

## THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. LINO S. TAN, DEFENDANT AND APPELLANT.

*G.R. No. 27213. September 10, 1927*

Ponente: VILLA-REAL J.

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### VILLA-REAL J.:

Lino S. Tan appeals to this court from the judgment of the Court of First Instance of Leyte, convicting him of the crime of frustrated murder and consummated murder, as charged in the information and sentencing him to suffer, for the first crime, the penalty of fourteen years and eight months cadena temporal, with the accessories provided for in article 56 of the Penal Code, and for the second crime, the penalty of cadena perpetua, with the accessories of the law, to indemnify the heirs of the deceased Sabino Cuayson in the sum of P1,000, with the costs, said penalties to be served in accordance with the rules established in article 88 of the Penal Code, that is, that the duration of the maximum penalty imposed shall not be more than threefold the length of time corresponding to the more severe penalty imposed upon the defendant.

In support of his appeal, the appellant assigns the following alleged errors as committed by the trial court in its judgment, to wit: (1) The trial court committed an error in not holding that the provocation and unlawful aggression came from the deceased Sabino Cuayson and Hilario Estabaya and that the accused only acted in self-defense; (2) the trial court also erred in considering the testimony of the witnesses of the prosecution more credible than that of the witnesses of the defense; (3) the trial court likewise committed an error in holding that the herein accused and appellant acted with treachery in discharging his revolver at Sabino Cuayson, causing the death of the latter; (4) the trial court also committed an error in holding that there was evident premeditation on the part of the herein accused and appellant in discharging his revolver at Hilario Estabaya, inflicting wounds upon different parts of the latter's body; (5) the trial court, lastly, committed an error in finding the herein accused and appellant guilty, beyond a reasonable doubt, in this case of the double crime of consummated murder and frustrated murder.

The following facts were proven, beyond a reasonable doubt, at the trial: In the year 1924 two public utilities operated a truck line between Ormoc and Dolores of the Province of Leyte one by the firm of Aboitiz & Co., and the other by the Tan family under the management of the herein accused-appellant Lino S. Tan. In the same year the offended party Hilario Estabaya, moved from the Province of Albay to Ormoc, Leyte, where he entered into the same business and the same line. As was natural, a rivalry in business soon sprang up between Hilario Estabaya and, Lino S. Tan. As time went on this rivalry grew worse and worse until personal encounters took place between the managers of the rival companies. Lino S. Tan belonging to a prominent and influential family in the locality had all the advantage, and the complaints filed by Hilario Estabaya with the local authorities were nearly always fruitless. Lino S. Tan used every means to interfere and ruin Hilario Estabaya's business, putting obstacles in the road where the latter's trucks had to pass following him with his truck, challenging him to fight and ordering his men to maltreat him. In the personal encounters which Hilario Estabaya had with the accused, the latter, being stronger and stouter, always had the best of it, which made him very conceited and he not only

boasted of it outside but also in court when testifying in his own behalf.

On the morning of January 14, 1925, Hilario Estabaya's truck collided with one of Tan's. While Estabaya was fixing his truck in the street, the accused, accompanied by Abdon Hermosilla, went to Nicolas Hermosilla's house nearby. Once in the house the accused drew a revolver from his pocket, cleaned it with his handkerchief and loaded it. When loaded, he pointed it at Hilario Estabaya and said: "If there weren't so many people I would shoot you, but that will happen in Ormoc."

