

THE UNITED STATES, PLAINTIFF AND APPELLEE, VS. ANDERSON MACK, DEFENDANT AND APPELLANT.

G.R. No. 3515. October 03, 1907

Ponente: CARSON, J.

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CARSON, J.:

The defendant was charged with the crime of asesinato (assassination) and convicted of the crime of homicidio (homicide). From this judgment of conviction he appealed to this court.

It is admitted that upon the night of May 4, 1906, the accused, a negro soldier, shot and killed a municipal policeman named Estanislao Indic. The evidence of record is contradictory and conflicting in the extreme, but we think that, giving the accused the benefit of the doubt as to the veracity and credibility of the witnesses, the following relation of the incidents, as they occurred, must be held to be in accordance with the weight of the evidence.

Just before the shooting, the accused was sitting on a bench a few feet back from the street, in the town of Tacloban, in the Province of Leyte, in an open space some 3 or 4 feet in width, between the tienda or canteen of a woman named Olimpia and another building. The deceased, with another policeman, approached the place, directed Olimpia to close her tienda, and, later, ordered the accused and another soldier who was standing near by to go to their quarters. The accused did not obey this order, and it is probable that some words passed between the soldiers, the policeman, and the woman which angered the deceased, though the weight of the evidence clearly maintains the contention of the accused that he did and said nothing to provoke or offend the deceased, except in so far as his failure to obey the order to go to his quarters may have had that effect. The deceased, who was standing some 10 or 12 feet from the accused, cursing and abusing him for his failure to obey the order, wrought himself into a passion, dragged himself free from his companion, who was endeavoring to restrain him and take him away, and started toward the accused, at the same time drawing his bolo and brandishing it in a threatening manner. Thereupon the accused got up, drew his revolver, and the deceased having then approached within a distance of from 3 to 6 feet, the accused fired three shots, one of which took effect in the left breast of the deceased, just above the nipple, and another in the back of his head.

There was some testimony tending to show that when the shooting took place the deceased was under the influence of liquor, and that he bore resentment against the accused arising out of a quarrel about a woman, but these contentions are not satisfactorily sustained by the evidence, nor is it necessary to take them into consideration in deciding the case.

Upon the foregoing statement of facts the defendant's contention, that he shot the deceased in self-defense and is therefore exempt from punishment, must be sustained.

The trial court was of opinion that the evidence offered by the accused established "an incomplete defense," which entitles the defendant to a reduction of the penalty, but not to complete exemption from punishment; in support of his opinion the trial judge reasons as follows:

"The accused claims exemption from criminal liability on the ground that the act was committed in self-defense. At the outset of the discussion of this point it may be well to quote the following from an opinion cited by his counsel:

"The defendant, having admitted the killing, has assumed the task of establishing his defense, not that the burden of proof shifted in the case, but it was necessary for him to establish his defense to the satisfaction of the court.' (United States vs. Capisonda, 1 Phil. Rep., 575.)

"It is true that the presumption of innocence is always in favor of the accused, but when, as here, the Government has actually proven the crime of homicidio, it need not go farther and negative a particular and exculpatory plea on the part of the accused such as self-defense. That must be established by the accused himself 'to the satisfaction of the court.'

"Article 8, subdivision 4, of the Penal Code prescribes the elements which must exist in order that self-defense may be established. Counsel for the accused maintains that it is sufficient if he establishes two of these elements, namely, illegal aggression and lack of sufficient provocation. But in each of the authorities which he cites on this proposition, although the court does not emphasize it, there was also present the third element 'reasonable necessity of the means employed to prevent or repel it' (the aggression). Thus in United States vs. Salandanan (1 Phil. Rep., 478) the court lays stress (p. 479) on the fact that 'it can not be asserted that the danger to the defendant had ceased' because disarmament by the deceased 'was the contingency which the accused might well have reasonably feared.' In other words, there was or seemed to be a 'reasonable necessity' on defendant's part of continuing the struggle. So in United States vs. Patala (2 Phil. Rep., 752) the court says (p. 756): 'Considering the nature of the aggression the defendant could have reasonably believed that his life was in danger and that it was a case of life or death with him.' This again could mean nothing less than that the means employed seemed reasonably necessary. In United States vs. Regis (2 Phil. Rep., 113) the deceased was the aggressor and the accused, although he had succeeded in wresting the bolo from the deceased Languido, inflicted the wounds because (p. 116) 'fearing that Languido might again possess himself of the weapon.' In none of these cases does the court say that this 'reasonable necessity of the means employed' is not essential to the establishment of self-defense and that its failure to specially mention this element is not to be construed as prescribing the rule for which counsel contends is apparent from United States vs. De Castro (2 Phil. Rep., 67), in which the opinion was written by the same judge (Mapa) who wrote the opinions in United States vs. Salandanan and United States vs. Patala (supra) and where after reviewing the facts it is observed (p. 70):

"* * * Such means were not reasonably required or necessary to repel the attack * * * It follows that there is absent in this case one of the three requisites of section 4 of article 8 of the code—that is, the reasonable necessity of the means employed to repel the attack—in order that the necessity for self-defense may be a complete exemption from criminal liability.'

