

**THE PEOPLE OF THE PHILIPPINES, PLAINTIFF AND APPELLEE, VS.
TIMOTEO PENESA, DEFENDANT AND APPELLANT.***CA-G.R. No. 263. August 19, 1948*

Ponente: PADILLA, J.

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Timoteo Penesa and Rosario Aguillon lived, as husband and wife, in the barrio of Marupit, municipality of Camalingan, province of Camarines Sur. Their daughter and five children of Rosario by her late husband lived with them. Due to continuous wrangles between Timoteo and Rosario's children by her late husband, both agreed to part. In pursuance of the agreement and after dividing the palay, lumber and firewood between Timoteo and the children of Rosario by her late husband, Timoteo left the house on 30 August 1942. Early in the morning of the following day, Timoteo returned to the house and asked Rosario to live with him in another place (pp. 4, 31, t.s.n.). The request was refused (p. 4, t.s.n.). Santiago Cerrado, a cousin of Rosario, came to the house and, upon seeing Timoteo, asked the latter why he was there after they had agreed to live apart. Angered by this remark, Timoteo unsheathed his bolo and assaulted Santiago. Crescencio Doro, the eldest son of Rosario, who tried to prevent another blow upon Santiago, and had made a remark similar to that of Santiago before the latter came to the house, was also assaulted by Timoteo. At this juncture, Rosario went down through the stairway, preceded by Santiago. Crescencio and Timoteo grappled for the possession of the bolo and both fell to the floor. A brother of Rosario appeared upon the scene and snatched the bolo and a dagger from the hands of Timoteo. As a result of the assault upon Santiago Cerrado, two wounds were inflicted upon him, one on the left forearm and another under the left axilla. They were not serious. Upon Crescencio Doro, the following wounds were inflicted: in the left palm affecting two fingers, 3 inches long and from $\frac{1}{2}$ to $\frac{3}{4}$ inch deep, which on the day of the trial was still bandaged because it was not yet healed; a cut in the skin not 30 deep in the left axilla parallel to the left nipple, 3 inches long; a cut above the elbow; of the left arm, 3 inches long and $\frac{1}{8}$ inch deep; and another in the right hand from the index to the little finger. The one in the left palm which cut the joints of the bones was serious and, if the hemorrhage was not stopped, it would have resulted in Crescencio's death.

Upon this evidence the trial court found Timoteo Penesa guilty of frustrated homicide; and, holding that the mitigating circumstance of passion and obfuscation without any aggravating circumstance to offset it concurred in the commission of the crime, sentenced him to suffer 6 years and one day of prisión mayor, with the accessories of the law, and to pay the costs. From this judgment he has appealed.

Appellant testifies that on 30 August 1942, Rosario Aguillon agreed to live with him in another house; that early in the morning of the following day, he returned to the house and sat on a trunk, and not long after Santiago Cerrado came and in a loud voice told him to come down because he had nothing left in that house, a remark which Santiago repeated when he went up the house; that he answered Santiago that he had a share in the house because he had built it, and for that reason he told him that he would not move out; that Santiago took hold of him by the hand and forced him to leave immediately; that while he was being led by Santiago and pushed toward the kitchen, he was assaulted from behind with a piercing weapon, and for that reason he fell down; that when he tried

to rise, they struck him on the right shoulder and on the head; that he took from the partition wall (tabique) a bolo to defend himself; that he struck and hit with the bolo all his assailants; that he was further struck on the right side of the breast, on the right eye on the neck, and on the cheek; that he fell unconscious; and that when he came to he found himself tied to a post.

The account given by the appellant of the incident is not worthy of belief. It was he who, annoyed and peeved by the interference of Santiago Cerrado and Crescendo Doro, assaulted both. There was no reason for the Santiago Cerrado and Crescendo Doro to force appellant to leave the house, for after all the latter and Rosario Aguillon already had agreed the previous day to live apart. It is incredible that he could have gotten hold of the bolo from the partition wall (tabique), because the trunk on which he sat was opposite the corner of the house where the bolo was kept and the trunk was nearer the door and the kitchen than said corner (pp. 46, 47, t.s.n.), and he was being pushed from the trunk to the kitchen. He could not have taken the bolo from the place where it was kept while he was being pushed towards the kitchen or after falling down. There can be no doubt that he had the bolo about his body when he came to the house early in the morning of that day. In view of the inherent improbability of the appellant's story about the assault of which he claims to have been the victim, as testified to by him alone, the version of the incident, as related by the three witnesses for the prosecution, which is logical, and reasonable) has to be accepted.

The trial court found the appellant guilty of frustrated homicide. This is an error. When he went to the house of Rosario early in the morning of 31 August, it was not with the intention to kill anybody, for he went there to entreat Rosario Aguillon to live with him in another house. Neither could the remarks uttered by Crescendo Doro and Santiago Cerrado have aroused his temper to such an extent as to engender the desire and intent to kill them. The finding of the trial court is based on the kind of weapon? carried by the appellant when he went to the house and on the parts of the victims' bodies at which the weapons were aimed, as shown by the wounds inflicted. The bolo with which the appellant inflicted the wounds upon Santiago Cerrado and Crescencio Doro was one ordinarily used by farm laborers. The dagger was carried for self-defense. The wounds inflicted upon the offended parties by the appellant were caused indiscriminately and not deliberately. Appellant's purpose in going to the house, and not the kind of weapons he carried, nor the parts of the victims' bodies on which the wounds were inflicted indiscriminately, is indicative and determinative of his intent.

We are of the opinion that the crime committed by the appellant against Santiago Cerrado, in the absence of proof as to the period of the offended party's incapacity for labor or of the required medical attendance, is slight physical injuries, as provided for in article 266 of the Revised Penal Code; and against Crescendo Doro is serious physical Injuries, for, although the physician who had treated him did not state in his testimony the time during which the wounds would heal or the period during which the offended party would be incapacitated to perform his ordinary or usual work, nevertheless the evidence shows that the wound inflicted on the 31st of August upon Crescencio Doro in the left palm affecting two fingers, 3 inches long and from $\frac{1}{2}$ to $\frac{3}{4}$ inch deep, was not yet cured on the day of the trial held on 9 October 1942, or that the wound did not heal within 30 days. Pursuant to article 263, paragraph 4, of the Revised Penal Code, and giving the appellant the benefit of the mitigating circumstance of passion and obfuscation, taken into consideration in his favor by the trial court (article 13, par. 6, Revised Penal Code), the penalty to be imposed upon him is six months and 1 day of prision correccional for the wounds inflicted upon Crescencio Doro; and 15 days of arresto menor for the wounds inflicted upon Santiago Cerrado.

The other points raised by the appellant were passed upon correctly by the trial court. Granting that the prosecuting officer did not have a lawful appointment, he was at least a de facto officer. The motion for new trial was denied properly. The fact that the appellant was detained was no obstacle for him to secure witnesses for his defense. He could have secured them through his relatives and friends or through compulsory process by giving

their names to the trial court. The facts set forth in the affidavit filed in support of the motion for new trial show that the same are not newly discovered but forgotten evidence. If admitted, the facts in the affidavit would contradict several points of the appellant's testimony.

The judgment appealed from is thus modified, with costs in both instances against the appellant.

Paras, Actg. C.J., Feria, Pablo, Perfecto, Bengzon, Briones, and Tuason, JJ., concur.

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