At about 2 o'clock in the afternoon of the same day while Hilario Estabaya was waiting in Ormoc for passengers for his truck, the accused approached him and challenged him to fight. As Estabaya said he did not want to fight since he had gone there in order to make a living, the accused insulted him and told Ariston Catapang, the conductor of the accused's truck, to look for a pair of handcuffs to put on Estabaya. Shortly after Hilario Estabaya's chauffeur, named Isidro Biong, informed him that they could leave as they had sufficient passengers. When the offended party went towards his truck, the accused hit him on the head with brass knuckles. Estabaya wanted to return the blow but Ariston Catapang stepped between them. Then the accused Lino S. Tan stepped back and drawing his revolver fired a shot at Estabaya which failed to hit him. Lino S. Tan fired several other shots at him which entered different parts of his body and Estabaya commenced to stagger. Upon falling to the ground Estabaya called to Sabino Cuayson, who was on his truck, saying: "Sabino, help me!" Sabino Cuayson ran to his aid, but when he was about to lift up Estabaya the accused fired a shot at him thus falling to the ground, as a result of which he died shortly afterwards.

From the medical examination made of the body of Hilario Estabaya, a contusion, produced by a blunt instrument, was found near the middle of the upper right frontal region; a wound produced by a bullet which penetrated the lateral part of the lower left jaw and embedded itself in the scapular region; another wound produced by a bullet which entered the anterior lateral part of the left arm and came out through the posterior part thereof, fracturing the bone; another wound produced by the bullet entering the lateral part of the right lumbar region and another caused by the said bullet coming out through the lateral part of the same region towards the left side; another wound produced by a bullet which penetrated the lateral part of the left thigh, coming out through the posterior part thereof.

From the medical examination of the body of Sabino Cuayson, a wound produced by a bullet was found under the left nipple, about three inches from the middle line, and another on the back three inches lower caused by the same bullet passing through, a distance of about an inch and a half from the vertebral column, resulting in instant death.

The accused, testifying in his own behalf corroborated by his witnesses, denied everything testified to by the witnesses of the prosecution against him, and furthermore stated that in the year 1924, while talking with a Hindu in the barrio of Simangan, the offended party suddenly stopped his truck and coming close to the accused asked him: "Did you say to Zacarias that you were going to throw me into the canal?;" that the accused answered: "You had better order us personally to do the cuime," at the same time catching hold of Hilario Estabaya by the shoulder, who dealt him a blow on the left temple; that upon feeling the blow he returned it, Estabaya falling into the canal, getting the worst of the battle because of the many blows he had received having given the accused but one; that the accused assisted Estabaya out of the canal and said to him: "American fight;" that Hilario Estabaya put his hand into his pocket and took out a penknife; that upon seeing it, Lino S. Tan said: "That's enough;" that in the month of August, 1924, while the accused's truck was standing in the barrio of Simangan ten persons came up to him in order to provoke him; that he saw six men in a house which Hilario Estabaya entered, coming from the street, making some remarks which did not please the accused; that the accused also sought six men to whom he said the following: "If they catch us, do not run, because we will have to hold out; if they kill us, we will have the

