

**THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. SANTIAGO GIMENA, DEFENDANT AND APPELLANT.***G. R. No. 40203. February 16, 1934*

Ponente: DIAZ, J.

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Charged with murder but subsequently convicted of homicide after due trial in the Court of First Instance of Oriental Negros, the herein defendant-appellant was sentenced to twelve years and one day of reclusion temporal, with the accessory penalties of the law, and to indemnify the heirs of his victim in the sum of P1,000, with the costs of the proceedings. He appealed from said sentence and now contends that the trial court erred in not holding that he acted in self-defense and in not acquitting him of the crime with which he had been charged.

A careful examination of the evidence presented by both the prosecution and the defense during the trial shows, to the satisfaction of this court, that on the night of May 9, 1933, the appellant inflicted two wounds on Casimiro Mahinay, to wit: a contused wound on the right eyebrow and a stab-wound on the left side of the abdomen. The latter would cause the instant death of said deceased at the same place where the incident occurred, that is, in the sitio of Cansuhi of the municipality of Guthulngan, Oriental Negros.

Just before the aggression, Felipe Ferolino, brother-in-law of the deceased Gasimiro Mahinay, met the appellant in said sitio where the two, together with other residents thereof, had gone to attend a meeting called by the councilor, which meeting did not take place, however, because said councilor did not show up. As soon as the two met, Felipe Ferolino, by way of either a frank or sarcastic remark, asked the appellant how their girl friends were. It seemed that the two had not been on good terms for the reason that about one month previous, they had had a quarrel arising from a clandestine cockfight because the appellant refused to pay a bet which Felipe Ferolino demanded of him. In answer to his remark the appellant, in turn, asked whether he wanted "practice", meaning fight. Ferolino moved backward and the appellant, taking that attitude as an acceptance of his challenge, gave him a blow on the head with the cane he carried. Ferolino fell to the ground and upon getting up he was stabbed on the left hip and on the back by the appellant with a knife which the latter was then seen to be holding in his left hand. When the deceased Casimiro Mahinay, completely unarmed, approached the two for the purpose of separating them or helping Ferolino, his brother-in-law, the appellant gave him a blow with his cane on the right eyebrow and later mortally wounded him on the left side of the abdomen with his knife.

The appellant attempted to prove by his testimony that if he found it necessary to wound the deceased Mahinay, it was in self-defense inasmuch as the latter held him by the neck, choking him in "such a way that I could hardly breathe". He also attempted to prove that the knife with which he wounded the deceased belonged to Felipe Ferolino; that the latter stabbed him with the knife in question; that when Ferolino dropped the knife because the appellant struck him on the wrist with his cane, the deceased held said appellant by the neck while Ferolino, in turn, held him by the wrist, and that, making a final effort, he succeeded in picking up the knife in question from the ground.

To corroborate the appellant, the defense witness Tirso Binaraw, testifying as to the fight between Ferolino and Mahinay on one side, and said appellant on the other, made the following statements:

"QUESTION OF THE FISCAL. Tell what you know.

"ANSWER OF THE WITNESS. What I have seen from a distance of about fifteen arm-lengths was that they were already fighting.

"Q.

How were they fighting?

—

A.

One Casimiro was holding Santiago by the neck. Felipe Ferolino and Santiago were trying to pick up something from the ground.

"Q.

Did you notice what they were trying to pick up from the ground?

—

A.

I did not because I was far away.

"Q.

What did you do then if you did anything?

—

A.

I merely looked at them from that distance and, after they had separated, the accused left and I likewise went home. I have not seen anything else besides.

"Q.

Did you not go near the place where they were?

—

A.

No, sir."

This testimony of said witness shows that he did not really see what he claims to have seen. Otherwise he would have seen how Ferolino stabbed the appellant, as the latter claims, and also how the deceased Casimiro Mahinay expired immediately after. Naturally he would have testified on all these things instead of merely saying that he saw nothing more than what he stated in his testimony.

