the windward of the fire. As Casimiro still held back the witness struck him a blow, at which moment Eusebio de la Cruz, a member of the municipal council, came upon the scene; and, learning what was the matter, he himself struck Casimiro another blow, and the latter yielded. The accused, upon seeing the witness strike Casimiro, immediately ran off in the direction of his auto. This witness says that at the time he encountered Burns and Casimiro near the house of Pedro de la Cruz, as above stated, the fire was burning in the basement, and flames were conspicuous through the door, but the conflagration had not yet reached the upper story of the house or otherwise attained great proportions.

When the witness, Primitivo Balanquit, had concluded his testimony, the fiscal announced that he would refrain from presenting as a witness Eusebio de la Cruz, for the reason that his testimony would be the same as that of the witness who had preceded. We consider this a serious blunder on the part of the prosecuting attorney, for in a case of such gravity it is important to have before the court the testimony of every person conversant with any fact shedding light on the subject of the crime.

The defense of the accused is chiefly based on proof tending to show that, at the time he is supposed to have set this fire, he was sleeping soundly two or three blocks distant from the scene of the fire; and in this connection it has been proved that on the night in question the accused joined a woman, named Tomasa Surio, with whom he enjoyed familiar relations, and went with her to the house of Eugenia Esplana, where the pair stretched themselves on a petate for rest.

The accused says that at about midnight he was aroused from deep slumber by his companion, who caught him by the arm and shook him, saying "Get up; the pueblo is burning." He immediately arose, hastily donned his shoes and shirt, and, after Tomasa Surio had lighted a lamp and unbarred the door, he ran out to discover the locality of the fire. Having arrived at the fire, he passed in front of the burning house and at the next corner met Casimiro Brea, no other person being then in sight. Casimiro told him to get out his auto or it would be burned. A moment later Primitivo Balanquit appeared, accompanied by two policemen, one of whom struck Casimiro three blows on the head; and in spite of the protest of the accused, Casimiro was marched off. The accused says he then proceeded to get out his auto, and having done so, he carried it to a safe distance; after which he returned and assisted in arresting the ravages of the flames.

Corroborating the accused upon the point of his whereabouts when the fire broke out, Tomasa Surio testified that he lodged that night in the house of Eugenia Esplana and that he was soundly asleep when she aroused him. She says that she herself had not been to sleep at all, having stayed up to sew upon her jacket, but she admits that she had gotten down on the petate to go to sleep a short while before her attention was attracted by the fire. Having heard the commotion she repaired to a window and, looking out, saw the conflagration, which was -already large. She then awoke the accused, who immediately put on his shoes and coat and went out.

Eugenia Esplana, who kept the house where the accused stayed in the company of Tomasa Surio, slept in the same room with them. Upon being called by the prosecution as a witness in rebuttal, she testified that she was awakened by the ringing of the bells, that she lighted a lamp and found Tomasa Surio lying on the petate, but the accused was not there.

The version of the case as presented by the accused involves manifest impossibilities; and a careful perusal of the evidence shows that the proof in support of his alibi is, fatally defective. In this connection it is sufficient to note that Tomasa Surio is supposed to have been aroused by the commotion or alarm attendant upon the fire. Stepping to the window she saw a big; conflagration and aroused her companion with the excited statement that the pueblo was being consumed. The accused hastily clothed himself and, upon arriving at the exact place of the fire, found nobody there whatever. Who then was the author of the commotion which had attracted Tomasa Surio's attention; and how was it possible for the accused, who had only been aroused after the fire had attained considerable headway, to get there, the first of all that numerous population, and even before the inmates of the burning house had been aroused? The conclusion can be safely stated that the proof of the alibi is false.

A circumstance tending to discredit the testimony of Tomasa Surio is found in her answer to a question which possibly took her unaware. Being asked whether Burns, upon going out from the house of Eugenia Esplana to see about the fire, returned immediately, she replied that he did, and she further said that he did not go out a second time. This statement is contrary to the testimony of Eugenia Esplana, who says that Burns did not return at all; and although Burns himself says that he did return to the house, it was after the fire was over, and the hour must have been far advanced. That Burns should have returned to the house of Eugenia Esplana to communicate again with Tomasa Surio at some time in the interval before his departure for Laoang is in itself probable, but certainly he did not return at once.

