

THE PEOPLE OF THE PHILIPPINE ISLANDS, PLAINTIFF AND APPELLEE, VS. VICENTE MATBAGON, DEFENDANT AND APPELLANT.

G. R. No. 42165. November 12, 1934

Ponente: VICKERS, J.

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VICKERS, J.:

This is an appeal from a decision of the Court of First Instance of Cebu, finding the defendant guilty of murder and sentencing him to suffer reclusion perpetua, to indemnify the heirs of Marciano Retubado in the sum of P1,000, and to pay the costs.

Appellant's attorney makes the following assignments of error:

"I, The lower court erred in giving credit to the perjured testimonies of Emiliano Retubado and Rufino Surigao, son and brother-in-law respectively of the deceased.

"II. The lower court erred in holding that it was the accused who waited at the colo tree to assault the deceased.

"III. The lower court erred in not acquitting the accused on the ground of complete legitimate self-defense."

We find no merit in the errors assigned. It clearly appears from the evidence that between eleven and twelve o'clock on the night of May 13, 1934, Marciano Retubado, the deceased, and Vicente Matbagon, the defendant, had a fight at the cockpit in Ilihan, in the municipality of Tabogon, Cebu Province. The fight resulted from a remark made by the defendant respecting the tuba sold by the niece of Marciano Retubado. Magno Surigao separated the defendant and the deceased, but they had already bitten each other. Shortly afterwards Marciano Retubado called his son and they started home. He carried a torch stuck in a bottle, and was followed by his son, Emiliano Retubado, a schoolboy fifteen years old. When they came opposite a colo tree, about fifty meters from the cockpit, the defendant with a knife in his hand approached the deceased and stabbed him in the breast. The deceased struck the defendant on the head with the bottle that he was carrying. The bottle was broken and the light went out. A struggle between the accused and the deceased followed. The deceased received in all four wounds: one on the chin, and another on the right side of the face; one, two inches deep, on the left side of the chest, and another, one and one-half inches deep, on the breast. The injured man died in a few minutes from the wounds that he had received on the breast and on the left side of the chest. The accused then ran away.

When the accused first stabbed the deceased, Emiliano Retubado cried for help. Rufino Surigao was the first to arrive. The distance between the place where the defendant was standing near the colo tree and the place where he stabbed the deceased was about a braza.

The trial judge found the defendant guilty of murder because the crime was committed with treachery; that the aggravating circumstance of nocturnity was offset by the mitigating circumstance of passion and obfuscation, since the defendant committed the crime because he had been bitten a few minutes before by the deceased.

In our opinion the evidence does not justify the finding of the trial judge as to the classification of the crime or the

appreciation of the modifying circumstances. In the first place there could not be, under the circumstances of this case, both treachery and the aggravating circumstance of nocturnity, because the nocturnity would be included in the treachery as an inseparable incident, and should not be considered separately (U. S. vs. Salgado, 11 Phil., 56,59).

With respect to the mitigating circumstance of passion and obfuscation, we think it was improperly appreciated in this case. It appears that at least half an hour intervened between the fight at the cockpit and the stabbing of the deceased. The accused in waiting for the deceased near the colo tree and in attacking him with a knife was actuated by a desire for revenge because of the injury he had received in the fight with the deceased. The attack was not the result of a sudden impulse of natural and uncontrollable fury (People vs. Hernandez, 43 Phil., 104, 111).

We come now to the question of whether or not the crime was committed with alevosia or treachery. As we have already stated, when the deceased, carrying a light, came opposite the colo tree where the defendant was waiting, the defendant with a pocketknife in his hand approached the deceased, and stabbed him. If the accused had been hiding behind the tree and had stabbed the deceased without warning, the crime would undoubtedly have been committed with treachery, but that is not what took place in this case. The accused was waiting near the colo tree, and when a braza away he was seen by the son of the deceased, and presumably by the deceased. The accused with a knife in his hand walked up to the deceased and stabbed him in the breast. Under these circumstances we think it is clear that there was no treachery or alevosia as that term is used in the Revised Penal Code. "There is treachery when the offender commits any of the crimes against the person, employing means, methods or forms in the execution thereof which tend directly and specially to insure its execution, without risk to himself arising from the defense which the offended party might make." It is clear that the accused did not commit the crime in such a manner as to insure its execution without risk to himself from the defense which the deceased might have made.

The next question is whether or not nocturnity should be taken into account as an aggravating circumstance in this case.

No. 15 of article 10 of the Penal Code provided that it was an aggravating circumstance that the crime be committed in the nighttime, or in an uninhabited place, or by a band of more than three armed men (en cuadrilla); that this circumstance should be taken into consideration by the courts according to the nature and incidents of the crime.

No. 6 of article 14 of the Revised Penal Code provides that it is an aggravating circumstance that the crime be committed in the nighttime, or in an uninhabited place, or by a band, whenever such circumstances may facilitate the commission of the offense; that whenever more than three armed malefactors shall have acted together in the commission of an offense it shall be deemed to have been committed by a band.

There appears to be no material difference between the provision of the Revised Penal Code and that of the Penal Code. In construing the provision of the Penal Code relating to nocturnity, it was repeatedly held by this court that nocturnity would be considered as an aggravating circumstance only when it appeared that it was especially sought by the offender or that he had taken advantage thereof in order to facilitate the commission of the crime or for the purpose of impunity.

