

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. BLAS ORTIZ AND MODESTA ZAUSA, DEFENDANTS AND APPELLANTS.

G. R. No. 35071. August 27, 1931

Ponente: IMPERIAL, J.

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IMPERIAL, J.:

Bias Ortiz and Modesta Zausa are charged with the crime of homicide in an information, the relevant portion of which reads:

"That on or about September 8, 1930, in the municipality of Pilar, Province of Capiz, P. I., the aforesaid defendants, conspiring and helping each other, willfully, unlawfully, and feloniously killed Sotero Bancoyo, attacking him with a bamboo lance (sumbiling) and wounding him on the left side of the abdomen, from which wound his bowels protruded. Contrary to law."

The defendants pleaded not guilty in the Court of First Instance of Capiz, were tried, and appealed from the judgment finding them guilty of said crime, for which they were each sentenced to fourteen years, eight months and one day of reclusion temporal, to indemnify the heirs of the deceased in the amount of P1,000, to suffer the accessories of the law, and each to pay one-half of the costs.

Counsel for the appellants assigns in his brief the following alleged errors:

- The trial court erred in giving credit to the testimony of the witnesses for the prosecution, and not to the witnesses for the defense, and in concluding that the deceased felt no resentment whatever.
- The court also erred in finding that after Sotero Bancoyo's death, the male defendant placed the shotgun beside the corpse in order to pretend that it belonged to the deceased.
- The court likewise erred in not finding that it was Bias Ortiz who wounded, assaulted, and killed Sotero Bancoyo, and that he did so in self-defense; and
- The trial court also erred in not acquitting the defendants because they acted in self-defense."

With the exception of the last assignment of error, all the others raise questions of fact. It has therefore been necessary in order to decide them, to make a careful examination of all the parol and documentary evidence adduced at the hearing. From an analysis of said evidence we find the following facts to be clearly proved:

Sotero Bancoyo, the deceased, and the appellants had known one another for many years at the time the crime was committed, for his wife and that of the male appellant were sisters. The latter-named appellant, for reasons which do not appear of record, confiscated and retained several of the dead man's cedula certificates, which the latter resented. About noon on September 8, 1930, the deceased, accompanied by three laborers, companions of his, was returning from a plantation belonging to Pio Brionson carrying some corn which he had gathered; on reaching the house preceding that of the defendants, as he felt thirsty he attempted to ask the occupants for water, but as they happened to be absent, he went to the defendants' house, situate in the barrio of Malapoy,

municipality of Pilar, Province of Capiz, and while in front of the house, called out to the male appellant for a drink of water. The latter answered from within that they had no water, and could not serve him, to which the deceased replied: "May we not drink your water?" The appellant rejoined, "But we have no water. How can you compel us to give you some water?" And immediately afterwards, he descended from the house carrying his shotgun, which he pointed at the deceased. When the latter saw the appellant's aggressive attitude, he flung himself upon him, caught hold of the weapon, and they both struggled for it. At this juncture Modesta Zausa, the female appellant, companion of Bias Ortiz, took a spear from within the house, rushed down and with it attacked the deceased, stabbing him on the left side of the abdomen, so that the intestines protruded. (Dying declaration.) The deceased fell to the ground unconscious, was assisted, and that night died of peritonitis.

The defense contends that the trial court should have given more credence to the witnesses for the defense, and held that the shotgun belonged to the deceased; that a struggle took place between the deceased and the male appellant in the course of which the latter succeeded in overpowering his opponent and in obtaining the firearm; that in defending himself the male appellant wounded the deceased with the spear, and that the shotgun found after the fight beside the dead man's right arm was not placed there by the appellant. As to the female appellant, the theory of the defense is that she took no part, directly or indirectly, in the attack.

The defense's account of the occurrence finds no support in the evidence. It clearly appears that the shotgun belonged to the appellant, who had it for a long time before the crime; several of the witnesses for the prosecution saw him with the gun. The appellant began the attack, because of the deceased's reproach in exclaiming there was not even water to drink in the appellants' house. These main facts have been established by the testimony of the following witnesses for the prosecution: Guillermo Baldia, Ambrosio Tungala, and Brigido Bernales; as well as by the deceased himself in his ante mortem declaration made before the justice of the peace who took charge of the preliminary investigation, and went at once to the place of the crime. The fact that the appellants testified to a different facts, and that their two witnesses apparently corroborated them, does not mean that the evidence of the prosecution has lost its value or that the real facts are not those established thereby.

It is argued that the ante mortem statement does not contain all the requisites for its validity, because it appears that the deceased's statement that he was very seriously wounded, and that he believed he would not survive, was made after and not before or at the beginning of the declaration. We hold that the latter is not invalid for this reason.