Testifying in his own behalf, the accused claimed that Primitivo Balanquit, the second important witness for the prosecution, was actuated by enmity towards the accused of several years standing, originating from an election wherein Primitivo Balanquit had figured as a defeated candidate for the office of municipal president while the accused had acted as president of the board of canvassers. Upon reading the testimony of Primitivo Balanquit we discover no internal evidence of the alleged enmity; and so far as his attitude to the present prosecution is concerned he seems to have been animated solely by the high-minded purpose of bringing the perpetrator of a grays, crime to justice. Moreover, upon what appears to be sufficient grounds, Primitivo Balanquit denies that he entertained any feeling of animosity towards the accused. Even supposing that the enmity existed, such fact has little bearing upon the solution of this case, for the Accused has admitted the truth of the capital point upon which Primitivo Balanquit gave testimony, namely, as to the presence of the accused, in company with Casimiro Breva, at the place where Primitivo Balanquit found them on calle San Juan near the scene of the fire, at a time when as yet the fire had made little progress and no one else had appeared upon the scene.

Among minor points suggestive of the possible guilt of the accused, though not alone entitled to much weight, are these: On the morning after the fire Major Newman, upon returning from Laoang in the automobile of the accused, stopped to make an investigation and was informed by the authorities that suspicion pointed to Burns as the possible author of the crime. Major Newman communicated this information to the accused, who, instead of

flatly asserting his innocence or asking the grounds upon which the suspicion rested, replied: "How can that be, when I was asleep? Come and see the place where I slept," which suggests that the idea of proving an alibi was already mature. Again upon the same morning, after returning with Major Newman from Laoang, the accused went up into the house of Eustaquia de la Cruz and found Pedro de la Cruz eating breakfast. Pedro invited the accused to eat with him, but the latter excused himself, saying that he had already eaten. He then said to Pedro, whoever did that (meaning, whoever set fire to the house,) was certainly base. Pedro de la Cruz reports the same conversation in these words: Burns. "It was a bad man who set this fire." Pedro. "Yes, a person without a soul." A question which naturally occurs to the mind is, why did the accused address Pedro de la Cruz with a question which assumed the fire to be of incendiary origin? Was it because he knew such to be the fact? The accused himself must have felt something of the force of this inference, for we note that in his testimony, after reporting the words addressed by him to Pedro de la Cruz, he diverts the conversation, without giving Pedro's reply, and proceeds to insinuate an admission on the part of the latter to the effect that the fire might have originated from a lamp that had been carelessly left upon a trunk.

Having exposed the falsity of the evidence in support of the defendant's alibi, we return to the testimony of Casimiro Breva, which supplies the direct and principal basis of conviction, in order to ascertain whether the story of this witness is entitled to credit and of sufficient force, in connection with other evidence, to prove the guilt of the accused beyond a reasonable doubt. In this connection it must not be forgotten that this witness, by his own admission, is in the position of a participant in the crime, if not in the capacity of a principal, at least as an accomplice. For this reason his testimony is open to suspicion and must be examined with care.

The trial judge, commenting upon the testimony of this witness, observed that it is full of details, and he says that it was delivered in a straightforward, natural style—an earmark of sincerity—without stumbling, and that, notwithstanding extensive cross-examination by the three attorneys for the defense, it had been in no material part falsified or disproved. He accordingly accepted it as true.

With this appreciation of said testimony we entirely agree. We discover in it none of the badges of deliberate falsehood; and although upon some minor points the witness appears to have been in error, the general consistency of the narrative convinces us of its truthfulness.

The experience of courts and the general observation of humanity teach us that the natural limitations of our inventive faculties are such that if a witness undertakes to fabricate and deliver in court a false narrative containing numerous details, he is almost certain to fall into fatal inconsistencies, to make statements which can be readily refuted, or to expose in his demeanor the falsity of his message.

For this reason it will be found that perjurers usually confine themselves to the incidents immediately related to the principal fact about which they testify, and when asked about collateral facts by which their truthfulness could be tested, their answers not infrequently take the stereotyped form of such expressions as "I don't know" or "I don't remember." In the case before us it is evident that the facts to which Casimiro Breva testifies came into existence, if at all, at a time when he could have had no information of the actual facts apart from his knowledge. There is nobody to tell that Casimiro Breva was awakened from profound slumber to hurry to the fire. He was there and knew all about it. Either he truly states that the fire was set by Burns or he was the author of the fire himself. And if Burns is innocent why did his apparition stand in company with Casimiro Breva at the point near the fire where Primitivo Balanquit found them? By this fact is the accused convicted.