There is nothing of record showing that the appellant received any wound as a result of having been stabbed by Felipe Ferolino, as he claims. The scar, the size of a twenty-centavo piece, which he had on the upper part of his right parietal region, and described on page 26 of the transcript of the stenographic notes, cannot be that of a wound caused by a stab with a knife because it is well known that a knife is not a blunt but a short penetrating instrument. The very form of the scar in question excludes the possibility that it is the result of a wound caused by such an instrument.

This court agrees with the trial court that the scar in question is the result of a contused wound and that it indicates that there had been a fight between Felipe Ferolino and the appellant, wherein canes or sticks were used. When the former fell to the ground as a result of the first blow given by the latter with his cane, the deceased approached the two for the purpose of separating them. The appellant, believing that said deceased did so in order to help or side with Felipe Ferolino, his brother-in-law, attacked the former with his cane. In the heat of his passion due to the blow he received on the upper part of his parietal region from said Ferolino, he wounded not only the latter but also the deceased Casimiro Mahinay.

The knife with which the appellant wounded said deceased did not belong to Felipe Ferolino but to said appellant, inasmuch as the latter's testimony, which his only evidence relative to such fact, is contradicted by the testimony of said Ferolino, Felipe Opsar and Saturnino Mahinay, who categorically asserted that the appellant already had said knife in his hand from the beginning. It should be noted that the appellant did not present said weapon. He said that he had lost it because he had dropped it. (Exhibits A and A-I.) If it really belonged to Felipe Ferolino, the appellant would not have dropped it nor lost it just as he did not throw away nor lose the cane with which he struck Ferolino and the deceased. He would have lost no time in presenting the weapon in question in order to better prove that it really belonged to Ferolino. On the other hand, from among so many people who witnessed the incident, because according to the evidence, many attended the meeting, the appellant presented not even one to corroborate his testimony that it was Felipe Ferolino who drew the knife in question.

This court attaches no importance to the contention that although the appellant was holding the knife in his left hand and the cane in his right, the deceased was wounded on the right side of the abdomen instead of the left. This contention is naturally based on the supposition that the appellant and the deceased were continually face to face with each other during the fight. Such supposition, however, is based only on the appellant's testimony. On the other hand, in every encounter or fight, particularly in cases where one does not look for it, the antagonists do not always hold the same position.

This court further deems it unnecessary to dwell upon the appellant's contention that while the deceased was strangling him, Felipe Ferolino at the same time held him by the right wrist with both hands, because in cross-examination he could not help but admit that said Ferolino then had a cane. Under such circumstances it was difficult, if not impossible, for him to do what it is claimed he had done.

Wherefore, the appellant's claim that he acted in self-defense is unfounded. It was he who provoked the fight between him and Felipe Ferolino and likewise he was the aggressor. Under the circumstances surrounding the commencement and development of the fight, there was not the least necessity of his having used the knife in wounding Casimiro Mahinay inasmuch as he was already armed with a cane, much less taking into consideration that the deceased was entirely unarmed. The justifying circumstance of self-defense, once the act against which it is invoked is proven, should be satisfactorily established, and without proof, it should necessarily be rejected.

This court agrees with the trial court that the act committed by the appellant only constitutes the crime of homicide, not murder, but does not believe that said appellant has any mitigating circumstance in his favor. Wherefore, in view of the absence of any aggravating circumstance, the judgment appealed from is hereby

modified by imposing upon the appellant the penalty of fourteen years, eight months and one day of reclusion temporal. In accordance with the provisions of Act No. 4103, the minimum of such reclusion is hereby fixed at seven years, without prejudice to the appellant being credited with one-half of the period of the preventive imprisonment he has heretofore undergone, in conformity with article 29 of the Revised Penal Code. As thus modified, the appealed judgment is hereby affirmed in all other respects, with the costs against the appellant. So ordered.

Street, Abad Santos, Hull, and Butte, JJ., concur.

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