At any rate, it appears that the deceased made the declaration referred to with the full conviction that he was very seriously ill, and with the consciousness that he was about to die. (Underhill on Criminal Evidence [2d ed.], sec. 103; U. S. vs. Castellon, 12 Phil., 160; U. S. vs. Mallari, 29 Phil., 14; U. S. vs. Jakan Tucko, 20 Phil., 235; U. S. vs. Virrey, 37 Phil., 618; and U. S. vs. Ramos, 23 Phil., 300.)

After carefully examining all the evidence presented, we have no hesitancy in finding that the attack was begun, as already stated, by the appellant Bias Ortiz, who levelled his shotgun at the deceased; that a struggle ensued between the two for the possession of the weapon; and that at this juncture Modesta Zausa came down from the house with a bamboo spear, approached the deceased and stabbed him on the left side of the abdomen, producing a wound so serious that it resulted in peritonitis, which caused his death that same night.

Finally, the defense contends that if the facts are really as stated, the appellant Ortiz should be acquitted because he did not take part in the attack made by Modesta Zausa, and because, according to the facts, there was no previous agreement between them to commit the crime. In this we believe the defense is right. It has been indisputably shown by the ante mortem statement (Exhibit D) that while the deceased and the male appellant were struggling for the shotgun, Modesta Zausa caught up the spear, hurried downstairs, approached the deceased, and suddenly stabbed him with it. From this it appears that there was no plan or agreement between the appellants to

carry out the attack which ended in the death of the victim, and that from the time Modesta Zausa thought of wounding the deceased to the time she actually did so, barely a few seconds elapsed, and this interval is palpably insufficient to give rise to the criminal agreement alleged in the information.

In *United States vs. Magcomot* (13 Phil., 386), we held:

"In the absence of a previous plan or agreement to commit a crime, the criminal responsibility arising from different acts directed against one and the same person is individual and not collective, and each of the participants is liable only for the acts committed by himself."

In *United States vs. Reyes and Javier* (14 Phil., 27), one of the defendants, named Reyes, suddenly and unexpectedly inflicted certain mortal wounds with his club upon one Legaspi, while the latter was being held by the other defendant. It was held:

"That Javier was neither principal nor accomplice in the commission of the crime of homicide of which Reyes was convicted, it appearing that there was no concerted action between him and his co-defendant, that he had no reason to believe that a homicidal attack was about to be made, and that, in holding Legaspi, he was not voluntarily cooperating therein."

In *United States vs. Juarez* (21 Phil., 440), the judgment of conviction for homicide was reversed with reference to one of the appellants on the ground that although in the course of a quarrel in a barrio he joined with some others who were threatening the deceased, he did not follow them in pursuing said deceased, there being nothing in the record to show that the accused had any reason for believing that his companions would take the victim's life should they catch him up.

In *United States vs. Monteroso and Monteroso* (33 Phil., 325), it was held that "* * * while the record discloses that the defendant Eugenio Monteroso joined with his father and his brothers in the quarrel which arose as a result of the misbehaviour of the deceased, it does not conclusively appear that he was a party to the deadly assault of which his father was guilty, or that he had any means of knowing that his father was about to make such an assault * * *," said accused should be acquitted.

In *People vs. Martinez* (42 Phil., 85), it is said that:

"As no evidence appears in the record showing that the three accused had agreed to kill the deceased, but on the contrary, as it appears from the evidence of the prosecution, that the accused Leon Martinez, in intervening in the fight between his father and brother and the deceased, acted independently without any previous agreement with his co-accused, it is not proper to consider said accused, Juan Martinez and Francisco Martinez, to be responsible for the consequences of the wound inflicted upon the deceased by his co-accused Leon Martinez."

Applying the same doctrine laid down in the cases cited to the case of appellant Ortiz, we hold that he cannot be convicted of homicide committed on the deceased Sotero Bancoyo, either as principal or as accessory before the fact, for it has been shown that there was neither plan nor agreement between him and his companion, the appellant Modesta Zausa, to commit the crime, and that he took no part in the latter's attack with the spear; and this notwithstanding the fact that the said appellant began by pointing his shotgun at the deceased, but without any consequences.

From all the foregoing it may be inferred that the first three assignments of error are unfounded, but that the fourth and last is well taken; wherefore, we have reached the conclusion that Bias Ortiz did not incur any criminal liability for the act committed by his co-appellant.

The penalty imposed upon Modesta Zausa is the minimum of the medium degree of that fixed by article 404 of

the Penal Code, which is in accordance with law, there being no modifying circumstance present.

Wherefore, the judgment appealed from is affirmed so far as it finds the appellant Modesta Zausa guilty of homicide and sentences her to fourteen years, eight months, and one day of reclusion temporal, to indemnify the heirs of the deceased in the amount of P1,000, to suffer the accessories of article 59 of the Penal Code, and to pay one-half of the costs of both instances, and reversed with reference to the appellant Bias Ortiz, who is hereby acquitted, with the other half of the costs de oficio. So ordered.

Avanceña, C. J., Johnson, Street, Romualdez, and Villa-Real, JJ., concur.

MALCOLM and VILLAMOR, JJ. :

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