Upon one important point only does it occur to us that the story told by Casimiro Breva could be subjected to criticism on the ground of prima facie improbability. The evidence shows that the accused well knew where Pedro de la Cruz lived and that he kept his automobile in the basement of his residence. Why then should the accused,

when planning to burn the automobile of Pedro de la Cruz, dispatch Casimiro Brea to look for that automobile on the streets of Pambujan? The answer may be that the design of the accused to burn the automobile in question had not at that moment taken the form of a fixed determination to set fire to it under the owner's house. Rather he may have hoped that the car might casually be found somewhere out on the streets. To this end, not desiring to make himself too conspicuous, in a place where his figure was familiar, he sent Casimiro to prosecute a search. For the rest we need only read in this act the fatuous stupidity which so often creates the evidence necessary to bring the perpetrator of a crime to the bar of justice.

Another point has been mentioned by the attorney for the appellant as tending to impeach the veracity of Casimiro Brea, which we will touch upon because of its implication with the psychology of attention. This witness says that he heard a detonation, supposedly the dull and heavy sound incident to an explosion. That an explosion occurred is not improbable, as the owner states that the tank of the car contained gasoline. Other witnesses say they did not notice it. The discrepancy is of course attributable to the different significance that the conflagration had to the minds of the different observers. A witness whose mind was fixed upon the destruction of his home and the consequent danger to his family could not be expected to pay much attention to an incident comparatively so trivial as the noise made by the explosion of a gasoline tank. But if such a sound was made and was audible to anybody, it was of course heard and noted by Casimiro Brea, though he was at the time some distance removed from the fire. To his imagination, excited by fear and perturbed by the thought of his participation in a great crime against persons to whom he bore no enmity, that sound naturally would have been like the thunder of Sinai. Like the knocking on the gate in Macbeth, immediately after the murder of Duncan by the usurper, it was a noise to appall the conscience ; and even if an explosion did not occur, his imagination could have honestly created it. There is nothing in this testimony to impair his credibility.

And now a few words as to the motive. Upon this point the testimony of Pedro de la Cruz suggests that the accused entertained resentment on account of the fact that Pedro de la Cruz was competing to some extent with the accused by using his automobile for the carriage of passengers for hire. In this connection it appears that the accused had been engaged in this business from a period antedating the time when Pedro de la Cruz first began using a car in this way; and it was apparently in order to eliminate competition, that the accused bought from Pedro de la Cruz the first car which had been acquired by him. After this, upon learning that Pedro de la Cruz was going to buy a second car, the accused remonstrated and advised him not to buy another machine as the business was then poor. It also appears that there had been a misunderstanding between the parties in connection with a loan, or sale, of gasoline which Pedro de la Cruz had made to the accused upon a certain occasion when gasoline was scarce and high. As a result of this misunderstanding, Pedro de la Cruz, upon a subsequent occasion, had refused to let the accused have gasoline. If the direct evidence connecting the accused with the crime were less positive, and a conviction depended upon clear proof of motive, we would be bound to hold that the evidence does not actually show this motive beyond a reasonable doubt. But after all in a case of this kind, where the direct proof of the perpetration of the crime is convincing, the question of motive is of secondary importance; and our conclusion upon the whole case is that no reasonable doubt as to guilt can be entertained.

In substance the complaint charges the accused with the crime of arson, committed in the night time by setting fire to an automobile in the lower part of an inhabited house, to wit, the residence of Pedro de la Cruz, availing himself of his knowledge that the inmates were then asleep. As a consequence, it is alleged that said automobile was consumed as well as the house above it, and in the burning of this house one of its inmates, to wit, Cipriano Jazmin, perished, being burned to death by the fire. The complaint further states that the fire spread and destroyed the houses of persons already mentioned in this opinion, doing damage in the total extent of P111,000.