"Indeed such a construction as counsel urges would effect a virtual repeal of article 8, subdivision 4, which recognizes the validity of self-defense only provided 'there are the following attendant circumstances;' not, as in article 403, 'if the deed is attended by any of the following circumstances.' It is clear therefore that in order to show himself entitled to complete acquittal in this case the accused must 'establish to the satisfaction of the court' a 'reasonable necessity of the means employed to prevent or repel' the attack. On this point let us hear the accused.

"He testifies (Def., pp. 47, 49) that he saw the deceased approaching when he was 'quite a distance away, * * * might have been 9 or 10 feet.' This was apparently (p. 51) before he had turned his head around and seen that the rear entrance was obstructed by a barrel and other articles mentioned. He had been sitting (Def., pp. 21, 42) on a bench between the tienda and the next house on the right. But he could not have been seated much in the rear of the front of either house for Adams, who was leaning against the corner of the tienda, was not more than 2 feet away (Def., pp. 9, 22), near enough indeed for the accused to reach over and touch him (Def., pp. 21, 47) and it seems also (p. 39) that the tendera who had been seated on the steps behind the accused was only

about a foot and a half from Adams. Moreover one step seems to have brought the accused to the edge of the street (Def., pp. 19, 45). He testifies (Def., p. 49) that there were no fixtures built into the street and he mentions no obstruction on the right except the house and its inmate, Townsend, who was standing on the corner (Def., pp. 48, 49). According to his own testimony the accused, after recognizing his danger, had time enough to rise from his seat, look backward for a way of escape, push Adams aside, extricate his revolver from the left side of his coat (Def., p. 43) with his right hand (Def., p. 2), change the weapon from the right hand to the left (Def., p. 43), and fire the shot that killed the deceased. Since one step brought him to the edge of the street and he 'had to wheel to the right' anyway (Def., p. 19), it would seem that during this interval he might have found time to move farther to the right, passing around Townsend if necessary, in order to dodge the deceased. While the latter was coming 9 or 10 feet, it should not have been impossible, and hardly difficult, for the accused to have covered the distance necessary to place him out of the deceased's path. If this case were being tried in any of the Federal courts it would be necessary for the accused to show, in order to establish his plea of self-defense, that he had retreated as far as he safely could, even though he was without fault and was in no danger of a murderous attack. [25 Am. & Eng. Encyc. of Law (2d ed.), p. 271-272.] This is not the rule in all or perhaps a majority of the State courts, but in view of the recent decision in *United States vs. Grafton*[1] (4 Off. Gaz., 364) it seems more than likely that the above rule would be followed in this jurisdiction. Besides, can it be said that there was 'a reasonable necessity' of shooting the deceased so long as the accused could escape?

"Again if escape were impracticable, was it 'reasonably necessary' for the accused to employ a firearm to repel or prevent the threatened attack? The Supreme Court has held, in considering this section, that it is not necessary to use a revolver in order to repel an attack with a calicut (*United States vs. Mendoza*, 2 Phil. Rep., 109), nor to inflict a mortal wound with a dagger when assailed with a bamboo club. (*United States vs. De Castro*, 2 Phil. Rep., 67.)

"The bolo carried by the deceased is a formidable-looking weapon with a blade fourteen and a half inches in length, but it is not a sharp-pointed instrument and the blade is almost blunt through rust and dullness. Indeed it is more than doubtful whether, if applied with ordinary force against any portion of the accused's body covered by clothing, it would penetrate the latter. According to the testimony of the accused and his witnesses the deceased was hardly in condition to use the weapon with more than ordinary force. Following is the accused's description of the appearance of the deceased at the time (Def., p. 53):

"He did not walk exactly straight, but he was not exactly staggering about; he was doing the same as any other man under the influence of liquor.'

"This is corroborated by Adams (Def., p. 4) and the tendera (p. 41). A man under the influence of liquor and unable to walk straight could hardly wield a weapon with full force or in such a manner that it could not be dodged.