right to kill them;" that as Hilario Estabaya did not leave, after an hour and a half the accused returned to the town; that on the 28th of the same month, upon arriving near the barrio of Cogen coming from Simangan, the accused saw Hilario Estabaya's truck coming behind them, a distance of 300 yards; that when the offended party's auto was near the accused's truck, the latter heard a shot coming from the former's truck; that the accused stooped and said to his father that Hilario Estabaya had fired it, begging him to let him have his revolver; that his father did not give him the revolver and that they were unable to overtake the truck of the said offended party, that on the morning of January 14, 1925, the truck in which the accused was riding collided with the truck of the offended party, which was then being driven by Sabino Cuayson, the mudguard of Estabaya's truck having been broken; that while both trucks were standing, Sabino Cuayson said: "Why did you hit our truck?;" that the accused answered that Sabino Cuayson was at fault because he had taken up about two thirds of the road; that Sabino Cuayson then replied in an angry tone: "This is your day, but our day is coming;" that the accused returned to the town because Cuayson and Estabaya knew if they provoked him they would receive the worst of it; that before the date of the crime the accused already had a revolver and always met Hilario Estabaya in Dolores, where the latter had his station; that on the afternoon of January 14, 1925, while the accused was on a corner waiting for passengers for his truck, he called to the conductor of his truck No. 4 named Iboy, to follow a woman who was carrying demijohn of water in order to carry it on his truck; that Hilario Estabaya came out of Nasing Yap's store and upon meeting the accused, inquired: "Why did you collide with our truck?;" that the accused answered: "I was not the chauffeur then;" that after saying this, Tan went to the place where his truck was in order to see if it was filled with passengers; that Hilario Estabaya approached him and said: "L \* \* \* thieves, you are accustomed \* \* \*, beast, what do you want?;" that the accused replied: "And well, what do you want?;" asking him furthermore not to make a disturbance and that he should be repentant on account of the punishment he received in Simangan in 1924 in which he received the worst of it; that at that instant the conductor of truck No. 3, named Vicente Villarubia, said: "Let us leave as the passengers want to transfer to another truck," that the accused then walked towards his truck and after having taken three steps Estabaya blocked his way and being face to face with him, struck him a blow on the left side of the upper lip; that the accused returned the blow with his left hand; that Hilario Estabaya then took out his penknife and opened it; that upon seeing Estabaya do this, the accused started to run and heard the offended party cry: "Sabiyo, help me;" that upon arriving near the house of his uncle, Pedro Tan, the accused looked back and saw Estabaya with a knife and Cuayson with a bolo in his hand brandishing it in the air; that as he saw that his pursuers were overtaking him and seeing the danger in which he was in, he faced around and loaded his revolver and faced around again in order to discharge it by way of alarm, that as Estabaya and Cuayson continued to overtake him, he fired at them hitting Estabaya, whom Cuayson tried to help, later falling on top of each other, Sabino first and Estabaya afterwards, the accused continuing on his way.

The defense furthermore tried to prove that upon hearing the shots, Carlos S. Tan, a brother of the accused, went to the place where the incident occurred and found Estabaya and Cuayson stretched out on the ground; that Ariston Catapang handed him a penknife, saying that he had picked it up on the ground; that as they told him that his brother had been pursued by Cuayson with a bolo in his hand, he asked for said weapon and they told him that it was in the truck, and he ordered him to get it; that it was Vicente Villarubia who had taken the bolo, without a sheath, which he found under the chauffeur's seat of the truck and sheathed the bolo.

Upon cross-examination the accused testified that Estabaya had always offended him, but he did not mind him and he always made fun of him because every time they fought, the former got the worst of it, that it was not true that he had used brass knuckles because there was no necessity for it as his strength was sufficient for said "bandit;" that Estabaya had already proven his strength in the first encounter they had in Sumangan in which he threw him into the canal, which showed that he was superior in strength; that when he was younger he used to be a boxer, that he had to make use of his revolver, because while he would be able to fight without arms, he would

not attempt it against a steel weapon.

The only questions of fact to be determined in the present appeal are as to who started the aggression, what sort of a fight did it develop into and what weapons did the combatants use.

From careful perusal of the evidence there is not the slightest doubt that the accused Lino S. Tan could not see with pleasure the competition which he had with Hilario Estabaya, a stranger, in the business of transporting freight and passengers, and always had personal encounters with the offended party, in which the latter always fared the worst. The accused had not only boasted of his triumphs outside, but also before the court when testifying as a witness in his own behalf. Hilario Estabaya, being a stranger in the place, complained to the local authorities when he was unable to tolerate it; but instead of receiving Protection, he became the subject of prosecution on the Part of those against whom he had complained, being obliged to make complaint to the Governor-General.