Upon inspection it will be seen that this complaint charges facts sufficient to constitute the commission of two

grave and entirely distinct crimes, the perpetration of which has been fully proved, namely, arson under article 549 of the Penal Code and homicide under article 404 of the same code, both of which crimes resulted from a single act. In this situation the penalty for the more serious crime must, under article 89 of the Penal Code, be imposed in its maximum degree. Now, arson under article 549 is a graver crime than homicide under article 404, inasmuch as the penalty for the former ranges from cadena temporal to cadena perpetua, whereas the penalty for the latter must be fixed within the limits of reclusion temporal. It results that the convict in the present case must be sentenced to cadena perpetua.

In this connection it will be observed that the two offenses of arson and homicide which were committed in this case are so related that a single penalty for both is imposed upon the perpetrator by the Penal Code. This is one of the situations where, under our system of criminal procedure, it is proper to charge more than one offense in a single complaint. The general rule of course requires that the complaint shall charge but one offense; but an exception is made in those cases where the law prescribes "a single punishment for various allied offenses." (Sec. 11, Gen. Ord. No. 58; sec. 21, No. 3, id.)

It has been suggested that the crime of homicide committed upon the person of Cipriano Jazmin could be properly qualified as murder under No. 3 of article 403 of the Penal Code, inasmuch as the death of this person resulted from a fire set by the accused. We are of the opinion, however, that this offense must be considered merely as an homicide; for it must be understood that when the Penal Code declares that homicide committed by means of fire shall be deemed to be murder, it is intended that there should be an actual design to kill and that the use of fire should be purposely adopted as a means to that end. There can be no murder in the absence of design to take life. In the case before us the accused is not shown to have entertained personal malice against Cipriano Jazmin, nor did he have designs against the life of any person. It is true that, according to Casimiro Breva, just before the match was applied the accused used language which showed that his mind was advertent to the fact that lives would be endangered by the setting of fire to the automobile, as when he said "Let those die who ought to die." But those words must be taken as indicative of a spirit of reckless bravado rather than of a determinate purpose to take life.

Still another reason why the death of Cipriano Jazmin cannot properly be qualified as murder under our Penal Code is to be found in the following consideration: As the complaint is drawn, the principal offense therein charged is arson, the homicide being stated merely as one of the incidental consequences thereof. This is in strict conformity with the facts proved, inasmuch as the immediate purpose of the accused was to accomplish the destruction of the automobile of Pedro de la Cruz. Arson, then, is the principal offense of which the accused is guilty; and arson of necessity involves the use of the element fire as the means of its consummation. This being admitted, it follows that the use of fire cannot be treated as a qualifying factor sufficient to raise the offense of homicide to murder, it being manifestly illegitimate to make use of the same factor in connection with both crimes.

Again, it has been intimated that the offense of homicide should not be taken into account at all in this case, the assumption being that said offense is sufficiently estimated in the penalty imposed upon the crime of arson. No decision of this court or of the supreme court of Spain has been called to our attention which supports this proposition; and we are of the opinion that upon principle it is untenable. It is not to be denied that the severe penalty prescribed by article 549 was fixed in view of the danger to life which is involved in the setting of fire to a building known to be occupied at the time by human beings, but it does not follow from this that a resulting homicide is to be considered as inherent in the crime of arson under that article or even as being appreciated in the penalty there fixed. The factor that is there appreciated is the danger to life, not the attendant homicide, or homicides, that may in fact ensue.

In this connection it is to be remembered that the crime of arson is consummated in the mere act of setting a house afire, and the fact that a fire may be extinguished before appreciable damage is done in no wise reduces the gravity of the offense. The supreme court of Spain has held that where fire is once actually set, the offense cannot be considered as frustrated arson merely because the fire is put out before the flames have extensively spread. (Decision of Dec. 11, 1875; 3 Viada, p. 603.) This doctrine was applied by this court in *U. S. vs. Go Foo Suy and Go Jancho* (25 Phil., 187), where a fire set by incendiaries was put out before the house was destroyed. The trial court having found the accused guilty of frustrated arson, this estimation of the offense was rejected by this court, which applied the penalty for the consummated offense. Such being the fundamental conception of the crime of arson, it cannot be maintained that a homicide resulting from the perpetration of such crime adds no additional gravity to the offense. On the contrary, the situation furnishes, in our opinion, a very apt illustration of two crimes proceeding from a single act, as contemplated in article 89 of the Penal Code.

