

**THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND
APPELLEE, VS. CELESTINO TAVERA ET AL., DEFENDANTS.
CELESTINO TAVERA AND JUAN JABALLA, APPELLANTS.**

G.R. No. 23172. March 17, 1925

Ponente: OSTRAND, J.

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OSTRAND, J.:

Celestino Tavera, Juan Jaballa and Feliciano Dalmacia were accused of the crime of murder, the information alleging in substance that in or about the evening of the 6th day of June, 1924, in the barrio of Poto, municipality of Tayabas, Province of Tayabas, Philippine Islands, Celestino Tavera, Juan Jaballa and Feliciano Dalmacia with treachery and known premeditation and with the deliberate purpose of killing one Hermenegildo Millar, and conspiring among themselves and mutually aiding each other, and after having for several days waited for an opportunity, surprised said Hermenegildo Millar in his house on an occasion when he was alone in the house and fast asleep, attacked said Hermenegildo Millar with bolos inflicting upon him a large number of wounds, more particularly described in the information, and from the effects of which he died instantly.

When the case was called for trial and before a plea was entered by the defendants, the prosecuting attorney presented a motion asking for the exclusion of Feliciano Dalmacia from the information in order that he might be used as a state witness. The motion was granted by the court and the case dismissed as to the said defendant.

After trial the court found the remaining defendants guilty of homicide and taking into consideration the aggravating circumstance of nocturnity and that the crime had been committed in the house of the deceased, sentenced each of them to suffer seventeen years, four months and one day of reclusion temporal, with the accessory penalties prescribed by law and to jointly and severally indemnify the heirs of the deceased in the sum of P500 and each to pay one-half of the costs. From this sentence said defendants appeal.

In their first assignment of error the defendants maintain that the court below erred in ordering the exclusion of Feliciano Dalmacia from the complaint and using him as a witness for the prosecution. The questions raised by counsel in this connection have been sufficiently answered in the decisions of this court in the cases of *United States vs. Abanzado* (37 Phil., 658) and *People vs. Velazco* (42 Phil., 75).

Under his second assignment of error counsel for the defendants argues that the court erred in not definitely ruling on the admissibility of the testimony of the witness Telesfora Lavitoria in regard to a conversation she had with her son, the deceased, a week before the latter's death in which said deceased told the witness that he had been threatened by the defendant Celestino Tavera. At the trial counsel moved that this testimony be stricken out. The court in ruling upon the motion said: "No ha lugar al descarte pedido, se considerara esta peticion, despues en la decision de esta causa." In our opinion, this was, in effect, a definite denial of the motion and enabled the defendant to take his exception and bring the question of the admissibility of the evidence before this court on appeal. Moreover, in view of the other evidence in the case, the testimony in question is of no importance and does not affect the result of the case.

The third assignment of error is of the same character as the second and relates to the provisional admission of certain exhibits objected to by the defense. Inasmuch as no exception was taken to the ruling of the court, this assignment need not be discussed.

In the fifth assignment of error counsel for the defendants contends that the court erred in not ordering an ocular inspection of the house of the deceased in order to determine whether the conditions there were such that the witness Feliciano Dalmacia could have seen what he in his testimony claimed to have seen. As to this, it is sufficient to say that the question as to whether or not ocular inspections should be had lies entirely in the discretion of the trial court.

The other four assignments of error relate only to questions of fact upon which we see no reason to disturb the findings of the court below. A careful examination of the record convinces us beyond a reasonable doubt of the guilt of the defendants. It is, indeed, a serious question whether the evidence does not show the defendants guilty of murder, but, giving them the benefit of whatever doubt there may be, we have decided to sustain the findings of the court below upon that point.

In addition to the two aggravating circumstances found by the trial court, there is a third circumstance, namely, that in the commission of the crime advantage was taken of superior strength. In view of the existence of three aggravating circumstances the penalty should be increased to the maximum of the maximum degree.

The judgment appealed from is therefore affirmed with the sole modification that the penalty imposed by the court below be increased to twenty years of reclusion temporal. Each of the defendants will pay one-half of the costs. So ordered.

Johnson, Malcolm, Villamor, Johns, and Romualdez, JJ., concur.

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