"Moreover the accused admits (Def., pp. 51, 79)—and it is a material circumstance [25 Am. & Eng. Encyc. of Law. (2 ed.), 282]—that he was taller than the deceased and he is unable to say (Def., p. 52) that the latter was taller than Lieutenant Soledad, who was then present in court. If not, the deceased must have been four or five inches shorter than the accused and he would have had to reach accordingly in order to strike the accused in the face or head, which would be the most vulnerable because least protected portion. Again the accused is a man of powerful physique, well proportioned and strong of limb. Could he not have parried the blow or wrested the weapon from the man whom he says was drunk and unable to walk straight?

"Finally, if the use of a firearm seemed necessary, could it not at least have been employed in such a way that fatal results might have been avoided? A shot directed at the menacing arm with the same unerring accuracy as that actually fired would have stayed the threatened blow. A bullet in the leg or foot not less surely than that which pierced the assailant's heart would have halted him and still spared his life. But the accused directed his first ball at a vital spot and although he saw that this 'took effect' and that the deceased 'became helpless within

a second' (Def., p. 43) he fired two additional shots (Def., pp. 11, 18, 28-44). This certainly did not indicate that the accused was doing no more than was 'reasonably necessary to prevent or repel' the attack. It demonstrates a considerable degree of recklessness and, in spite of the witnesses who speak of his apparent 'coolness,' that the accused was in fact greatly excited. Human life is too sacred and the tendency to disregard it too common to justify a court in finding that the destruction of it under such circumstances is wholly blameless.

"But although the accused has not established 'to the satisfaction of the court * * * reasonable necessity' for killing the deceased in order to save himself, he has made what the courts call an 'incomplete defense' under article 86 of the Penal Code (United States vs. Mendoza, 2 Phil. Rep., 109; United States vs. De Castro, 2 Phil. Rep., 67), which entitles him to a reduction of the penalty by two degrees."

We agree with the trial court that on a plea of self-defense under the provisions of case 4 of article 8 of the Penal Code, an accused person is not entitled to exemption from criminal responsibility unless each and all the following facts are established to the satisfaction of the court:

First. That there was an unlawful aggression;

Second. That there was reasonable necessity for the employment of the means taken to prevent or resist such unlawful aggression;

Third. That there was no sufficient provocation on the part of the accused.

We think it affirmatively appears from the evidence of record that there was an unprovoked, illegal aggression on the part of the deceased, as held by the trial court, after a careful analysis of the testimony; and further that there was reasonable necessity for the use of the means employed by the accused to defend himself from this unlawful aggression.

The trial court held that in shooting and killing the deceased, the defendant adopted a mode of defense which was not "reasonably necessary," because it was of opinion, first, that it was possible by taking to flight he might have escaped injury; second, that he might have parried the blow aimed at him or wrested the bolo from his assailant without the necessity for the use of his revolver; and third, that even though it were necessary to use his revolver against his assailant, the accused might have successfully defended himself against the attack by directing his aim at the arm or hand with which the bolo was held, or at the legs or feet of his assailant.

We do not think that under all the circumstances in this case it was the duty of the defendant to take refuge in flight. Without attempting to lay down a rule covering all the cases wherein it is the duty of one who is unlawfully assailed to "give ground" instead of resisting the attack, it is sufficient to hold, that under such circumstances the assailed person need not attempt to retreat where there is no reasonable ground to believe that by so doing he can safely avoid the threatened attack; nor is he required to continue his retreat when there is no reasonable ground to believe that he can do so with safety. These propositions fall within the rule of the Federal courts relied upon in the opinion of the trial court and applied by him to the facts in this case. (Wheaton's Criminal Law, 10th ed., p. 486, and many cases there cited; Bishop's Criminal Law, 8th ed., secs. 864 and 869, and cases cited; Clark's Criminal Law, p. 154, and cases cited.)

The defendant was sitting on a bench in a narrow alleyway when the deceased started to advance upon him from a distance of from 9 to 12 feet, brandishing a "formidable-looking bolo." We do not think that under the circumstances the defendant had reasonable grounds to believe that he could safely make his escape by flight. In order to do so it was necessary that the defendant, in the second or two required by his assailant to advance the couple of paces which would bring him within striking distance, should recognize his danger, resolve upon flight rather than resistance, rise from his seat, look backward only to discover that there were obstacles which made it

impracticable to escape to the rear, step forward a few feet toward his approaching assailant, turn to the right or to the left on reaching the street, thus exposing his unprotected body to his assailant's attack, and finally distance his pursuer in flight. If the deceased was in fact endeavoring to reach the defendant and to strike him with his bolo, it is very doubtful whether there was time to avoid the blow by instant flight; certainly the accused had reasonable grounds to believe that he could not hope to make his escape with safety; and even though it were true that "he might have found time" to "dodge the deceased" and make his escape by flight, yet it is too much to ask of one who is in imminent peril of a felonious and murderous attack that without reasonable grounds to believe he can safely do so, he should "give ground" rather than use any other more certain means to defend himself which he may have at hand.