We note that the trial court found present in the case before us the aggravating circumstances of nocturnity and evident premeditation. We have no hesitancy in saying that the aggravating circumstances mentioned were present in the commission of the offense of arson, though absent in the commission of the offense of homicide. However, in the view we take of the case, the aggravating circumstances are unimportant, inasmuch as the penalty for arson, under article 549 of the Penal Code, must at any rate be imposed in the maximum degree on account of the concurrence of the other crime of homicide.

One other feature of the case, arising from the language used in the final sentence of the amended complaint, must be examined. It is there said that the offense which is the subject of the complaint was committed "in violation of article 550, No. 2, in relation with article 89 * * * of the Penal Code." Upon referring to article 550 of the Penal Code, it will be seen that one of the forms of arson there punished is the setting of fire to an inhabited house, without the incendiary knowing whether such house is occupied or not at the time. The offense committed in the present case does not properly fall under that article because it clearly appears from the proof, that when this fire was set the accused well knew that the house was the home of Pedro de la Cruz and that his family were sleeping therein. The offense therefore falls, as we have already indicated, under article 549, which contemplates, among other things, the case where the incendiary sets fire to any building, knowing it to be occupied at the time by one or more persons. As the offense denounced in article 549 is a graver offense than that denounced in article 550, No. 2, and carries a much havier penalty, the question arises whether the allegation in the complaint, to the effect that the crime was in violation of article 550, No. 2, constitutes any impediment to the sentencing of the accused, under article 549, for the form of the crime which was in fact committed. The trial judge apparently supposed that the accused could be sentenced only under article 550, No. 2. This view is in our opinion incorrect.

This court has repeatedly held that it is not the technical name given by the fiscal in the title or preliminary part of the information that determines the character of the crime but the facts alleged in the body of the information, and that, therefore, an accused person may be convicted of a crime which is more serious than that named in the title or preliminary part, if such crime is covered by the facts alleged in the body of the information and its commission is established by the evidence. (*U. S. vs. Ondaro*, 39 Phil., 70; *U. S. vs. Treyes*, 14 Phil., 270; *U. S. vs. Jeffrey*, 15 Phil., 391; *Davis vs. Director of Prisons*, 17 Phil., 168.)

In *U. S. vs. Supila* (13 Phil., 671), where the complaint charged the accused as an accessory in the crime of murder, it was held that he could be convicted as principal, provided the facts stated in the complaint were such as to constitute the offense of murder. Again, in *U. S. vs. Lim San* (17 Phil., 273), it was held that a person charged with attempted murder could be convicted of frustrated murder. The discussion contained in the opinion in the case last cited conclusively shows that the offense of which a person stands in jeopardy when arraigned upon a criminal charged is that constituted by facts stated in the information and not that designated by the fiscal

in the preamble; and every consideration adduced in support of that proposition can be stated with equal force with reference to the concluding statement in the complaint naming the provision of the Penal Code which is supposed to be infringed. The qualification of the crime involved in such a reference is matter of opinion, and, like the designation of the offense given in the caption of the complaint, or in the opening paragraph, embodies only a conclusion of law.

Furthermore, while subdivision 2 of section 6 of General Orders No. 58 requires that the information shall contain "the designation of the crime or public offence charged," section 8 permits the designation of the crime generally "as a felony or misdemeanor" and in the form of an information given in the latter section it is not required that the particular article or law violated should be stated at all, it being sufficient to conclude that the facts alleged are "contrary to the statute in such case made and provided." This shows that the prosecuting attorney is not required to name the particular law or article violated. It results that the erroneous or improper denomination given by the fiscal to the offense, or the erroneous citation by him of the law which is supposed to be infringed, is of no importance and in no way affects the legal aspects of the complaint.

In at least two cases this Court has applied penalties imposed in the Penal Code to crimes which were alleged in the complaint to have been committed in violation of determinate statutes passed by the Philippine Commission. Thus, in *U. S. vs. Panlilio* (28 Phil., 608), the accused was charged with a violation of Act No. 1760, and this court found him guilty of a violation of article 581, No. 2, of the Penal Code and applied the penalty fixed by that provision. In the case of *U. S. vs. Paua* (6 Phil., 740), the accused was charged with a violation of section 315 of the Customs Administrative Law then in force (Act No. 355). He was found guilty of bribery and sentenced under articles 383 and 387 of the Penal Code.