Under such a social and commercial environment, without the support of anyone, Hilario Estabaya was not able to have or feel any stimulus to be the one to provoke anyone. Whereas Lino S. Tan, due to the protection that he received from the local authorities and by reason of the high social and financial standing of his family, had and felt the incentive to fight with advantage with his competitor. Taking into consideration the defeats which he met in his various encounters with the accused, and knowing that the latter was superior in strength, the simple breakage of a mudguard on a truck was not sufficient motive for Hilario Estabaya to provoke the accused to a personal fight; neither was the small penknife which he carried and which the defense contends the offended party used, sufficient to start a fight with the accused who, besides being superior in muscular strength, carried a revolver. These considerations of a subjective, objective and social character lead us to the conclusion that the provocation and aggression came from the accused and not from Hilario Estabaya.

The alleged use of the penknife was denied by the offended party, who said that when he was lying on the ground Carlos S. Tan, a brother of the accused, searched his person and took the penknife which he had in his shirt pocket.

If, as we have seen, the provocation and aggression came from the accused and if, according to the evidence, the shots immediately followed the attack with a sharp weapon, Hilario Estabaya could not have had time to take out his penknife and open it, either to attack or even defend himself, and it would have been of no avail against the deadly bullets fired by one who was beyond the reach of his hands.

The theory of the defense that Hilario Estabaya was the first to provoke and attack, and that when the accused returned the blow, he took out his penknife and pursued the said accused is not, therefore, supported by the physical and psychological circumstances of the case.

Neither is the defense's contention tenable that Hilario Estabaya called to Sabino Cuayson to come to his aid in the fight with the accused and not for the purpose of helping him when he received the shot in the lower left jaw, which made him lose his equilibrium; and that the act of said Sabino Cuayson's helping to pursue him, bolo in hand, was the reason why he fired at him, causing his death. As Hilario Estabaya was seriously wounded, before thinking of revenge, it was more natural for him to think, as he did, of his own conservation, calling to Sabino Cuayson for assistance. The hole where the bullet came out considered in connection with the hole where the bullet entered confirms the theory of the prosecution, because the ball entered below the left nipple, three inches from the middle line and came out on the back three inches lower, a distance of an inch and a half from the vertebral column, which indicates that at the moment Sabino Cuayson received the fatal shot he was leaning forward in the act of raising Estabaya from the ground.

The contention of the defense that Sabino Cuayson was armed with a bolo is overthrown by the evidence of the prosecution, which shows that Carlos S. Tan ordered Ariston Catapang to get it from under the seat of Hilario Estabaya's truck, which was, in a way, corroborated by the testimony of Vicente Villarubia, to the effect that the sheath of the said bolo was under Cuayson's seat of the truck.

Taking into consideration, then, the antecedents of the case and the circumstances surrounding the commission of the acts imputed to the accused and admitted by him, the conclusion is inevitable that the accused-appellant, with evident premeditation in regard to Hilario Estabaya, and treachery in regard to Sabino Cuayson, and without justification, fired various shots at the former inflicting serious Wounds which did not produce their natural and logical consequence, thanks to the opportune assistance of science, and fired a shot at the latter which produced almost instant death, the act committed against Hilario Estabaya constituting the crime of frustrated murder, and that committed against Sabino Cuayson, consummated murder, without any circumstances to modify his criminal liability. For the crime of frustrated murder the law imposes the penalty of presidio mayor in its maximum degree to cadena temporal in its medium degree (art. 403 in connection with arts. 65 and 75, rule 3 of the Penal Code), and for the crime of consummated murder, the penalty of cadena temporal in its maximum degree to death (art. 403 of the Penal Code). There being no circumstance modificative of the criminal liability, said penalties must be imposed in their medium degrees, namely, fourteen years, and eight months in the former and cadena perpetua in the latter case.

By virtue of the foregoing, the judgment appealed from being in accordance with the facts and the law, the same is affirmed in all its parts, with the costs against the appellant.

The penalties imposed must be served in the order of their gravity and the sum total of the penalties that must be served shall not be more than threefold the gravest penalty, and in no case more than forty years (art. 88, Penal Code). So ordered.

Avanceña, C. J., Johnson, Street, Malcolm, and Johns, JJ., concur.

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