

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. POTENCIANO MONTALBO, DEFENDANT AND APPELLANT.

G. R. No. 34750. December 31, 1931

Ponente: AVANCEÑA, C.J.

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AVANCEÑA, C.J.:

The judgment appealed from convicts the appellant of the crime of homicide with the extenuating circumstance of passion and obfuscation, and sentences him to twelve years and one day of reclusion temporal, the accessories of the law, to indemnify the heirs of the deceased in the sum of P1,000, and the costs.

Between 4 and 5 o'clock in the afternoon of August 14, 1930, a basketball game was in progress in the army gymnasium on General Luna Street of this City of Manila. Among those present at the game were: The appellant, Potenciano Montalbo; the deceased, Jose Paras; and a companion of the latter, Conrado Lorenzo,—all students. The deceased stood with one arm leaning against one of the goal posts with Conrado Lorenzo to his right. The appellant was behind him. As the deceased's right arm, which was against the post obstructed the appellant's view, so that he could not see the game well, he called the former's attention to it, but the deceased said he had to lean his arm against the post in order to keep his balance. After a few moments, the appellant caught the deceased's right sleeve and jerked it strongly downwards. The deceased turned towards the appellant who stepped back two paces, saying, "What do you want?"

According to the Government evidence, when Conrado Lorenzo saw this, he stepped in pushing the deceased away with his right hand and holding the appellant off with his left. In spite of this, the appellant approached the deceased and hit him in the chest; and it was then that Lorenzo saw the appellant had a penknife in his hand, and that the deceased was wounded and he gradually fell until a bystander held him up.

According to the evidence of the defense, when the deceased turned towards the appellant, and the latter took two steps backward, he followed him up and struck him with his fists. One of the witnesses corroborated this, saying that fist blows were indeed exchanged by them. Moreover, the trial court found that the deceased had attacked the defendant with his fists. This finding must have been based upon the evidence of the defense, for that of the prosecution makes no mention of the circumstance. The trial court, however, further held that there was not sufficient proof that the attack took place before the appellant had used his knife. We do not find this borne out by the evidence for the defense, which the court took into consideration. And as for the evidence of the prosecution, it does not admit of this conclusion, for it shows that upon the deceased being wounded in the chest he began to sink little by little, and being in such a state, he could not have attacked the appellant.

Notwithstanding all this, we hold that the defendant did not act in self-defense, the elements of which were not all present in this case. Though the deceased struck him with his fists, the appellant was not justified in mortally wounding his assailant with the penknife. This was not a reasonably necessary means of repelling the attack. (U.S. vs. De Castro, 2 Phil, 67; Decision of the Supreme Court of Spain of November 28, 1885; 35 Jurisprudencia

Criminal, 858-861.) Moreover, the appellant provoked the attack by jerking down the deceased's coat-sleeve, taking two steps backward, and challenging him with the words, "What do you want?"

The trial court justly took account of the mitigating circumstance of passion and obfuscation. We find the judgment appealed from to be borne out by the evidence and in accordance with the law, and it is hereby affirmed, with costs against the appellant. So ordered.

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

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