In these cases it was impossible to sustain the charges of the violation of the particular laws mentioned in the complaint, and the accused necessarily had to be acquitted of such charges. Nevertheless, they were convicted and punished for the offenses defined in the articles cited from the Penal Code. It must not, however, be forgotten that in those cases the facts stated in the complaint were sufficient to constitute offenses under the particular provisions of the Penal Code which were applied. If the complaints had been defective in this particular the result could only have been an acquittal of the offense actually charged. Thus, in *U. S. vs. Sevilla* (1 Phil., 143), the complaint charged the accused with the crime of threats (amenazas) under article 494 of the Penal Code. The proof showed that he was not guilty as charged but was guilty of criminal compulsion (coaccion) under article 497. It was held that he could not be convicted of the last-named offense, because it was not charged in the complaint; and in disposing of the case the court expressly reserved the right to the fiscal to institute another prosecution for the offense shown to have been committed.

It is clear from the foregoing resume of the authorities that an erroneous reference in a complaint to the statute or provision of the Penal Code which is supposed to have been infringed is no impediment to the imposition of the proper penalty for the offense actually committed, where the facts sufficient to constitute such offense are stated in the complaint. However, as was observed by Mr. Justice Moreland in *U. S. vs. Panlilio* (28 Phil., 608, 615), we would not permit an accused to be convicted under one Act when he is charged with the violation of another, if the change from one statute to the other involved a change of the theory of the trial or required of the defendant a different defense or surprised him in any way. This consideration, of course, resolves itself into the application of the familiar proposition that defects in the form of a complaint are immaterial except where they "tend to prejudice a substantial right of the defendant upon the merits." (Sec. 10, Gen. Ord. No. 58.)

In the present case the accused could not have been prejudiced in defending himself against the crime of arson under article 549 of the Penal Code, which offense was clearly set forth in the facts stated in the complaint, by the circumstance that in the concluding words of the complaint it was alleged that the offense committed was an

infraction of article 550, because exactly the same resources of defense would have been available in arresting the force of the accusation in the one case as in the other. Nor can it be said that the offense charged in article 549 is really a different offense from that charged in article 550. Both are arson, the only difference being that the penalties respectively attendant upon them differ according to the conditions under which the offenses are committed. It is similar to the situation involved in estafa or robbery, where the penalties to be meted out are graduated according to the value of the amount appropriated or robbed.

We observe that the trial judge made no finding as to the extent of the pecuniary damage inflicted upon the victims of the crime committed in this case and did not impose upon the convict the obligation to repair such damage. The reason for this is doubtless to be found in the fact that Pedro de la Cruz and Sergio Socorro were the only individuals, among the injured persons, who made any estimate as to the loss which they had suffered. Pedro de la Cruz says that the loss inflicted upon himself was not less than P40,000, while Sergio Socorro says that his house was appraised after the fire at a valuation of P500. Although, for the reason stated, it is impossible to make any pronouncement in this judgment for the indemnization of the other persons whose houses were burned, we see no reason why we should not impose, as we hereby do impose, upon the accused the obligation to indemnify Pedro de la Cruz in the amount of P40,000, and Sergio Socorro in the amount of P500; and judgment will accordingly be entered to this effect, without subsidiary imprisonment in case of insolvency, it being understood that this disposition shall be void so far as concerns the indemnization of either of said parties who may heretofore have instituted any civil action to enforce reparation. The right to maintain a civil action for damages is hereby reserved to the other individuals whose property was burned. It will be further understood that, if the resources of the convict shall be inadequate to repair all of the pecuniary damage for which he is responsible, any sum which may be made out of him by the execution of this judgment shall be divided among the injured parties in the just proportion of their respective losses.

The judgment of the trial court, in so far as it finds the accused guilty of arson will be affirmed, but the sentence will be modified by substituting the penalty of cadena perpetua, with the accessories prescribed in article 54 of the Penal Code, for the penalty of cadena temporal, with the corresponding accessories. The judgment will also be further modified by imposing upon the convict the obligation to indemnify Pedro de la Cruz in the amount of P40,000, and Sergio Socorro in the amount of P500, under the conditions already stated. As thus modified, the judgment will be affirmed, with costs against the appellant. So ordered.

Mapa, C. J., and Araullo, J., concur.

CONCURRING

VILLAMOR, J.,

In giving my concurring vote, I just want to express my opinion as to that part of the decision, prepared with great ability by Mr. Justice Street, relative to the question whether the death of one of the inmates of the house burned should be considered as another crime resulting from the same act and having the effect of raising the penalty fixed in article 549 of the Penal Code to its maximum degree.

