

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. FERNANDO DE FERNANDO, DEFENDANT AND APPELLANT.

G. R. No 24978, March 27, 1926

Ponente: STREET, J.

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STREET, J.:

This appeal has been taken by the defendant Fernando de Fernando from the judgment of the Court of First Instance of Zamboanga, in which he was held guilty of the crime of murder and sentenced to suffer the penalty of twenty years cadena temporal, to indemnify the heirs of the deceased Buenaventura Paulino in the sum of P1,000 and to pay the costs, by virtue of a complaint filed by the fiscal charging him with the said crime.

As a basis for his appeal the accused, assigns the following errors as committed by the trial court: (1) In holding that the acts committed by the accused constituted the crime of murder; (2) in not holding that the accused was exempt from criminal liability and in not acquitting him.

At the trial the following facts were proven beyond a reasonable doubt: Before the day of the crime several Moro prisoners had escaped from the Penal Colony of San Ramon, Zamboanga. The residents of the barrio of Muncahan of the municipality of Zamboanga were alarmed by the presence of three suspicious looking persons who were prowling around the place. The accused Fernando de Fernando who, at that time, was a municipal policeman, when passing in front of the house of one Remigio Delgado, was called by the latter's daughter Paciencia Delgado, who stated that her father wished to see him. When the policeman came up the house Remigio Delgado informed him that three unknown and suspicious looking persons, dressed in blue, were prowling around his house. The accused remained in the said house talking with Paciencia Delgado, both being seated on a bench near the window. While they were thus talking, at about 7 o'clock at night, there appeared in the dark, at about 4 meters from the stairs, a person dressed in dark clothes, calling "Nong Miong." At the time neither the accused nor Paciencia Delgado knew who was thus calling. The accused inquired what he wanted but instead of answering he continued advancing with bolo in hand. Upon seeing this Fernando de Fernando took out his revolver and fired a shot in the air. As he saw that the unknown continued to ascend the staircase he fired at him. The unknown disappeared and ran to the house of a neighbor Leon Torres where, after placing upon a table the bolos that he carried, he fell on the floor and expired. Remigio Delgado, who was in the kitchen and had recognized the voice of the unknown, on hearing the shots ran into the parlor, took hold of the arm of the defendant and asked him why he had fired at Buenaventura Paulino. Fernando de Fernando only said "Let me go, that is a cross eyed person" and immediately repaired to the house of the teniente of the barrio, Santiago Torres, from where he telephoned to the chief of police advising him of what had happened. When the body was examined it was found that a bullet had penetrated the base of the neck at the right, imbedding itself in the left side under the skin.

The status of the accused on the night in question was that of an agent of the law, to whom notice had been given of the presence of suspicious looking persons who might be the Moro prisoners who had escaped from the Penal

Colony of San Ramon. The appearance of a man, unknown to him, dressed in clothes similar in color to the prisoners' uniform, who was calling the owner of the house, and the silence of Paciencia Delgado, who did not at the time recognize the man, undoubtedly caused the accused to suspect that the unknown man was one of the three persons that the owner of the house said were prowling around the place. The suspicion became a reality in his mind when he saw that the man continued ascending the stairs with a bolo in his hand, not heeding his question as to who he was. In the midst of these circumstances and believing undoubtedly that he was a wrongdoer he tried to perform his duty and first fired into the air and then at the alleged intruder. But it happened that what to him appeared to be a wrongdoer was the nephew of the owner of the house who was carrying three bolos tied together. At that psychological moment when the forces of fear and the sense of duty were at odds, the accused was not able to take full account of the true situation and the bundle of bolos seemed to him to be only one bolo in the hands of a suspicious character who intended to enter the house. There is, however, a circumstance that should have made him suspect that the man was not only a friend but also a relative of the owner of the house from the fact that he called "Nong Miong," which indicated that the owner of the house might be an older relative of the one calling, or an intimate friend; and in not asking Paciencia Delgado who it was that was calling her father with such familiarity, he did not use the ordinary precaution that he should have used before taking such fatal action.

Taking into consideration the state of mind of the accused at the time, and the meaning that he gave to the attitude of the unknown person, in shooting the latter he felt that he was performing his duty by defending the owners of the house against an unexpected attack, and such act cannot constitute the crime of murder, but only that of simple homicide. He cannot be held guilty, however, as principal, with malicious intent, because he thought at the time that he was justified in acting as he did, and he is guilty only because he failed to exercise the ordinary diligence which, under the circumstances, he should have by investigating whether or not the unknown man was really what he thought him to be. In firing the shot, without first exercising reasonable diligence, he acted with reckless negligence.

The crime committed by the accused, therefore, is homicide through reckless negligence defined and punished in article 568, in relation with article 404, of the Penal Code, the penalty prescribed by law being *arresto mayor* in its maximum degree to *prision correccional* in its minimum degree.

In view of the foregoing and reversing the appealed judgment, the accused is held guilty of the crime of homicide through reckless negligence, and he is sentenced to suffer one year of *prision correccional*, to pay the amount of P500 to the heirs of the deceased as an indemnity, with subsidiary imprisonment in case of insolvency, the costs and with credit of one-half of the preventive imprisonment already suffered. So ordered.

Avanceña, C. J., Street, Malcolm, Villamor, Ostrand, Johns, and Romualdez, JJ., concur.

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