

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. MARCOS MERCADO, DEFENDANT AND APPELLANT.

G.R. No. 27415. November 29, 1927

Ponente: AVANCEÑA, C.J.

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AVANCEÑA, C.J.:

On the morning of July 23, 1926, in the municipality of Bustos, Province of Bulacan, Rufino Lopez was attacked and wounded on the left side of the abdomen with a sharp edged weapon by his brother-in-law Marcos Mercado. The wound extended to the peritoneal cavity and, according to Doctor Estrada, who attended the injured man, it was serious enough to have produced his death had it not been properly treated in time.

A complaint having been filed against Marcos Mercado charging him with the crime of frustrated murder, he was convicted and sentenced. to fourteen years, eight months and one day reclusion temporal, with the accessories of the law, to indemnify the injured party in the sum of P780 and to pay the costs of the action.

The evidence of the prosecution shows that while Rufino was gathering ears of corn that morning, he was suddenly attacked by the accused who inflicted upon him the wound hereinbefore described. According to the injured party, as soon as he felt himself wounded, he turned around and only then saw the accused behind him. He caught his aggressor's right hand which bore the weapon, with his left hand, and with his right tried to snatch the weapon. While they thus grappled, Alejandro Mercado, who was some distance away and saw the attack, left the bolo with which he was working on the ground and went towards the combatants. Alejandro succeeded in wresting the weapon from the accused who stepped back from them. The accused, however, upon seeing the bolo left by Alejandro on the ground, picked it up and came back to where the injured party was, in order to again assault him, but was prevented from doing so by Alejandro's intervention. The accused then asked the latter for the weapon taken from him, offering in exchange the bolo which he had picked up from the ground. After Alejandro had received his bolo and had delivered the weapon to the accused, the latter withdrew.

The lower court found that the qualifying circumstance of treachery was present in the commission of the crime. We do not find such circumstance sufficiently proven. We cannot admit that the attack took place as related by the offended party; we cannot conceive how, coming upon him from behind, the accused could have wounded him on the left side of the abdomen, having the weapon in his right hand. The position of the wound shows that the attack must have been made with the accused in front of the injured party. Besides, Alejandro Mercado, testifying for the prosecution, contradicted from the injured party on this point. According to said witness, the accused came up from behind but suddenly placed himself in front of his victim and it was then that he wounded the latter in the abdomen.

As the versions of the occurrence given by the witnesses for the prosecution are contradictory to each other, we cannot accept them, finding that the crime was committed in this or that particular way, and, hence, we cannot hold that the circumstance of treachery was present.

It has been clearly shown that the accused intended to kill the offended party, having' executed to this end all the

acts that should have produced this result but for Alejandro's intervention This is seen not only from the location and seriousness of the wound inflicted on the injured party, but also from the accused's conduct in picking up Alejandro's bolo after the latter had disarmed him and in returning to where the injured party was in order to again attack him with said bolo.

Counsel for the defense tried to show that the accused acted in legitimate self-defense, as it was the injured party who first provoked and attacked him, taking hold of his neck. We do not find this defense proven.

The facts established by the evidence of the prosecution constitute the crime of frustrated homicide, aggravated by the circumstance of the accused being a brother-in-law of the injured party. The penalty one degree lower than that provided by the law for the crime of homicide should be imposed.

The judgment appealed from is modified and it being understood that the crime committed is that of frustrated homicide, the appellant is sentenced to ten years and one day reclusion temporal, said judgment appealed from being confirmed in all other respects, with the costs against the appellant. So ordered.

Johnson, Street, Malcolm, Villamor, Ostrand, Johns, and Villa-Real, JJ., concur.

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