In the opinion of Groizard, one of the most famous commentators on the Spanish Penal Code, of which ours is but a copy, "it is the potential damage that is considered here in fixing the grave penalty of cadena temporal to cadena perpetua. The risk which a person runs who may be found in a place that is burned, whether it be a building, a farm-house, a hut or shelter, or a vessel in port, is what constitutes the gravity which is the object of this crime;

just as the damaging intent of the agent, manifested by his setting fire to a place where he knows there is one or more persons, gives an idea of his subjective perversity."

The same author adds: "In the classification of the crime attention must be given to the intention of the author. When fire is used with the intent to kill a determined person who may be in a shelter, and that object is secured, the crime committed is not that defined herein, but that of murder, penalized in article 418 (art. 403 of the Penal Code of the Philippines), with the penalty of cadena temporal in its maximum degree to death." (Groizard, Vol. 8, p. 45.)

There is no evidence in the record which goes to show that the intention of the accused was to cause the death of any person by means of fire; the only thing that appears is that his object was to set fire to the automobile which was under the house and consequently the house itself, knowing that it was inhabited. The fact that the fire produced the death of a person, an injury more or less grave, a damage or any other attempt against persons or property, does not change the nature of the criminal act and does not justify us in considering the different effects of the fire as constituting different crimes.

The objective gravity of the offense, including all actual and possible consequences of the criminal act, is what the legislator took into consideration in imposing the most serious penalty of cadena temporal to cadena perpetua. In my opinion, the court errs on a point of law, in considering the different punishable acts, resulting from an arson, as constituting so many different crimes, which authorize the imposition of the penalty in its maximum degree, in accordance with article 89 of the Penal Code.

If the death of Cipriano Jazmin constitutes a crime which should be considered independently of the crime of arson, the legal qualification corresponding thereto is not that of homicide, but that of murder, because, the accused having acted with known premeditation, as is maintained in the judgment of this court, this qualifying circumstance includes all the results of the criminal act, that is, the act of setting fire to the house knowing that it was inhabited. In such case, the penalty that should be applied is that of cadena temporal in its maximum degree to death, in accordance with article 403 of the Penal Code. And the crime penalized by this article being more serious than that defined and penalized in article 549, the court would have to impose the penalty of death, were article 89 to be applied. This conclusion shows the weakness of the theory which considers the death of Cipriano Jazmin, which resulted from the fire, as an independent crime, and not as covered by that of arson which is prosecuted herein.

I should state, nevertheless, that the preceding discussion does not tend to change the result of the decision of the court, because, even without considering the crime of homicide, the concurrence of one aggravating circumstance, like that of nocturnity, suffices for the imposition of the penalty in its maximum degree.

DISSENTING

MALCOLM, J.,

I cannot give my assent to the incarceration for life of a fellowman on such flimsy and inconsistent testimony, either circumstantial in nature or coming from a polluted source, as exists in this case. I cannot bring myself, as did the trial court, to find the defendant guilty on a "preponderance of the evidence," supported by the uncalled for remark that the accused is an American of robust stature who reminded his honor of "the cowboys displayed on the films of the cinematographs." It is incredible that a sane man, in embarking on a dangerous criminal venture,

would solicit the aid of a newly employed laborer and would divulge to him the methods to be used in consummating the act, thus placing himself at the mercy of a second party. It is incredible that the accused, who was well known, in Pambujan, and who knew exactly where the automobile of Pedro de la Cruz was to be found and where his house was located, would send an employee who had never been in the town before to discover the whereabouts of the automobile, which, naturally, the servant could not do, thus exciting unnecessary suspicion, when, as stated, the employer knew all the time where the automobile was kept. It is incredible that the accused" could set fire to the automobile by the method narrated by the principal witness for the prosecution, in contravention of all the laws of nature and of physics. It is incredible that anyone but a fiend of the most degraded type would, in order to put out of business a competitor possessed of one solitary automobile, set fire to this automobile, thus endangering his own automobile which was situated nearby and cause a property loss of over P100,000, and the death of one person, and which conceivably might have caused even greater damage and the death of other human beings, including five small children. These are points which cannot be argued away by free assumptions and inferences. Frank E. Burns is an innocent man.

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