It was said in the case of People vs. Trumata and Baligasa (49 Phil., 192) /that nocturnity should not be estimated as an aggravating circumstance, since the time for the commission of the crime was not deliberately chosen by the accused; that if it appears from the record that the accused took advantage of the darkness for the more successful consummation of his plans, to prevent his being recognized, and that the crime might be perpetrated unmolested, the aggravating circumstance of nocturnity should be applied (U. S. vs. Billedo, 32 Phil., 574, 679).

In the present case none of the foregoing reasons exists for appreciating nocturnity as an aggravating circumstance. The attack made by the defendant upon the deceased was but a sequel to the fight at the cockpit, which had taken place half an hour before. If the defendant had killed the deceased in the fight at the cockpit, probably no one would contend that nocturnity should be appreciated as an aggravating circumstance in that case. It would be purely accidental, and so it was in the present case.

The Supreme Court of Spain in its decision of May 23, 1885 held that even in the case of robbery with homicide the fact that the crime was committed at night is not to be appreciated as an aggravating circumstance when it may be inferred that the darkness was not intentionally sought or taken advantage of, but intervened casually: "Considerando que tampoco es de estimar en perjuicio de los mencionados reos Oliva y Ruiz Bringas la circunstancia de haberse ejecutado el delito de noche, que es la 15 del citado artfculo 10, porque no surte efecto alguno legal en sentido de agravar la pena imponible si los culpables no la han elegido para realizar mejor sus malos propositos, o como medio de conseguir la impunidad, lo cual no consta que hicieran aquellos al matar y robar al Ldpez, toda vez que hallandose los tres con frecuencia en una habitacion independiente de las demas que ocupaban otros vecinos, no parece que les fuera necesaria una hora precisa para su perpetracion, deduciendose sin gran esfuerzo que, si el delito se cometid de noche, fue sin ser buscada exprefeso, interviniendo esa circunstancia casualmente".

In its decision of January 25, 1888, relating to a tumultuous affray at night, the same court held that the fact that the offense was committed at night should not be regarded as an aggravating circumstance, because it was not chosen or sought for by the accused, but was purely accidental.

On the other hand, in its decision[^] of April 14, 1888, the Supreme Court of Spain held that the aggravating circumstance of nocturnity should be appreciated when the accused chose the nighttime or took advantage of it to commit the crime more easily or to secure his impunity.

Viada's comment on this question is as follows: "En aquellos delitos, cuya naturaleza no empece a la apreciacion de la circunstancia de la noche, habra que distinguir: cuando aparezca que el autor del hecho busco la noche, o por lo menos se aprovecho de ella para facilitar la ejecucion del delito, o lograr, a ser posible, su impunidad, debera apreciarse esta circunstancia de agravacion; cuando aparezca lo contrario, esto es, que la noche no ha sido aguardada ni aprovechada con intencion por el delincuente para ejecutar en ella el delito, en este caso no debera tomarse en consideration la circunstancia de nocturnidad, que f ue puramente accidental, para agravar la responsabilidad del culpable." (2 Viada, 262, 5th ed.)

In the case at bar the accused neither sought the nighttime nor took advantage of it to commit the crime with greater facility or to escape. If he had hidden behind the tree and attacked the deceased without warning or availed himself of the darkness to prevent his being recognized or to escape, then nocturnity would have been an aggravating circumstance. If the accused in this case did not take advantage of the nighttime to commit the crime or to escape, then the darkness did not facilitate the commission of the offense. To take advantage of a fact or circumstance in committing a crime clearly implies an intention to do so, and one does not avail oneself of the darkness unless one intended to do so.

For the foregoing reasons, the defendant is found guilty of the crime of homicide, without the presence of any aggravating or mitigating circumstance, and is condemned to suffer an indeterminate sentence of not less than eight years of prision mayor and not more than fourteen years, eight months, and one day of reclusion temporal, and to indemnify the heirs of the deceased, Marciano Retubado, in the sum of P1,000, without subsidiary imprisonment in case of insolvency.

As thus modified, the decision appealed from is affirmed, with the costs against the appellant.

Avancena, C. J., Street, Abad Santos, Imperial, and Diaz, JJ., concur.

MALCOLM and GODDARD, JJ., dissenting:

We are of the opinion that the crime committed was murder qualified as such because of the presence of treachery and that consequently the judgment should be affirmed.

HULL, J., with whom concur VILLA-REAL, and BUTTE, JJ., dissenting:

The Revised Penal Code provides that nocturnity is an aggravating circumstance when the circumstance "may facilitate the commission of the offense."

This language is clear and contemplates that each case will be considered on its merits. There is no need of an elaborate argument to expound the meaning of the section if the plain words therein used are given their every-day current use.

The test fixed by the statute is an objective one. If I read the majority opinion right, before nocturnity can be considered, it must meet the objective test fixed by the statute and a subjective test fixed by the majority opinion.

To hold that a sudden, murderous assault committed on a dark night has no greater chance of success than if committed in broad day-light, does violence to the experience of mankind.

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