Nor can we agree with the opinion of the trial court that there was no reasonable necessity for the use of the revolver because the deceased was a smaller man than the accused and perhaps under the influence of liquor, or because on examination, after the occurrence, it is discovered that the bolo in the hands of the deceased was "almost blunt through rust and dullness."

Mere physical superiority is no protection to an unarmed man, as against an assailant armed with a large bolo, and if it be true that the deceased was under the influence of liquor when he made that attack, his intoxication probably rendered him the more dangerous, unless he was so drunk as to be physically helpless, which is not suggested in the evidence.

Nor does the fact that after the occurrence the blade of the bolo was found to be "almost blunt through rust and dullness," and that it is "more than doubtful whether if applied with ordinary force against any portion of the accused's body covered by clothing it would penetrate the latter," justify the conclusion that there was no reasonable necessity for the defendant's use of the only weapon at hand to resist the onslaught of his adversary. Lying on the desk in the trial court, in the broad light of day, that bolo was, in the language of the trial court a "formidable-looking weapon; with a blade fourteen and a half inches in length;" the accused, in apparent imminent danger of his life, could not reasonably be expected to take the chance that mere ordinary force would be used in striking, or that the blow would be given upon some protected part of his body, or that the cutting edge of the blade was not keen enough to give him his death blow.

The findings of facts occurring in the cases cited in the opinion of the trial judge are not applicable in this case. On a plea of self-defense the question as to the "reasonable necessity" for the use of the means employed is one of fact to be determined in accordance with the particular facts proven in each case.

In the case of the United States vs. Mendoza (2 Phil. Rep., 109), the court held that the character of the weapon in the hands of the aggressor, a calicut, was such that in our opinion the defendant could not have reasonably believed that it was necessary to kill his assailant in order to repel the attack. A calicut is a comparatively harmless weapon. It is an instrument shaped like a small chisel (escoplo) with no point or cutting edge on either side, and is used for the purpose of taking out the contents of betel nuts or the like.

In the case of the United States vs. De Castro (2 Phil. Rep., 67) the accused inflicted a mortal wound with a dagger and the court held that such means were not reasonably required or necessary to repel the attack, in view of the fact that it was made with nothing more than a piece of bamboo (una simple caña partida), a weapon insufficient to put the life of the person attacked in imminent peril, more especially in consideration of the insignificance of the attack itself, for, according to the witnesses, the blow struck by the deceased did not even bruise the accused.

A murderous attack with a formidable-looking bolo is a very different thing from an assault with a small chisel or a piece of bamboo, and the fact that this court has held that the taking of life was not reasonably necessary in

defending oneself against assault in the latter cases does not sustain a ruling that taking the life of one's assailant in the former case may not become reasonably necessary in the defense of one's person, as we think it was in the case at bar.

Finally, if it be admitted that it was reasonably necessary to make use of the revolver, it would be unreasonable to hold that in the shades of night the defendant, with his adversary advancing upon him and within a few feet of striking distance, should be held responsible for a failure to take deliberate and careful aim at the arm or hand that held the bolo or at the legs or the feet of his assailant. The reasonable and natural thing for him to do under the circumstances was to fire at the body of his opponent, and thus make sure of his own life.

It is suggested that since the first shot inflicted a fatal wound there was no necessity for the firing of the two succeeding shots in order to prevent or repel the attack. The record discloses that these shots were fired in rapid succession. Not every wound which proves fatal is sufficient to stop an enemy's attack, and the accused and his assailant were so close at hand that until the assailant fell to the ground it can not be said that the accused was out of danger. Even a wounded man with a drawn bolo in his hand might prove to be no mean antagonist at close quarters.

The judgment of the trial court is reversed and the appellant acquitted of the crime with which he was charged, with the costs of both instances de oficio; and if in custody, he will be discharged forthwith, or if at liberty under bail, his bond will be canceled and his sureties exonerated. So ordered.

Torres, Johnson, Willard, and Tracey, JJ., concur.

Arellano, C. J., dissents.

[1] 6 Phil. Rep., 55.

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